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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JENNIFER ALVAREZ et al., Plaintiffs and Appellants, v. BANK OF AMERICA et al., Defendants and Respondents.	B238037/B242275 (Los Angeles County Super. Ct. No. BC425178)

APPEALS from a judgment and order of the Superior Court for Los Angeles County, Elizabeth Allen White, Judge. Judgment affirmed; order reversed.

Doumanian & Associates and Nancy P. Doumanian for Plaintiffs and Appellants.

Reed Smith, Kim M. Watterson, Michele J. Beilke, Anne M. Grignon and Margaret M. Grignon for Defendants and Respondents.

This case involves two consolidated appeals, one from a summary judgment in an employment case brought by 11 plaintiffs[1] alleging racial discrimination, and the other from an award of over $620,000 in attorney fees against plaintiffs and in favor of their former employer, defendants Bank of America Corporation and Banc of America Card Servicing Corporation (collectively, BofA). We find that plaintiffs failed to meet their burden on appeal to point to evidence in the record that could support a finding that BofA's reason for terminating their employment was a pretext for discrimination, and therefore we affirm the summary judgment. However, we reverse the order awarding attorney fees to BofA. While the evidence presented in connection with the summary judgment motion conclusively established that plaintiffs engaged in the fraudulent conduct for which they were terminated, plaintiffs asserted they were treated differently than Caucasian employees who engaged in the same conduct. Although the undisputed evidence ultimately established that BofA conducted a race-neutral investigation and terminated employees based upon race-neutral criteria, plaintiffs did not have access to this evidence until discovery was conducted. Under such circumstances, we conclude the trial court abused its discretion by finding that BofA was entitled to attorney fees as a prevailing defendant.

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[1] The plaintiffs are: Jennifer Alvarez, Marlene Valladaras, Sonia Avila, Homar Carrillo, Daniel Becerra, Alfredo Medina, Lilia Lomeli, Ruben Aguayo, Andy Pineda, Walter Morataya, and Luz Torres.

BACKGROUND

Plaintiffs were employed by BofA as collection associates. At the time the events in this case took place, BofA employed collection associates at several collection sites across the country to contact BofA credit card customers and obtain payments on past-due accounts. One of those sites was in Pasadena, where all of the plaintiffs worked.

A. *BofA's Collection Process*

The collection associates at the Pasadena site were divided into two groups. The "Mainstream" group comprised associates who obtained payments from English-speaking customers; the "Bilingual" group comprised associates who obtained payments from Spanish-speaking customers. The associates in each group were further divided into smaller "delinquency units" to obtain payments from customers at various stages of delinquency, e.g., 30-day, 60-day, etc. The final delinquency unit was the 180-day charge-off unit.[2] At the time of the events here, all of the plaintiffs were assigned to the Bilingual 180-day charge-off unit.

Each delinquency unit was assigned a book of accounts to collect. The account books assigned to the units at the Pasadena site also were at times assigned to units at BofA's New Jersey collection site (the NJ site), the only other site that had Bilingual units.

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[2] After six months without a payment, the account "charges-off," i.e., BofA takes a loss on the debt and sells the debt to a third party.

BofA set monthly collection goals for each delinquency unit at each site. At the Pasadena site, the associates in each unit were divided into teams, and the book of accounts and monthly collection goals for each unit were divided among each of the teams. The associates in each team worked together to obtain collections from their team's book of accounts. They did so by calling the customer, getting the customer's authorization for a payment, and recording the customer's bank account information for the payment. As soon as an associate submitted a payment, but before the money actually was collected by BofA, the payment was credited toward the team's monthly collection goal. The associates earned incentive-based compensation when their team met or exceeded their monthly goals.

Sometimes, a payment recorded by a collection associate is returned by the customer's bank. BofA refers to those returned payments as "NSF," or non-sufficient funds. There are a number of reasons why a payment might be an NSF. For example, if the account was closed, a stop payment was issued, or there was a hold placed on the account, the submitted payment would be returned as an NSF. There is a subset of NSF payments that is designated "UTL," or unable to locate. A returned payment is designated UTL when the account to be debited is not valid or cannot be found. A UTL may be caused by the collection associate making a mistake when keying in an account number or by the customer providing an inaccurate or invalid account number. But a UTL may also be the result of a collection associate intentionally entering an invalid account number; by doing so, the

associate would receive credit toward the monthly payment goals, even though that payment later would be returned uncollected.

B. *BofA Investigates Suspicious Collection Activity*

In late September or early October 2008, Andrew Dell, the BofA executive responsible for customer assistance reporting, loss, and delinquency goal setting and analytics, was informed of some suspicious behavior related to accounts that had been assigned to the NJ site Bilingual 180-day charge-off unit. Dell asked his forecasting and analytics executive to review the collection rate performance reporting for any aberrant behavior at the NJ site or any other site. After conducting the review, the executive reported there were increasing numbers of payments to "straight roller" accounts at two units at the NJ site and at the Pasadena Bilingual 180-day charge-off unit. Straight roller accounts, which are accounts that pass through all stages of delinquency without payments or any contact with BofA, are very difficult to collect on, and a large number of collections on those accounts is highly suspicious.

At around the same time, the senior risk operations manager for the Northeast region, Jeffrey Nathan, and the site leader for the NJ site, Rob Sweet, started an investigation into the collection practices of associates at the NJ site. Working with human resources executive Benjamin Ryan, Nathan and Sweet reviewed the NSF activity for each associate in every unit at the NJ site, both Mainstream and Bilingual. They found that a significant number of the NSFs were designated UTL. Historically, an associate generally averaged fewer than five

UTLs per month, but Nathan and Sweet found that some associates had significantly higher numbers of UTLs than that average. The high number of UTLs suggested to them that those associates might be intentionally entering incorrect account data when submitting payments. They conducted a further investigation that included in-person interviews with the identified associates. Ultimately, they determined that more than 50 associates engaged in fraudulent collection practices at the NJ site, and BofA terminated their employment.[3]

While the NJ site investigation was going on, Ryan directed Dell to compile data related to NSFs from all units at all sites. The compiled data showed that the percentages of NSFs from the NJ site Bilingual 180-day charge-off unit, the NJ Bilingual relationship management unit, and the Pasadena site Bilingual 180-day charge-off unit were significantly higher than all other units: between 35.8 and 42.9 percent of those NJ site units' portfolios were NSFs in September and October, and the percentage for the Pasadena site Bilingual 180-day charge off unit was over 27 percent, while the percentages for other units all were less than 10 percent. Based on that data, Ryan directed senior manager of risk operations Barry Simmons to conduct a further investigation into the Pasadena site similar to the investigation done at the NJ site.

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[3] Three of the terminated associates identified as White. BofA also investigated and terminated several team leaders and unit leaders as a result of its investigation into the NJ site.

Ryan instructed Simmons to review NSF payments for all associates, both Mainstream and Bilingual, in all units.

Simmons transitioned to a different role in the company shortly thereafter, and Pasadena site leader Robert Winfree took over his role in the investigation, working directly with Ryan. Winfree asked two unit leaders, Abayomi "Abbey" Buchanan and Troy Coble, to filter a report known as a "Candidate Report"[4] to identify NSF payments for the months of August, September, and October 2008 in all units, both Mainstream and Bilingual. Winfree then manually cross-referenced the NSF payments listed on the filtered Candidate Report against BofA's account databases to determine which NSF payments were UTLs and the identities of the associates who took those payments.

At Ryan's direction, Winfree identified all associates who had 15 or more UTLs in any of the relevant months. There were a total of 13 associates who met this threshold; 12 worked in the Bilingual 180-day charge-off unit, and one worked in the Mainstream 180-day charge-off unit. All were Hispanic. All 13 associates were placed under investigation. As part of that investigation, Winfree examined each

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[4] A Candidate Report (or Candidate List) is an Excel spreadsheet containing details for all customer assistance accounts, segmented out by site and delinquency stage. One of the fields shows the date of the most recent payment on the account and whether it was an NSF payment. It does not, however, identify whether the NSF was a UTL, nor does it identify the associate who took the payment. At the time of the investigation, the only way to determine whether the NSF was a UTL and the identity of the associate who took the payment was to manually cross-reference the NSF payment against BofA's account databases and review the details for each transaction.

UTL for each of those associates to determine the reason for the UTL, and prepared a summary of each associate's UTLs, which he provided to Ryan.[5] In addition, Ryan instructed investigators from BofA's investigative services division to conduct in-person interviews of each associate Winfree identified; Ryan also instructed the investigators to investigate certain team leaders and unit leaders.

During the interviews with the associates, four of the associates admitted that they had falsified payments to meet their collection goals, and three of them -- Ruben Aguayo, Sonia Avila, and Cinthya Alvarado -- provided written statements to that effect. In admitting to falsifying payments, the associates stated that they were pressured by management to do it in order to reach their collection goals. Although the remaining associates denied any wrongdoing,[6] the investigators

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[5] Winfree also compiled historical information about each investigated associate's monthly UTLs from January 2008 through October 2008. None of the associates had more than 3 UTLs in any of the first four months. Two associates had a significant increase in monthly UTLs in May 2008, four more had a significant increase in June 2008, and by August 2008, all but two associates had significantly higher UTLs than they had in the first four months. In September 2008, seven of the associates had 20 or more UTLs; one of them had 46.

[6] Contrary to the assertion by plaintiffs' counsel at oral argument, *all* of the plaintiffs admitted engaging in these improper practices. In addition to those who provided written statements at the time of the investigation, six other plaintiffs (plaintiffs Alvarez, Valladaras, Becerra, Medina, Morataya, and Torres) admitted at their depositions to engaging in the practices. Finally, each plaintiff was asked in an interrogatory to identify each current or former BofA employee he or she believed engaged in unlawful and/or inappropriate collection practices. *Every* plaintiff provided an identical response, which included the follow sentence: "Plaintiff identifies himself [or herself] and the other plaintiffs who engaged in said 'collection practices.'"

found their explanations for their large numbers of UTLs were not credible. Based on the results of the investigation, BofA concluded that all 13 associates engaged in fraudulent collection practices by processing payments to fictitious accounts in violation of BofA policies with which each BofA employee agrees to comply, and terminated their employment.[7]

C. *The Present Lawsuit*

Eleven of the 13 terminated associates filed the instant lawsuit, alleging four causes of action under the Fair Employment and Housing Act (Gov. Code,[8] § 12940) (FEHA), a cause of action for tortious termination of employment in violation of public policy, and a cause of action for intentional infliction of emotional distress. Three of the FEHA claims are based on allegations of racial discrimination/disparate treatment, and the fourth FEHA claim is for retaliation based upon

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[7] BofA subsequently investigated Pasadena associates who had 10 or more UTLs in August, September, or October 2008. That investigation was conducted in the same manner as the previous investigation -- Winfree identified all associates in any unit, Mainstream or Bilingual, with 10 or more UTLs in any of those months, the account details for each UTL payment taken by those associates were reviewed, and the associates were interviewed by an investigator. Seven associates were investigated, six in the Bilingual 180-day charge-off unit and one in the Mainstream 180-day charge-off unit. The investigator found that the explanations given by two of the Bilingual associates were credible. BofA terminated the employment of the other five associates; those associates are not parties to this case.

[8] Further undesignated statutory references are to the Government Code.

plaintiffs' purported complaints to management "about oppressive and overly zealous collection tactics endorsed by [BofA]." The tortious termination claim alleges that BofA's termination of plaintiffs violated their right under sections 12920 and 12921 to hold employment without discrimination.

1. *Summary Judgment Motion*

A year and a half after the complaint was filed, BofA filed its motion for summary judgment. It argued the undisputed evidence established that plaintiffs were terminated following a race-neutral investigation that disclosed they engaged in fraudulent collection practices, and there is no evidence from which a reasonable trier of fact could conclude that BofA acted with discriminatory animus. Therefore, BofA contended it was entitled to judgment as a matter of law.

Two weeks later, plaintiffs filed ex parte applications to shorten time to hear a discovery motion, a motion to continue the summary judgment, and a motion to continue the trial. The trial court granted the applications. At the subsequent hearing on those motions, the trial court ordered the appointment of a discovery referee to resolve any discovery disputes, and granted the motions to continue the trial date and summary judgment motion. The court continued the hearing on the summary judgment motion for 60 days; thus, the motion would be heard almost four and a half months after the motion was filed.

Three weeks later, plaintiffs filed another ex parte application for an order striking BofA's summary judgment motion on the ground that BofA was refusing to cooperate in discovery. The trial court denied the

application, finding it had no authority to strike a motion for summary judgment. The court instructed plaintiffs' counsel to bring any discovery issues to the discovery referee and, if those issues could not be resolved in time for plaintiffs to respond to the summary judgment motion, they could bring a motion to continue the summary judgment at that time.

Plaintiffs filed another ex parte application to continue the summary judgment motion a week later. The trial court found that the request to continue was premature, and denied the application without prejudice. A month later -- a week before their opposition to the summary judgment motion was due -- plaintiffs again filed an ex parte application to continue the summary judgment motion. They noted that two days earlier, the discovery referee granted their motions to compel the depositions of five current or former BofA employees, and argued they did not have sufficient time to conduct those depositions before the opposition to the summary judgment motion was due. The trial court denied the ex parte, noting that under Code of Civil Procedure section 437c, subdivision (h), plaintiffs were free to make an application for a continuance in their opposition to the motion.

Plaintiffs filed their opposition to the summary judgment motion, which included a paragraph stating that they did not have sufficient time to take the depositions of four BofA employees in the Mainstream group after the discovery referee granted their motion to compel those depositions. Plaintiffs implied that the testimony of those employees would show that employees in the Mainstream group also engaged in fraudulent conduct, which would be relevant to challenge BofA's

evidence that it conducted a race-neutral investigation. Plaintiffs did not cite to Code of Civil Procedure section 437c, subdivision (h); instead, they argued (in the heading of the argument) that the summary judgment motion "[s]hould be [c]ontinued or [d]enied due to [BofA's] [r]efusal to [c]ooperate in [d]iscovery."

The hearing on the summary judgment motion went forward as scheduled. The trial court issued a detailed tentative ruling, denying plaintiffs' request for a continuance on the ground that the request did not meet the requirements of Code of Civil Procedure section 437c, subdivision (h), and granting the motion for summary judgment. The court found that BofA met their burden to show that plaintiffs' termination was based on legitimate, nondiscriminatory factors -- fraudulent collection practices, which plaintiffs admitted they engaged in -- and plaintiffs failed to present any evidence that suggested any discriminatory animus or intent.

The trial court adopted the tentative ruling as its order, and entered judgment in favor of BofA.

2. *Motion for Attorney Fees*

BofA filed a motion for attorney fees under FEHA, on the ground that plaintiffs' claims of racial discrimination were unreasonable, frivolous, and unsupported by any evidence. It requested an award of over $760,000, and supported its request by submitting a declaration from its lead attorney and monthly invoices in which all details except the legal professionals' names, hours, and amount billed were redacted.

Plaintiffs opposed the motion on several grounds, including that plaintiffs' action was not frivolous or unreasonable. In addition, plaintiffs argued the motion should be denied because BofA's submission of redacted invoices prevented the court from determining whether those fees were reasonable and necessary. Finally, plaintiffs asked the court to consider plaintiffs' inability to pay the fees sought as a basis to deny the motion; plaintiffs' counsel submitted her own declaration to support the assertion that plaintiffs did not have the ability to pay the fees sought.

The trial court issued a tentative ruling in advance of the hearing on the motion, denying the fee request "because the Court does not find that Plaintiffs' action was frivolous, unreasonable, without foundation or filed in bad faith for purposes of an award of attorneys fees under FEHA." After hearing the arguments of counsel, however, the trial court indicated that it was reconsidering its tentative ruling, and would take the matter under submission. Plaintiffs' counsel asked the court not to change its tentative ruling based upon the completely redacted invoices, which prevented plaintiffs from being able to challenge the reasonableness or necessity of the fees incurred. Two days later, the trial court issued its ruling, ordering BofA to submit unredacted bills with descriptions of the work performed; the order also allowed plaintiffs to submit a brief as to the reasonableness of the fees requested, and set a new hearing on the motion.

BofA complied with the court's order, and plaintiffs filed a supplemental opposition to the motion that addressed the reasonableness of the fees sought and raised other arguments unrelated

to reasonableness. Ten of the 11 plaintiffs also submitted their own declarations attesting to their financial condition, to show they had no ability to pay any award of attorney fees. In its tentative ruling, which the trial court adopted as its final ruling following the hearing, the court granted the motion, finding that plaintiffs' action was frivolous, unreasonable, and without foundation, and awarded BofA $626,821.22 in attorney fees.

3. *Appeals*

Plaintiffs timely filed separate notices of appeal from the summary judgment and from the order granting BofA's motion for attorney fees. The appeal from the summary judgment was assigned case No. B238037, and the appeal from the fee award was assigned case No. B242275. We granted plaintiffs' request to consolidate the appeals.

DISCUSSION

A. *Appeal From the Summary Judgment*

Plaintiffs contend the trial court erred in granting BofA's summary judgment motion. As to their discrimination and disparate treatment claims, they argue that they satisfied their prima facie case and produced evidence that Hispanic employees in the Bilingual group were treated differently than Caucasian employees in the Mainstream group, which gives rise to an inference of unlawful discrimination, and that BofA failed to meet its burden to show there was a legitimate, nondiscriminatory reason for terminating plaintiffs. With regard to their wrongful termination in violation of public policy claim, plaintiffs

argue there were disputed issues as to whether they were terminated for voicing their complaints about BofA's business practices. They also argue there were disputed issues regarding whether their termination was in retaliation for complaining about their manager's wrongful conduct. With regard to their claim for intentional infliction of emotional distress, plaintiffs offer no analysis in their single-paragraph argument, and simply state there were disputed issues of fact as to their manager's conduct. Finally, plaintiffs contend the trial court erred by denying their requests to continue the summary judgment motion to allow them to conduct additional discovery.[9]

1. *Review of Summary Judgments*

A moving party is entitled to summary judgment when the party establishes that it is entitled to entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment makes this showing by demonstrating that the plaintiff cannot establish one or more elements of each cause of action, or that the defendant has a complete defense to each cause of action. (*Towns v. Davidson* (2007) 147 Cal.App.4th 461, 466.)

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[9] At oral argument, plaintiffs' counsel sought to raise for the first time an additional argument, relying upon Labor Code section 1102.5, which had been amended after briefing was completed in this case, but well before the matter was set for oral argument. She gave no explanation for her failure to raise the issue earlier, or to even give the court and opposing counsel notice that she intended to raise the issue at oral argument. We decline to address the argument. (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 232, fn.6 ["We need not consider points raised for the first time at oral argument"].)

"On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.] . . . [W]e determine with respect to each cause of action whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff's case, or has demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial, such that the defendant is entitled to judgment as a matter of law." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).)

Although our review is de novo, "'the appellant has the burden of showing error, even if he did not bear the burden in the trial court. [Citation.] . . . "[D]e novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed." [Citation.]' [Citation.]" (*Bains v. Moores* (2009) 172 Cal.App.4th 445, 455.)

2. *BofA's Moving Papers Satisfied its Burden on Summary Judgment*

a. *BofA Satisfied its Burden*

As the first step of our review, we must determine whether BofA "conclusively negated a necessary element of [plaintiffs'] case" with respect to each cause of action. (*Guz*, *supra*, 24 Cal.4th at p. 334.)

i. *Discrimination/Disparate Treatment Claims*

At trial, "a plaintiff employee who claims discrimination must first make a prima facie case, consisting of evidence that she was within the class protected from discrimination and was performing her job competently, but was terminated -- plus some other circumstance suggesting discriminatory motive. [Citation.] This showing raises a presumption of discrimination, shifting to the defendant employer the burden of producing evidence to establish a genuine issue that the termination was made for a legitimate, nondiscriminatory reason. [Citation.] If the employer does so, the presumption disappears, but the employee, who retains the overall burden of persuasion, may then yet seek to show discriminatory motive, by evidence that the employer's proffered reason was false and a pretext, and any other evidence of discriminatory motive. [Citation.]" (*Kelly v. Stamps.com Inc.* (2005) 135 Cal.App.4th 1088, 1097 (*Kelly*).)

"A defendant employer's motion for summary judgment slightly modifies the order of these showings. If, as here, the motion for summary judgment relies in whole or in part on a showing of

nondiscriminatory reasons for the discharge, the employer satisfies its burden as moving party if it presents evidence of such nondiscriminatory reasons that would permit a trier of fact to find, more likely than not, that they were the basis for the termination. [Citations.] To defeat the motion, the employee then must adduce or point to evidence raising a triable issue, that would permit a trier of fact to find by a preponderance that intentional discrimination occurred. [Citations.]" (*Kelly*, *supra*, 135 Cal.App.4th at pp. 1097-1098.)

In this case, BofA presented evidence that it examined the pattern of UTL payments entered by all collection associates at the Pasadena site and, using race-neutral criteria, conducted an investigation of all associates who met those criteria. Based upon that investigation, BofA determined that all of those associates intentionally submitted false payments in violation of BofA policies, and terminated their employment on that basis. BofA submitted evidence that each plaintiff had agreed upon their employment to follow BofA's policies and code of ethics, as well as evidence that each plaintiff, either during the investigation or in discovery, admitted to engaging in fraudulent collection practices. This evidence is sufficient for a trier of fact to find that BofA's reason for the termination was nondiscriminatory. Therefore, BofA conclusively negated a necessary element of plaintiffs' discrimination/disparate treatment claims, and the burden shifted to plaintiffs to produce evidence that would permit a trier of fact to find that intentional discrimination occurred.

ii. *Retaliation Claim*

Plaintiffs alleged in their complaint that BofA violated FEHA by terminating them in retaliation for complaining to management "about oppressive and overly zealous collection tactics endorsed by [BofA]." To establish a prima facie case of retaliation under FEHA, "a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. [Citations.] Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. [Citation.] If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation ""drops out of the picture,"" and the burden shifts back to the employee to prove intentional retaliation. [Citation.]" (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.)

In its summary judgment motion, BofA noted that "[s]ection 12940[, subd. (h)] forbids retaliation 'because the person has opposed any practices forbidden under [FEHA] or because the person has filed a complaint, testified, or assisted in any proceeding under [FEHA].'" Although BofA did not raise it in its motion for summary judgment, it observes in its respondents' brief that the purported "protected activity" plaintiffs alleged in the complaint is not activity protected by FEHA, and therefore their retaliation claim necessarily fails. We agree.

But even if plaintiffs had alleged a cognizable retaliation claim under FEHA, BofA presented evidence -- plaintiffs' admissions -- that none of the plaintiffs engaged in protected activity (i.e., complained

about or reported any alleged discrimination during their employment), as well as evidence that none of the people involved in the decision to terminate their employment was aware of any protected activity by any of the plaintiffs. This evidence conclusively negated two of the three necessary elements of plaintiffs' prima facie case. In addition, as noted with regard to the discrimination/disparate treatment claims, BofA presented evidence that its reason for terminating plaintiffs' employment was plaintiffs' fraudulent collection practices. Thus, even if plaintiffs had based their retaliation claim on conduct protected by FEHA, BofA was entitled to summary judgment on that claim unless plaintiffs submitted evidence sufficient to raise a triable issue as to whether they engaged in protected activity, whether the people who made the termination decision were aware of that protected activity, and whether BofA terminated their employment in retaliation for engaging in that activity.

iii. *Tortious Termination Claim*

Plaintiffs' tortious termination in violation of public policy claim alleged that their termination violated their right under sections 12920 and 12921 to hold employment without discrimination. As noted with respect to plaintiffs' discrimination/disparate treatment claims, BofA conclusively established that its reason for the termination was nondiscriminatory and it was entitled to summary judgment unless plaintiffs produced evidence that would permit a trier of fact to find that intentional discrimination occurred.

iv. *Intentional Infliction of Emotional Distress Claim*

"The elements of the tort of intentional infliction of emotional distress are: "'(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. . . .' Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community.' [Citation.]" (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) To satisfy the second element, the "'"'emotional distress [must be] of such substantial quantity or enduring quality that no reasonable [person] in a civilized society should be expected to endure it.'"' [Citation.]" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051.)

In its summary judgment motion, BofA argued, among other things, that the conduct upon which plaintiffs' claim is based -- termination of their employment -- is not, as a matter of law, the kind of outrageous conduct required to establish a cause of action for intentional infliction of emotional distress. BofA also submitted deposition testimony from each of the plaintiffs in which each plaintiff described the emotional distress they allegedly suffered; none of emotional distress any of the plaintiffs described rose to the level of severe or extreme emotional distress. Thus, BofA conclusively negated at least two of the elements necessary to establish the claim, and was entitled to summary judgment. Therefore, the burden shifted to plaintiffs to produce evidence that their claim was based on conduct

other than their termination and that the emotional distress they suffered was severe or extreme.[10]

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[10] Because of the difficulty it has caused in thoroughly reviewing the record in this case, we feel compelled to comment on the excesses of BofA's summary judgment motion. As is apparent in our discussion of BofA's arguments and evidence supporting its motion, BofA needed to establish relatively few material facts to prevail. Nevertheless, BofA filed a 100-page separate statement of undisputed material facts and more than 2200 pages of declarations and exhibits, including as purported "material" facts numerous facts that, although relevant generally to the case, were clearly not material to the motion. We are willing to assume that BofA, like many defendants bringing summary judgment motions, may have been led astray by the oft-cited "'Golden Rule'" announced in *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327: "if it is not set forth in the separate statement, it does not exist." (*Id*. at p. 337.) Although this announcement came in the context of a discussion of material facts, it appears that this "rule" has prompted many defendants to include in their separate statements all facts, even those that are not at issue in their motions. In doing so, defendants do themselves, and particularly the courts, a great disservice by burying the material facts in an avalanche of facts that have no bearing on their motions.

While BofA's separate statement was somewhat excessive, the more egregious excess was the enormous volume of evidence it submitted in support of its motion. The evidence included declarations in which multiple declarants repeated (often verbatim) background facts or technical information related to BofA's collection practices. It also included entire sets of discovery responses from each plaintiff, encompassing more than a thousand pages, even though the only responses material to the motion can be found on a handful of pages. BofA also submitted hundreds of pages of deposition testimony, much of which was repetitive and unnecessary. We acknowledge that BofA needed to present additional evidence to support its statement of facts (as opposed to its separate statement of undisputed material facts) and provide relevant background information and context, such as how BofA's collections sites operated and the reason the investigation was initiated. But that could have been accomplished through the judicious use of declarations from a handful of people and, if necessary, short excerpts from deposition testimony. The point is that, for purposes of a summary judgment motion, a defendant is not required to present -- and should be discouraged from presenting -- repetitive evidence of every fact that is relevant to the entire case. This is especially true when, as in this case, there

3. *Plaintiffs Failed to Meet its Burden on Appeal, Both Procedurally and Substantively*

As noted, on appeal from a summary judgment, the appellant bears the burden of showing the trial court erred by pointing to the specific portions of the record that demonstrate there is a triable issue of material fact. (*Bains v. Moores*, *supra*, 172 Cal.App.4th at p. 455.) In addition, the California Rules of Court set forth requirements the appellant must meet in preparing the record. (Cal. Rules of Court, rules 8.122, 8.124, 8.144.) Plaintiffs here failed at both.

We begin with the record. Plaintiffs elected to proceed by means of an appellants' appendix rather than a clerk's transcript. The Rules of Court in effect at the time plaintiffs filed their appendix required that the documents in an appendix be arranged chronologically[11] (Cal. Rules

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are a limited number of material facts that entitle the defendant to judgment as a matter of law.

Further, BofA's separate statement and evidentiary submissions were not the only overly-burdensome filings in connection with their summary judgment motion. After plaintiffs filed their opposition to the motion (which, at more than 3300 pages, also included excessive amounts of evidence regarding facts that were not material to the motion), BofA filed more than 500 pages of objections to plaintiffs' evidence (most of which objections went to evidence that was unrelated to the material facts), accompanied by a proposed order on the objections that was more than 700 pages long. The trial court in this case did an admirable job separating the wheat from the chaff in order to rule on BofA's motion.

[11] Effective January 1, 2016, rule 8.124(d)(1) of the Rules of Court was amended, and no longer requires an appendix to comply with rule 8.144(a), which governs the "Paper and format" of clerk's transcripts, and includes the requirement that documents be arranged chronologically (Cal. Rules of Court, rule (8.144(a)(1)(C)).

of Court, rules 8.124(d)(1), 8.144(a)(1)(C)), that the index of documents indicate the volume in which the document may be found (Cal. Rules of Court, rules 8.124(d)(1), 8.144(b)(1)), and that the cover of each volume indicate the page numbers in that volume (Cal. Rules of Court, rules 8.122(d)(1), 8.144(c)(2)). Plaintiffs' appellants' appendix did not comply with any of these requirements.[12] While these requirements are not substantive, they are imposed to assist this court in its review of the record. And, with a 35-volume appendix with over 10,000 pages, plaintiffs' failure to comply with the requirements significantly hampered this court's ability to efficiently complete its work.

Plaintiffs' other failure on appeal is more serious and substantive. A fundamental rule of appellate review is that an appealed judgment is presumed to be correct, and error must be affirmatively shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) To meet this burden in an appeal from a summary judgment, the appellant must cite to evidence in the record that shows the existence of a triable issue of fact. (*Bains v. Moores*, *supra*, 172 Cal.App.4th at p. 455; *Hodjat v. State Farm Mutual Automobile Ins. Co.* (2012) 211 Cal.App.4th 1, 10 ["It is an appellant's duty to direct the court to evidence that supports his arguments"].) Plaintiffs did not meet their burden here.

Plaintiffs' 42-page opening brief on appeal contains a total of 20 citations to the record, 17 of which are found in the procedural history

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[12] Plaintiffs also violated the Rules of Court by failing to include the notices of appeal (required by Cal. Rules of Court, rules 8.122(b)(1)(A), 8.124(b)(1)(A)) and including reporter's transcripts that could be designated under rule 8.130 (Cal. Rules of Court, rule 8.124(b)(3)(B)).

section and relate to the filing of documents in the trial court. There are two citations to the record in the entire statement of facts, and one citation in the argument section (citing to a statement made by the trial court at a hearing, which plaintiffs incorrectly contend demonstrates the court's purported animosity toward plaintiffs). After BofA argued in its respondents' brief that plaintiffs' failure to support their argument with citations to the record required that the judgment be affirmed, plaintiffs filed a reply brief with a 69-page chart listing the purported material factual disputes, along with citations to the record, that plaintiffs asserted were disregarded by the trial court. Even if such a belated attempt to cite to the record was appropriate, plaintiffs' effort nevertheless fails because all of their citations are to their separate statement in opposition to the summary judgment motion. Thus, plaintiffs *still* did not cite to any *evidence* to support their arguments. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 178, fn. 4 ["a separate statement is not evidence; it *refers* to evidence submitted in support of or opposition to a summary judgment motion"].)

An appellant who fails to cite to the evidence in the record indicating the existence of triable issues of fact may be deemed to have forfeited any claim that the trial court erred in granting summary judgment. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.) In light of plaintiffs' complete failure to cite to any evidence in support of their assertions, even after the possible consequences of that failure was noted by respondents, we conclude this is an appropriate case in which to find that plaintiffs have forfeited their challenge to the summary judgment on the merits.

We also conclude that plaintiffs have forfeited their argument that the trial court erred by denying their request to continue the summary judgment hearing to allow them to complete discovery. Not only did plaintiffs fail to cite to the record in support of any of their factual assertions regarding their requests, they failed to address the grounds upon which the trial court denied their request -- i.e., the request did not meet the requirements of Code of Civil Procedure section 437c, subdivision (h). Therefore, we decline to address plaintiffs' argument and affirm the summary judgment. (See *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700 ["When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary"].)

B. *Appeal From the Attorney Fee Award*

Plaintiffs' opening brief on their appeal from the trial court's order awarding BofA attorney fees suffers from the same infirmity -- lack of citations to the record -- as does their brief on the appeal from the summary judgment.[13] Although we could deem the entire appeal forfeited, we will exercise our discretion to consider two of the many issues plaintiffs raised, i.e., whether the trial court abused its discretion (1) by awarding more than $620,000 in fees without properly taking

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[13] Although we ordered the two appeals consolidated for purposes of briefing, argument, and decision, plaintiffs filed separate opening briefs for each appeal; their reply brief addressed both appeals.

into account plaintiffs' ability to pay; and (2) in finding, for purposes of awarding fees under FEHA, that plaintiffs' case was frivolous, unreasonable, and without foundation.

Section 12965, subdivision (b) authorizes an award of reasonable attorney fees and costs to the prevailing party in a FEHA case. A trial court has discretion to award fees to a prevailing defendant in such a case only upon a finding that the plaintiff's action "'was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.'" (*Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383, 1388 (*Cummings*), quoting *Christiansburg Garment Co. v. E.E.O.C.* (1978) 434 U.S. 412, 422 (*Christiansburg*).) In determining whether to award a defendant attorney fees under FEHA, the court must also consider the plaintiff's ability to pay. (*Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1203.)

In this case, it appears that the trial court failed to consider each plaintiff's ability to pay when it awarded BofA more than $620,000 against plaintiffs jointly.[14] As noted, after the first hearing on BofA's motion for attorney fees, the trial court allowed plaintiffs to submit a supplemental brief regarding the reasonableness of the fees requested. With their supplemental brief (or before the continued hearing),

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[14] The order awarding BofA its attorney fees is silent as to whether the obligation is joint, joint and several, or several, and it does not apportion the fees among the 11 plaintiffs. Therefore, the obligation is presumed to be joint, so an individual plaintiff's potential liability is not limited to a proportionate share of the award. (Civ. Code, § 1431; *Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810, 838.)

plaintiffs submitted declarations from 10 of the 11 plaintiffs showing they did not have the ability to pay any amount of attorney fees.[15] The court overruled BofA's objections to those declarations. Nevertheless, it appears that in ruling on the attorney fee motion, the court did not consider the declarations.[16] Instead, after finding that plaintiffs' claims were frivolous, unreasonable, and without foundation, the court moved immediately to determine the amount of fees to be awarded, based upon the number of hours BofA's attorneys reasonably expended, multiplied by their reasonable hourly rates.

In light of the evidence before the court that all of the income that each plaintiff earned (at least those who were employed) went to pay their basic living expenses, it is evident that the court did not consider their ability to pay when it made its award. Ordinarily, we would reverse the order awarding attorney fees and remand the matter to the

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[15] Some of the plaintiffs declared that they were currently unemployed and had no income. The other plaintiffs, who were employed, declared they earned between $12 and $18 per hour, and each declared that all of his or her wages went to pay for basic living expenses. Although, as BofA's counsel noted at oral argument, plaintiffs' declarations did not include any information about any assets they might have that could go toward paying the attorney fee award, we do not believe that omission is particularly relevant under the circumstances. A person making $18 an hour, for 40 hours per week, for 52 weeks per year, would earn less than $38,000 per year. It is unlikely that such a person would have the financial ability to pay a $620,000 attorney fee award or, indeed, even a one-eleventh share of that award (i.e., approximately $56,000, or about a year and a half of his or her entire annual income).

[16] The court stated that it "only considers Plaintiffs' arguments permitted by the scope of the supplemental briefing, i.e., the reasonableness of the fees claimed by Defendants."

trial court with instructions to reconsider the order, taking into account each plaintiff's ability to pay in determining whether to award fees at all and, if so, the appropriate amount of fees each plaintiff should be ordered to pay. But we need not remand the matter in this case because we conclude the trial court abused its discretion in finding that plaintiffs' case was frivolous, unreasonable, and without foundation.

In reviewing the trial court's determination that plaintiffs' case met the criteria for awarding attorney fees to the defendant in a FEHA case, we are mindful of the United States Supreme Court's warning, repeated by the appellate court in *Cummings*, that "'[i]n applying these criteria, it is important that [the trial] court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial.'" (*Cummings*, *supra*, 11 Cal.App.4th at p. 1388, quoting *Christiansburg*, *supra*, 434 U.S. at pp. 421-422.)

In this case, we agree with the trial court that, based upon the evidence presented in the motion for summary judgment, plaintiffs' claims were unreasonable and without foundation. But the evidence that causes us to reach that conclusion is evidence that plaintiffs were not privy to except through discovery, i.e., evidence showing that BofA

conducted a race-neutral investigation and terminated those employees found during that investigation to have committed fraudulent collection practices.

To be sure, plaintiffs all admitted they had engaged in that conduct, and those admissions support BofA's assertion that the terminations were for a legitimate non-discriminatory reason. But plaintiffs alleged that that articulated reason was a pretext for discrimination because Caucasian employees also engaged in those practices but were not investigated or terminated. As the trial court noted in its ruling on the summary judgment motion, plaintiffs presented evidence that several of them had been told (by Mainstream associates and/or management) or observed that some non-Hispanic Mainstream employees engaged in the same practices that plaintiffs engaged in, but they were not investigated. Although most of that evidence was ruled inadmissible for purposes of the summary judgment motion, it is relevant (and not hearsay) here because it shows that plaintiffs possessed information that could support their allegation.

Based on this information, and in the absence of evidence regarding BofA's investigation, plaintiffs had reason at the outset of this case to suspect that BofA treated Hispanic employees differently than it treated Caucasian employees. They were entitled to conduct discovery to determine whether their allegation was true. Of course, if, once they concluded discovery and found no evidence to support their allegation, they continued to litigate, they could be subject to an attorney fee award for the fees BofA incurred after that point. (See *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro*

(2001) 91 Cal.App.4th 859, 873, citing *Moss v. Associated Press* (C.D.Cal. 1996) 956 F.Supp. 891, 895.) But the position BofA took in its motion for attorney fees was that plaintiffs' claims were frivolous at the outset; therefore, neither BofA nor the court addressed when, during the course of the litigation, it became clear (or should have become clear to plaintiffs) that plaintiffs' claims were not viable. In any event, we note that discovery in this case was ongoing at the time of the summary judgment. Therefore, we conclude the trial court abused its discretion by finding, for the purpose of awarding fees under FEHA, that plaintiffs' case was frivolous, unreasonable, and without foundation.

DISPOSITION

The judgment is affirmed. The order awarding attorney fees is reversed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J. COLLINS, J.