TENTATIVE RULINGS
LAW & MOTION CALENDAR
Wednesday, December 13, 2023 3:00 p.m.
Courtroom 19 –Hon. Oscar A. Pardo
3055 Cleveland Avenue, Santa Rosa

The tentative rulings will become the ruling of the Court unless a party desires to be heard. If you desire to appear and present oral argument, **YOU MUST NOTIFY** the Judge's Judicial Assistant by telephone at **(707) 521-6723**, and all other opposing parties of your intent to appear, **and whether that appearance is in person or via Zoom**, no later 4:00 p.m. the court day immediately preceding the day of the hearing.

If the tentative ruling is accepted, no appearance is necessary unless otherwise indicated.

TO JOIN ZOOM ONLINE:

Department 19 Hearings
MeetingID: 160-421-7577
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PLEASE NOTE: The Court's Official Court Reporters are "not available" within the meaning of California Rules of Court, Rule 2.956, for court reporting of civil cases.

1. MCV- 261010, Citibank v. Hernandez

Plaintiff Citibank, N.A. ("Plaintiff") filed the complaint in this action against defendant Agustin Hernandez ("Defendant"), with causes of action arising from line of credit. This matter is on calendar for Plaintiff's motion pursuant to vacate dismissal under Cal. Code Civ. Proc. ("CCP") § 664.6 and the attached settlement agreement (the "Agreement") and to enter a judgment for the full settlement amount. The motion is GRANTED.

CCP § 664.6(a) provides: "If parties to pending litigation stipulate, in a writing signed by the parties outside of the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement." CCP § 664.6(b)

provides that a written agreement is enforceable if signed by a party, that party's attorney, or an insurer's authorized agent. *See also Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1295. Like proving a contract, in order to have an enforceable agreement under CCP § 664.6, the moving party must show that there was mutual consent to common terms. *Bowers v. Raymond J. Lucia Companies, Inc.* (2012) 206 Cal.App.4th 724, 732-733. A motion to enforce a settlement agreement under CCP § 664.6 must show there is an agreement signed by all the parties to the agreement, not just the parties against whom the agreement is sought to be enforced. *Sully-Miller Contracting Co. v. Gledson/Cashman Construction, Inc.* (2002) 103 Cal.App.4th 30, 37. The court retains equitable powers over requests to enter judgments under § 664.6. *Lofton v. Wells Fargo Home Mortgage* (2014) 230 Cal.App.4th 1050, 1062.

Plaintiff moves the Court for a judgment in the amount of $2,554.50. Despite notice being given, the motion is unopposed.

The parties have stipulated that Defendant owes Plaintiff $2,920.82. See Declaration of Brian Langedyk ("Langedyk Decl."), Exhibit A (the "Agreement"). The terms of the agreement require Defendant to pay $2,920.82 to Plaintiff in 6 payments ranging from $488.32 to $486.50. Agreement ¶ 4. The payments began on March 29, 2023, and the final payment was due on August 25, 2023. *Ibid*. Should Defendant default, Plaintiff is entitled to the full judgment amount plus costs, minus credits for amounts paid. *Ibid*. The parties agreed that the Court would maintain jurisdiction to enter said judgment under CCP § 664.6. Agreement ¶ 7. The balance remaining after credit for payments is $1,946.00. See Langedyk Decl., ¶ 9. Plaintiff has filed a memorandum of costs showing costs of $608.50. See Plaintiff's Memorandum of Costs. This results in a total judgment requested of $2,554.50.

Plaintiff has demonstrated an agreement between the parties and that Defendant has breached the agreement. Plaintiff's requested costs are explicitly allowable under the agreement and are reasonable.

Therefore, the Motion is **GRANTED**. The Court will vacate the dismissal and enter a judgment against Defendant of $2,554.50., with $1,946.00 in principal and $608.50 in costs.

Plaintiff's counsel shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b). Once Plaintiff has submitted the order to the Court, the Court will sign the proposed judgment.

2. MCV-261929, JPMorgan Chase Bank v. Logan

Plaintiff JPMorgan Chase Bank, N.A. ("Plaintiff") filed the complaint in this action against defendant Dawn R. Logan ("Defendant"), with causes of action arising from line of credit. This matter is on calendar for Plaintiff's motion pursuant to vacate dismissal under Cal. Code Civ. Proc. ("CCP") § 664.6 and the attached settlement agreement (the "Agreement") and to enter a judgment for the full settlement amount.

There is no proof of service within the file indicating that Defendant was served with the hearing date. Plaintiff served their moving papers on September 25, 2023, but have served nothing after the court clerk assigned the instant hearing date. Therefore, the motion is DENIED without prejudice.

3. SCV-266709, Humphreys v. Flint

Plaintiffs Kristen Humphreys ("Kristen") and Jesse Humphreys ("Jesse", together with Kristen, "Plaintiffs")[1] filed the currently operative second amended complaint (the "SAC") in this action against defendants Darlene Flint ("Flint") and Charles Belhumeur ("Belhumeur" together with Flint, "Defendants") and Does 1-50 alleging causes of action for: 1) assault and battery; 2) abuse of process; 3) malicious prosecution; 4) defamation; 5) trespass; 6) nuisance; 7) intentional interference with economic relations; 8) intentional infliction of emotional distress; 9) declaratory relief; 10) quiet title; and 11) injunctive relief.

This matter is on calendar for Plaintiffs' motion to compel further answers to requests for production of documents ("RPODs") against Flint under Code of Civil Procedure ("CCP") § 2031.310.

I. Governing Law

A. Inspection Requests and Producing Documents

Regarding the RPODs, a demand for production may request access to "documents, tangible things, land or other property, and electronically stored information in the possession, custody, or control" of another party. A party to whom a document demand is directed must respond to each item in the demand with an agreement to comply, a representation of inability to

[1] The Plaintiffs share a last name, and therefore first names are used for clarity when distinguishing between the Plaintiffs. No disrespect is intended.

comply, or an objection. CCP § 2031.210(a). If only part of an item or category demanded is objectionable, the response must contain an agreement to comply with the remainder, or a representation of the inability to comply. CCP § 2031.240(c)(1). If a responding party is not able to comply with a particular request, that party "shall affirm that a diligent search and a reasonable inquiry has been made in an effort to comply with that demand." CCP § 2031.230. "This statement shall also specify whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody, or control of the responding party" and "[t]he statement shall set forth the name and address of any natural person or organization known or believed by that party to have possession, custody, or control of that item or category of item." *Id.*

CCP § 2031.240(c)(1) provides that when asserting claims of privilege or attorney work product protection, the objecting party must provide "sufficient factual information" to enable other parties to evaluate the merits of the claim, "including, if necessary, a privilege log." However, failure to provide a privilege log does not, in and of itself, waive attorney client privilege. *Catalina Island Yacht Club v. Superior Court* (2015) 242 Cal.App.4th 1116, 1131.

Upon receipt of a response to a request for production, the propounding party may move for an order compelling further response if the propounding party deems that a statement of compliance with the demand is incomplete; a representation of inability to comply is inadequate, incomplete, or evasive; or an objection in the response is without merit or too general. CCP § 2031.310(a). A motion to compel further responses to a request for production of documents must "set forth specific facts showing 'good cause' justifying the discovery sought by the demand." CCP §2031.310(b)(1). Absent a claim of privilege or attorney work product, the party who seeks to compel production has met his burden of showing 'good cause' simply by showing that the requested documents are relevant to the case, *i.e.*, that it is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence under CCP § 2017.010. *See also Kirkland v. Sup. Ct.* (2002) 95 Cal.App.4th 92, 98. Once good cause is shown, the burden shifts to the responding party to justify its objections. *See Coy v. Superior Court of Contra Costa County* (1962) 58 Cal.2d 210, 220–221. It is insufficient to claim that a requested document is within the possession of another person if the party has control over that

document. *Clark v. Superior Court of State In and For San Mateo County* (1960) 177 Cal.App.2d 577, 579.

B. Attorney-Client Privilege

The attorney-client privilege limits disclosure of confidential communications between a lawyer and client. Evid. Code § 954. "But not all communications with attorneys are subject to that privilege." *Caldecott v. Superior Ct*. (2015) 243 Ca1.App.4th 212, 227. The attorney-client privilege follows from the establishment of the professional relationship between client and attorney. *Moeller v. Superior Ct.* (1997) 16 Cal.4th 1124, 1130. Once this relationship is established, the attorney-client privilege attaches to communications made in confidence during the course of the relationship. *Ibid.* As such, "[i]n assessing whether a communication is privileged, the initial focus of the inquiry is on the *'dominant purpose of the relationship' between attorney and client and not on the purpose served by the individual communication*." *Fiduciary Tr. Int'l v. Klein* (2017) 9 Cal.App.5th 1184, 1198 (emphasis in original).

The party claiming the attorney-client privilege as a bar to disclosure has the burden of showing that the communication sought to be suppressed falls within the parameters of the privilege. *Doe 2 v. Superior Ct*. (2005) 132 Ca1.App.4th 1504, 1522. Although the information must have been transmitted, or the advice given, "in the course of that relationship" (Evid. Code, § 952), there is no requirement that the attorney actually be employed in order to create an attorney-client relationship. *Benge v. Superior Court* (1982) 131 Cal.App.3d 336, 345. Evidence Code section 951 states the prevailing view that a person may discuss a potential legal problem with an attorney for the purpose of obtaining advice or representation, and the statements made are privileged whether or not actual employment ensues. *Ibid.*

"The protections of the attorney-client privilege and the work product doctrine may be waived by disclosure of privileged communications or work product to a party outside the attorney-client relationship if the disclosure is inconsistent with goals of maintaining confidentiality or safeguarding the attorney's work product." *City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023, 1033. Evidence Code § 952 provides, in full:

> As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are

present to further the interest of the client in the consultation or those to whom disclosure is *reasonably necessary* for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship. [Emphasis added].

"(I)n order for disclosure to a third party to be "reasonably necessary" for an attorney's purpose, and thus not to effect a waiver of privilege, it is not enough that the third party weighs in on legal strategy. Instead, the third party must facilitate communication between the attorney and client. *Anderson v. SeaWorld Parks and Entertainment, Inc.* (N.D. Cal. 2019) 329 F.R.D. 628, 634; Andrade v. Superior Court (1996) 46 Cal. App. 4th 1609.

B. Sanctions

CCP § 2031.310(h) (relating to requests for production of documents) provides that a monetary sanction "shall" be imposed against the party losing a motion to compel further responses unless the court finds "substantial justification" for that party's position or other circumstances making sanctions "unjust." For the court to order sanctions against an attorney, the Court must find that the attorney advised their client to engage in discovery misconduct. *Kwan Software Engineering, Inc. v. Hennings* (2020) 58 Cal.App.5th 57, 81. Additionally, the motion must advise the attorney that joint and several liability against the attorney is sought for the sanctions. *Blumenthal v. Superior Court* (1980) 103 Cal.App.3d 317, 319.

II. Analysis

A. Compelling Responses

On February 9, 2022, Flint produced responses to Plaintiffs' RPODs which assert that she had no documents which refer or relate to the subject matter of this dispute, other than documents protected by the attorney-client privilege. Flint produced no privilege log or delineation of documents over which this privilege was asserted. Flint was thereafter deposed on August 1, 2023. In the deposition notice, Plaintiffs requested that Flint produce any documents that relate to statements made by Flint to any other individual regarding the suit, communications between herself and her neighbor Steve Howe ("Howe"), and communications between herself and any other neighboring individuals. Flint served no objections to the document requests in advance of the deposition. During deposition, it became apparent that Flint had discussed the incidents underlying the present case with Howe after she was served with the summons and

complaint. Flint's counsel asserted an objection of attorney-client privilege over this document, asserting that it was prepared at the direction of counsel.

The instant motion was filed on October 1, 2023.

Flint is correct that her rights to attorney client privilege are not waived by the failure to provide a privilege log, although this course of conduct does not obviate the need for Flint to properly respond to the request by providing one. The parties extensively discuss what appears to be a particular example of a document which is allegedly protected by the attorney-client privilege, but what isn't clear, entirely due to Flint's refusal to provide a privilege log, is whether this addresses the entire scope of the documents at issue. Flint's response that she has no documents responsive not protected by privilege are therefore deficient, and compelling a code complaint response which at least makes apparent all documents which may fall under a privilege claim is necessary.

The Court also does not find persuasive that Flint needed the assistance of Howe in preparing her notations for her purported attorney, Andrew Martinez. Flint's declaration is accompanied by multiple emails, none of which establishes that Mr. Martinez directed Defendant Flint to record her notes using a third-party scribe. Why the assistance of Howe was necessary, when Flint clearly has access to digital mediums which would allow her to transcribe her thoughts and impressions in the most legible manner possible, is not explained or made clear. Additionally, Defendant's contention that her communications with Howe were 'reasonably necessary' per Evidence Code §952 is misplaced. In her opposition Defendant properly cites to case law which illustrates the type of third-party communications which are deemed to be "reasonably necessary" and are covered by the attorney-client privilege for purposes of Evidence Code §952. These include the physician-patient relationship, psychotherapist-patient relationship, parental relationship, and the private investigator (on agency grounds). Unfortunately, how does not fall within any protected relationship.

Also not persuasive is the post-deposition effort to aver that Flint prepared the at issue memoranda after contacting her attorney. Flint's deposition testimony is quite clear that she did not prepare the memoranda at the direction of her attorney. See Declaration of Nathanial Smith, Exhibit 4, Deposition of Darlene Flint ("Flint Depo."), p. 80:12-24. The Court is not persuaded by the subsequent effort to aver that the document was produced at direction of Mr. Martinez, and the emails provided by Flint do not provide any support for the proposition she claims they

do. Flint claims in the emails attached to her declaration that she completed the at-issue document on August 10, 2020, just three days after the prompting of her attorney. See Declaration of Darlene Flint ("Flint Decl."), Exhibit B. Flint's deposition testimony states that the document was prepared over the course of "three weeks", requiring several multi-hour sessions. Flint Depo., pg. 81:4-17. Flint has failed to present evidence of her narrative that the document falls under the privilege, and therefore does not meet her burden to show the documents are protected. *Doe 2 v. Superior Ct*. (2005) 132 Ca1.App.4th 1504, 1522.

Therefore, the Court finds that Flint's objection and failure to fully respond to the request to produce documents is insufficient. Plaintiffs' motion to compel is GRANTED. Flint shall produce a privilege log for all documents withheld but not directly addressed by this order within 30 days. The attorney-client privilege is found inapplicable to the memorandum produced by Mr. Howe.

B. Sanctions

Sanctions are mandatory for discovery abuses as to RPODs. The Court finds that Flint's refusal to provide a privilege log is without basis in law and is discovery abuse. The failure to provide a response which delineates the documents sought to be protected under the privilege is a facially non-compliant response under the Discovery Act. CCP, § 2031.240 (b) and (c)(1). Therefore, the Plaintiffs' request for sanctions is proper.

Plaintiffs request sanctions of $2,600, representing attorney work of six and a half hours for the motion at $400.00/hour. Smith Declaration ¶ 8. The Court finds this amount reasonable. Costs for filing fees of $60 are also appropriate. The documents at issue, and the failure to properly support the objections of counsel, means that the sanctions are properly attributable to counsel as well. Flint and/or her counsel are to pay $2,660.00 to Plaintiffs within 30 days of this order.

III. Conclusion

Based on the foregoing, Plaintiffs' motion to compel is GRANTED. Flint shall produce a privilege log for all documents withheld but not directly addressed by this order within 30 days. The attorney-client privilege is found inapplicable to the memorandum produced by Mr. Howe. Flint and/or her counsel are to pay $2,660.00 in monetary sanctions to Plaintiffs within 30 days of this order.

Plaintiff's counsel shall submit a written order to the court consistent with this tentative

ruling and in compliance with Rule of Court 3.1312(a) and (b).

4. SCV-270065, Miranda v. Ceja Madrigal

Plaintiffs Marina Miranda, Isabella Miranda (by and through her guardian ad litem, David Miranda) and Wyatt Miranda (by and through his guardian ad litem, Rudy Miranda) (all together, "Plaintiffs") filed the complaint (the "Complaint") in this action against defendants Maurico G. Ceja Madrigal ("Individual Defendant"), Carrera Garcia Transport, LLC. ("CGT"), Wade Transportation Company ("WTC" together with Individual Defendant and CGT, "Defendants"), and Does 1-50 alleging causes of action for: 1) Motor Vehicle Negligence; and 2) General Negligence.

This matter is on calendar for the motion by Defendants for summary judgment pursuant to Cal. Code Civ. Proc. ("CCP") § 437c. For the reasons set forth below, the motion for summary judgment is **DENIED**.

I. The Burdens on Summary Judgment

A. Generally

Summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CCP § 437c(c). A moving defendant meets its initial burden to show that one or more elements of a cause of action "cannot be established" (CCP § 437c(p)(2)) by presenting evidence that, if uncontradicted, would constitute a preponderance of evidence that an essential element of the plaintiff's case cannot be established. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851; *Kids Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 879. Alternatively, a defendant may show that there is a "complete defense" to a cause of action. CCP § 437c(p)(2). To show a complete defense, a defendant must present admissible evidence of each essential element of the defense upon which it bears the burden of proof at trial. *See, e.g. Anderson v. Metalclad Insulation Corp.* (1999) 72 Cal.App.4th 284, 289. A defendant cannot base its "showing" on the plaintiff's lack of evidence to disprove its claimed defense. *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 472.

A moving party does not meet its initial burden if some "reasonable inference" can be drawn from the moving party's own evidence which creates a triable issue of material fact. *See,*

e.g. Conn v. National Can Corp. (1981) 124 Cal.App.3d 630, 637; *Binder v. Aetna Life Ins. Co*. (1999) 75 Cal.App.4th 832, 840. If the moving defendant does not meet its initial burden, the plaintiff has no evidentiary burden. CCP § 437c(p)(2).

If a defendant meets its initial burden to show a "complete defense," the burden shifts to the plaintiff to provide sufficient evidence to raise a triable issue of fact as to the defense asserted. CCP § 437c(p)(2). *Consumer Cause, Inc.*, 91 Cal.App.4th at 468. An issue of fact exists if "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." *Aguilar*, 25 Cal.4th at 845.

"(T)he pleadings determine the scope of relevant issues on a summary judgment motion." *Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74. "(T)he burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability *as alleged in the complaint;* that is, a moving party need not refute liability on some theoretical possibility not included in the pleadings." *Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493 (emphasis in original). Where the deficiency is with the complaint, and not the evidence presented, the legal effect of a motion for summary judgment is the same as that of a motion for judgment on the pleadings. *American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1117.

"[D]ueling expert opinions created a factual dispute not appropriately resolved by way of summary judgment." *Hernandez v. KWPH Enterprises* (2004) 116 Cal.App.4th 170, 176 *citing Kockelman v. Segal* (1998) 61 Cal.App.4th 491, 505.

B. General Negligence

"The elements of a cause of action for negligence are: duty; breach of duty; legal cause; and damages." *Friedman v. Merck & Co.* (2003) 107 Cal.App.4th 454, 463. Whether a duty of care is owed is a question for the court and not a jury. *Ballard v. Uribe* (1986) 41 Cal.3d 564, 572. "Legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done." *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 434. "A plaintiff meets the causation element by showing that (1) the defendant's breach of its duty to exercise ordinary care was a substantial factor in bringing about plaintiff's harm, and (2) there is no rule of law relieving the defendant of liability. (Citation.) These are factual questions for the jury to decide, except in cases in which

the facts as to causation are undisputed." *Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205.

C. Negligent Hiring, Training, and Supervision

An employer may be liable to a third party for negligently hiring an unfit employee. *J.W. v. Watchtower Bible and Tract Society of New York, Inc.*, (2019) 29 Cal. App. 5th 1142. Moreover, an employer may be held directly liable for the behavior of an unfit employee where the employer was negligent in the hiring, training, supervising, or retaining of that employee. *Doe v. Uber Technologies, Inc.*, (N.D. Cal. 2016) 184 F. Supp. 3d 774, (applying California law). Thus, negligence liability may be imposed on an employer either based on action, for example, the negligent hiring of an agent, or inaction, for example, the failure to provide adequate supervision of the agent's work. *Id*.

For an employer to be liable for negligent hiring, a plaintiff must prove that:

- The employee who caused the injury was unfit for hiring or retention or was only fit if properly supervised, and such supervision was ultimately not provided by the employer;
- The employer's hiring or retention of the unfit employee was the proximate cause of the plaintiff's injury; and
- The employer knew or should have known of the employee's unfitness, that is, that the risk posed by the employee was foreseeable, such that the employer should have been on notice that the employee was unfit for a particular job.

(Phillips v. TLC Plumbing, Inc. (2009) 172 Cal. App. 4th 1133, 1139–40).

D. *Negligence Per Se*

Negligence per se is a statutorily established principle related to negligence claims. See Evidence Code § 669.

> The negligence per se doctrine is codified in Evidence Code section 669, under which negligence is presumed if the plaintiff establishes four elements: (1) the defendant violated a statute, ordinance, or regulation of a public entity; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence of the nature of which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

Galvez v. Frields (2001) 88 Cal.App.4th 1410, 1420.

"The first two elements are normally questions for the trier of fact. The last two elements are determined by the trial court as a matter of law." *Daum v. SpineCare Medical Group, Inc.* (1997) 52 Cal.App.4th 1285, 1306.

"'Highway' is a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel. Highway includes street." Veh. Code, § 360. "A 'roadway' is that portion of a highway improved, designed, or ordinarily used for vehicular travel." Veh. Code, § 530.

"No person shall stop, park, or leave standing any vehicle upon a freeway" with limited exceptions. Veh. Code, § 21718 (a). "'**Freeway**' is a highway in respect to which the owners of abutting lands have no right or easement of access to or from their abutting lands or in respect to which such owners have only limited or restricted right or easement of access." Veh. Code, § 332. Failure to pull a vehicle to the shoulder when it suffered a mechanical malfunction, and thereby leaving it in the lanes of a freeway, was a violation of the prior statute Veh. Code, § 22520 (now Veh. Code § 21718). *People v. Hernandez* (1990) 219 Cal.App.3d 1177, 1184; see also *Shuff v. Irwindale Trucking Co.* (1976) 62 Cal.App.3d 180, 184 (leaving a portion of a tractor trailer sticking into the lane while most of the vehicle was on the shoulder was a violation of Veh. Code, § 22520, and supported negligence claims); *Aguirre v. Reno* (1971) 19 Cal.App.3d 284, 287 (stopping vehicle in lane where there was a broad shoulder available to pull off was a violation of Veh. Code § 22520 which supported contributory negligence claims).

II. Evidentiary and Pleading Issues

First, to address Plaintiffs' contention that multiple facts should be deemed disputed under CCP § 437c(e), this is a matter that falls entirely within the Court's discretion. See CCP § 437c(e) (where a sole witness's declaration forms the basis for the material fact, "summary judgment may be denied in the discretion of the court".) The analysis here need not hinge on this discretionary determination, as there is adequate evidence presented by Plaintiffs to raise a material fact without deeming these matters disputed under this section. The Court does not deem these facts disputed on this basis.

The Court also notes Plaintiffs' objections that particular facts posed by Defendants' Separate Statement of Undisputed Facts ("DSS") doesn't address facts discovered "(s)ince complaint has been filed". See, e.g., Plaintiff's Separate Statement of Undisputed Facts ("PSS")

¶ 3. These facts are outside the scope of what is capable of being addressed at summary judgment, as the pleadings act as the outer bounds of what Defendants to need rebut. *Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74. Defendants are not obligated to negate Plaintiffs' new alternative theory of negligence not raised in the Complaint. *Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493.

The Court did not receive any reply from Defendants as of the posting of this tentative ruling.

III. Facts

Shortly after midnight on February 4, 2020, the vehicle operated by Decedent Stephanie Miranda struck the tractor trailer (the "Truck") operated by Individual Defendant. DSS ¶ 2 (the "Accident"). The Truck was parked on the right shoulder of the northbound offramp for Bicentennial Way on US101 in Santa Rosa. DSS ¶ 4. The Truck was on the shoulder, approximately two feet from the roadway. DSS ¶ 5. According to Individual Defendant, the lights of the Truck were illuminated, and the hazard lights were engaged. DSS ¶¶ 6-7. Individual Defendant only intended to pull over for five minutes before departing. DSS ¶ 13.

The Truck's engine was running at the time of the Accident. DSS ¶ 8. There were no objects obstructing visibility of the Truck at the time of the Accident. DSS ¶ 9. However, the area where the truck was parked was dark due to the nighttime conditions. PSS ¶ 9. There were no signs indicating that parking on the shoulder of the off ramp was improper or illegal. DSS ¶ 10. Individual Defendant had stopped the Truck briefly to check his GPS for directions and had been stopped for approximately three minutes at the time the accident occurred. DSS ¶¶ 12-14. Defendants have produced an expert opinion that this conduct comports with the standard of care applicable to the tractor-trailer trucking industry. DSS ¶¶ 15-17.

IV. Analysis

In response, Plaintiffs have produced evidence that the Truck's lights and hazard lights were not illuminated at the time of the Accident. PSS ¶¶ 6-7. Individual Defendant was unfamiliar with the area to which he was making a delivery and did not plan his trip from Gilroy, where he stopped three hours before the Accident, to Santa Rosa, CA. PSS ¶¶ 30, 43. Individual Defendant's stop was made for non-emergency reasons. PSS ¶ 49. Individual Defendant did not place any reflective triangles, reflectors or flares while stopped. PSS ¶¶ 50-51. Plaintiffs contend that Individual Defendant and had very little experience driving trucks in the United States and

had never received any formal truck driving training. PSS ¶ 24. Individual Defendant never received any training from Defendant CGT or Defendant Wade. PSS ¶ 26. Individual Defendant also acknowledged at deposition that he was unfamiliar with the rules of the road, trip planning and stopping at night and shoulders of freeways and highways. PSS ¶ 26. Plaintiffs have produced an expert opinion that this conduct does not comport with the standard of care within the tractor-trailer trucking industry. PSS ¶ 15-17.

Defendants argue that they are entitled to summary judgment, as they have presented evidence that Individual Defendant's actions complied with the applicable standard of care, and that therefore there was no breach on which to predicate Plaintiffs' causes of action for negligence.

First, to address the legal issues raised by Plaintiffs' briefing, Plaintiffs present no case or law with clear application here. Plaintiffs cite extensively to Veh. Code § 21718, but the case law around the prior version of this statute makes abundantly clear that violations of Veh. Code § 22520 relate exclusively to vehicles stopped **in the traffic lane**. "The evidence showed Hernandez had the ability, but failed, to pull his truck onto the shoulder while it continued to coast. He failed to coast to the shoulder, not because his truck unavoidably stopped, but because he was hoping to start it while he was still moving. Given this evidence, the 'impossibility' exception of section 22520 does not apply here." *People v. Hernandez* (1990) 219 Cal.App.3d 1177, 1184. As such, Individual Defendants' stop upon the shoulder does not appear to implicate Veh. Code § 21718 as Plaintiffs argue.

Similarly, the application of Veh. Code § 25300 appears similarly inadequately argued. Individual Defendant was obligated to place reflectors or flares "immediately" if the vehicle was "parked off the roadway but within 10 feet thereof during darkness". Veh. Code § 25300 (c). "A 'roadway' is that portion of a highway improved, designed, or ordinarily used for vehicular travel." Veh. Code, § 530. However, the failure to place the requisite reflectors merely provides "prima facie proof" of negligence per se and does not legally impact the Court's ability to determine whether Defendants have shifted their burden. *Callison v. Dondero* (1942) 51 Cal.App.2d 403, 409.

Defendants have presented adequate evidence to shift the burden at summary judgment. Defendants have presented evidence that Individual Defendant had parked on the shoulder, outside the lane, had the vehicle running, and had his lights and hazard lights illuminated.

Defendants have presented expert opinion showing that this conduct fell within the standard of care. Defendants' expert has opined that given the brevity of the stop, this is sufficient to meet the standard of care within the trucking industry.

However, Plaintiffs have presented adequate evidence to meet the shifted burden. First, and most salient, Plaintiffs have presented evidence that the truck did not have its lights on at the time of the accident. This alone is sufficient to present a triable issue of material fact, as the expert opinion offered by Defendants is predicated on Individual Defendant having engaged his hazard lights. See Declaration of Larry Miller, ¶ 11(e).

Similarly, a triable issue of fact is offered through Plaintiffs' own expert opinion. Even where Defendants' facts regarding the incident are accepted as true, Plaintiffs' expert has opined that multiple facts regarding the incident do not meet the standard of care within the industry of heavy vehicle drivers. The discrepancy between Defendants' expert's opinion and the Plaintiffs' expert's opinion is a determination of fact properly determined at trial. *Hernandez v. KWPH Enterprises* (2004) 116 Cal.App.4th 170, 176 *citing Kockelman v. Segal* (1998) 61 Cal.App.4th 491, 505.

Finally, there are triable issues of material fact as it relates to the negligent hiring, training, and supervision theory. Plaintiffs have raised disputed facts as to the level of training which the Individual Defendant had prior to the date of the Accident. Defendants did not dispute Plaintiffs' factual contentions that neither Defendant CGT nor Defendant Wade offered any training to the Individual Defendant prior to the accident. Although Defendant contend that the Individual Defendant was properly licensed by the State of California, approved by Defendant CGT's insurance Company, and had no prior vehicle accidents he did acknowledged not being adequately familiar with the rules of the road. (DSS ¶ 17-¶ 19; PSS ¶ 26).

Therefore, the motion for summary judgment is DENIED.

V. Conclusion

Based on the foregoing, the motion for summary judgment is **DENIED**.

Plaintiffs' counsel shall submit a written order to the court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

5. SCV-271017, Volkinator Enterprises Inc. v. Zortman

Petitioner Volkinator Enterprises, Inc., ("Petitioner") filed the petition (the "Petition") in

this action against the Levi Zortman ("Respondent") to confirm the arbitration award entered May 4, 2022 (the "Arbitration Award").

This matter is on calendar for Petitioner's motion for post-petition attorneys' fees incurred as a result of the arbitrated action, and successful petition to translate that matter to judgment. This Motion is **GRANTED.** Petitioner is awarded **$7,691.50** for bringing this matter from arbitration to Judgment.

1. Plaintiff is Entitled to Attorneys' Fees.

The Court notes that Petitioner has provided **no** authorities in their memorandum making clear to the Court on what basis the Court may award them post-petition fees. The Court presumes, given that this arises out of an arbitration petition, which itself depends on the underlying contract signed by the parties, that Petitioner moves under Civil Code § 1717. The attorneys' fees are potentially awardable under Civil Code section ("Civ. Code") § 1717. Civ. Code section 1717(a) provides in relevant part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

There is clearly an attorneys' fees clause within the arbitration provision in the contract at issue in the instant case. See Petitioner's Petition, Exhibit 4(b) (the "Contract"), ¶ 13 ("In the event that any legal or equitable action, proceeding or arbitration arises out of or concerns this Agreement, the prevailing party shall be entitled to recover its costs and reasonable attorney's fees"). No opposition was tendered to the motion. Based on the evidence, there is a basis for fees.

The fee award calculation generally begins with the "lodestar," which is the number of hours reasonably expended multiplied by the reasonable hourly rate prevailing in the community for similar services by an attorney with similar skill and experience. *See, e.g. PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132. The trial court may adjust the lodestar amount based on various factors specific to the case to fix the attorney fees at fair market value for the services provided, including: "(1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to

which the nature of the litigation precluded other employment by the attorneys, [and] (4) the contingent nature of the fee award." *Ketchum*, 24 Cal.4th at 1132. *See also Gorman v. Tassajara Dev. Corp.* (2009) 178 Cal.App.4th 44, 92 ("The first step involves the lodestar figure—a calculation based on the number of hours reasonably expended multiplied by the lawyer's hourly rate. 'The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided.'…The factors to be considered include the nature and difficulty of the litigation, the amount involved, the skill required and employed to handle the case, the attention given, the success or failure, and other circumstances in the case." (internal citations omitted).

The Court notes the fees and time expended as shown by the Walsh Declaration, and the fees requested are reasonable.

There is no multiplier to the lodestar requested or appropriate to this case.

The Court therefore determines that the appropriate fee award for post-arbitration work in bringing this matter to judgment is $7,691.50. The motion is GRANTED in this amount. Respondent shall pay that sum within thirty (30) days of entry of the order granting this Motion.

Petitioner's request for post judgment interest is not properly contained in the notice of motion. Petitioner again provides no legal support for this request. Due to the lack of notice within the notice of motion, and the failure to provide authority supporting the request, the request is DENIED without prejudice.

Petitioner's counsel shall submit a written order to the court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

6. SCV-273823, Dyer v. New American Funding, LLC

Plaintiff Shauna Dyer ("Plaintiff") filed the currently operative complaint (the "Complaint") in this action against defendants New American Funding, LLC ("Defendant"), and Does 1-5, for causes of action arising from alleged violations of employment law. This matter is on calendar for the petition (styled as a "motion") by the Defendant to compel arbitration pursuant to Cal. Code Civ. Proc. ("CCP") § 1281.2. Defendant's petition to compel arbitration and stay proceedings is CONTINUED to December 15, 2023, at 11:00 am in Dept. 19 for an

evidentiary hearing regarding the execution of the disputed arbitration agreement.

I. The Basis for the Motion

Defendant moves to compel arbitration based on an arbitration agreement allegedly electronically signed by Plaintiff on October 6, 2020. See Declaration of Renae Souza, Exhibit D (the "Arbitration Agreement"). Plaintiff opposes the motion, alleging in her opposition that she does not remember signing the Arbitration Agreement, and that there are factual inconsistencies in Defendant's evidence. Plaintiff provides evidence attempting to show that the time the electronic signature is indicated on the Arbitration Agreement does not match the time she received confirmation that she had completed her on-boarding paperwork.

II. Governing Law

A. Arbitration Agreements

A party seeking to compel arbitration pursuant to CCP § 1281.2 must "plead and prove a prior demand for arbitration under the parties' arbitration agreement and a refusal to arbitrate under the agreement." *Mansouri v. Sup. Ct*. (2010) 181 Cal.App.4th 633, 640-641. It must also prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. *See, e.g. Cruise v. Kroger Co*. (2015) 233 Cal.App.4th 390, 396-397, 399-400. State law applicable to contracts generally governs whether a valid agreement to arbitrate exists. *Metters v. Ralphs Grocery Co.* (2008) 161 Cal.App.4th 696, 701.

However, the validity of the signature in an agreement to arbitrate is a foundational fact when compelling arbitration. *Ruiz v. Moss Bros. Auto Group, Inc*. (2014) 232 Cal.App.4th 836, 842-843. In *Ruiz* at 842, the court explained: "The petitioner bears the burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence, while a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. [Citation] The trial court sits as the trier of fact, weighing all the affidavits, declarations, and other documentary evidence, and any oral testimony the court may receive at its discretion, to reach a final determination. [citation]." When a party bound to an arbitration agreement challenges the authenticity of the signature, the party moving to compel arbitration bears the burden of proving the signature is authentic. *Id* at 846.

Where allegations of fraudulent agreements to arbitrate exist, and are opposed, "the

enforceability of an arbitration clause may depend upon which of two sharply conflicting factual accounts is to be believed, the better course would normally be for the trial court to hear oral testimony and allow the parties the opportunity for cross-examination." *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 414.

B. Equitable Estoppel

Under the equitable estoppel doctrine, a party to an arbitration agreement may be required to arbitrate with a nonparty. *See, e.g. JSM Tuscany, LLC v. Sup. Ct.* (2011) 193 Cal.App.4th 1222, 1237. "'The fundamental point' is that a party is 'not entitled to make use of [a contract containing an arbitration clause] as long as it worked to [his or] her advantage, then attempt to avoid its application in defining the forum in which [his or] her dispute ... should be resolved.'" *Jensen v. U-Haul Co. of California* (2017) 18 Cal.App.5th 295, 306 ("*Jensen*"), quoting *NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 84. A non-signatory may enforce an arbitration clause on grounds of equitable estoppel only when the claims against the non-signatory are "dependent upon, or founded in and inextricably intertwined with" the obligations imposed by the agreement containing the arbitration clause. *Goldman v. KPMG LLP* (2009) 173 Cal.App.4th 209, 217-218 ("*Goldman*"); *Marenco v. DirecTV LLC* (2015) 233 Cal.App.4th 1409, 1419 ("*Marenco*") (equitable estoppel doctrine required employee who signed arbitration agreement with predecessor corporation to arbitrate claims against non-signatory successor corporation because employees who continued working after merger impliedly accepted successor corporation's decision to continue existing terms of employment, including arbitration agreement).

III. The Arbitration Agreement Clearly Applies to Defendant

In attempting to avoid the motion to compel arbitration, Plaintiff argues that the party named within the Complaint is Defendant, New American Funding, LLC, and that the party to the arbitration agreement with Plaintiff was Broker Solutions, Inc. This argument is entirely defeated by Plaintiff's own Complaint, as the applicability of the terms of the Arbitration Agreement are clearly the employment contract at issue between Plaintiff and Defendant based on Plaintiff's own pleadings. Plaintiff alleges that Defendant converted from Broker Solutions, Inc. to their current corporate form as Defendant "(i)n or around March 13, 2023". Complaint ¶ 2. Plaintiff's allegation being that Defendant and Broker Solutions, Inc. are the same entity, Defendant is clearly entitled to enforce Broker Solutions, Inc.'s rights under the Arbitration

Agreement. The allegation within Complaint makes clear that Defendant **is** a party to the contract, in that Defendant is the successor to Broker Solutions, Inc.

Any attempt to argue now that Defendant is an entirely different entity from Broker Solutions, Inc. would properly require application of the principle of equitable estoppel. Plaintiff cannot "make use of [a contract containing an arbitration clause] as long as it worked to [his or] her advantage, then attempt to avoid its application in defining the forum in which [his or] her dispute ... should be resolved." *Jensen, supra,* 18 Cal.App.5th at 306. Plaintiff cannot attempt to advance her case based on the terms of her employment regulated by a contract, only to disclaim the contract in response to Defendant's attempt to enforce its terms.

Plaintiff's attempt to argue that the Arbitration Agreement is not legally applicable to the parties is unpersuasive. The remaining issue is whether the arbitration agreement is factually supported.

IV. <u>A Hearing is Necessary to Determine the Credibility of the Parties</u>

Plaintiff has raised that the Arbitration Agreement was not signed by her, and therefore the proper course is for the Court to set a hearing on the matter so the credibility of the parties may be assessed and weighed. Plaintiff has raised no other meritorious defenses to arbitration. This matter is continued to December 15, 2023. at 11:00 am in Department 19 for an evidentiary hearing on the motion.

****This is the end of the Tentative Rulings.*****