TENTATIVE RULINGS

DEPT. C-16
(657-622-5216)

Judge David A. Hoffer
May 13, 2024

These are the Court's tentative rulings. They may become orders if the parties do not appear at the hearing. The Court also might make a different order at the hearing. (*Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 442, fn. 1.)

If a party intends to submit on the Court's tentative ruling, please call the Court Clerk to inform the court. If both parties submit, the tentative ruling will then become the order of the Court.

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#	Case Name	
1	30-2019-01087579 Ray vs. Basmadjian	Plaintiff Edward W. Ray, Jr.'s ("Plaintiff") unopposed Motion for Relief ("Motion") is **GRANTED**. Plaintiff has produced a declaration supporting surprise and excusable neglect on the part of his counsel regarding the failure to provide objections to the court's proposed final

		statement of decision. This is sufficient for purposes of Civ. Proc. Code § 473(b). The court hereby orders the final statement of decision entered on 11/28/23 to be vacated. (ROA #813.) The court will consider the objections made by Plaintiff in the Motion and will issue its amended final statement of decision. No further briefings or arguments are permitted. Plaintiff is ordered to give notice of this ruling.
2	30-2021-01191704 Pontes vs. Intelliloan, Inc.	Plaintiff Chaz Pontes' Motion to Vacate Arbitration and Order Staying Proceedings and Requests for Sanctions is **GRANTED.** The Legislature enacted section 1281.98 in 2019 to curb a particular arbitration abuse. The abuse was that a defendant could force a case into arbitration but, once there, could refuse to pay the arbitration fees, thus effectively stalling the matter and stymying the plaintiff's effort to obtain relief. The Legislature called this "procedural limbo." (*Gallo v. Wood Ranch USA, Inc.* (2022) 81 Cal.App.5th 621, 634 (Gallo) [quoting legislative history].) The Legislature enacted section 1281.97 along with section 1281.98 and amended both sections in 2021. The former provision concerns fees due at the initiation of the arbitration. CCP § 1281.98 applies to fees and costs required during the arbitration to continue the proceeding. (*Williams v. West Coast Hospitals, Inc.* (2022) 86 Cal.App.5th 1054, 1066.) Otherwise, the provisions are analogous, and courts analyze them similarly. (See *Gallo*, supra, 81 Cal.App.5th at p. 633 & fn. 4.) Unless the parties expressly agree to the contrary, the drafting party's receipt of the invoice triggers the 30-day clock under section 1281.98(a)(1). (*Espinoza v. Superior Court* (2022) 83 Cal.App.5th 761, 774.) If the drafting party does not pay the invoice within the 30 days, thus materially breaching the arbitration agreement under section 1281.98(a)(1), the employee or consumer may unilaterally "[w]ithdraw the claim from arbitration and proceed in a court of appropriate jurisdiction." (Code Civ. Proc., § 1281.98(b).)

		FAA Preemption Defendant also argues the FAA preempts CCP § 1281.98, but, as Plaintiff points out in Reply, no controlling authority supports that view. When faced with non-payment of fees to initiate arbitration under CCP §§ 1281.97 and 1281.98, California courts have rejected FAA preemption because the prompt payment of arbitration fees promotes, rather than hinders, resolution via arbitration. (*Hohenshelt v. Superior Court* (2024) 99 Cal.App.5th 1319, 1325-1326; *Suarez v. Superior Court* (2024) 99 Cal. App. 5th 32, 42-43; *Espinoza v. Superior Court*, supra, 83 Cal.App.5th at 770; *Gallo*, supra, 81 Cal.App.5th at 641-42.) The same is true here under CCP § 1281.98. Payment was Due 30 Days After Receipt Here, it is undisputed that after the Court granted Defendant's Motion to Compel Arbitration on 12/14/21 and arbitration was initiated with JAMS before Hon. Kirk Nakamura (Ret.). It is also undisputed that JAMS sent an invoice dated 11/20/23 to the parties and Defendant did not pay the invoice until 01/17/24. Plaintiff's Exhibit 13 is the invoice from JAMS dated 11/20/23. Both the Notice of Hearing that accompanied the invoice and the invoice itself state payment is "due upon receipt." There is no express provision in the arbitration agreement stating the number of days in which the parties to the arbitration must pay any required fees or costs. Thus, the invoice complies with CCP § 1280.98 subdiv. (a)(2). As such, the statutory payment deadline was 12/20/23 and Defendant did not make payment until after they had breached, i.e., 01/17/24. (See Cvejic v. Skyview Cap., LLC (2023) 92 Cal. App. 5th 1073, 1077 ["As the legislative history and caselaw direct, we strictly enforce this statute."].) Defendant argues that payment was not actually due until 02/16/24, a date set forth in the Notice of Hearing and confirmed by JAMS. However, the 02/16/24 date stated in the Notice applied to the deadline to cancel or continue the arbitration hearing date, otherwise risk losing fees already paid with the current hearing date. Indeed, the first sentence of the Notice of Hearing made it abundantly clear when payment is due: "All fees are due upon receipt." (See, Plaintiff's Ex. 13.) The representation by JAMS that the payment was not due

		until 02/16/24 has no bearing on when payment is due under statute. Moreover, Section 1281.98 does not allow for any extension of time for the due date absent an agreement "by all parties." (§ 1281.98, subd. (a)(2).) (See, *Williams v. West Coast Hospitals, Inc.*, supra, 86 Cal.App.5th at 1974 [although defendant's belated payment of a few days was unintentional "nothing in section 1281.98 as drafted depends on the intent or good faith of a particular drafting party in a specific case"]; *Espinoza v. Superior Court*, supra, 83 Cal.App.5th at 776 [statute is unambiguous and triggering event is "nothing more than nonpayment of fees within the 30-day period – the statute specifies no other required findings, such as whether nonpayment was deliberate or inadvertent, or whether the delay prejudiced the nondrafting party"; "plain language therefore indicates the Legislature intended the statute to be strictly applied whenever a drafting party failed to pay by the statutory deadline"]; *DeLeon v. Juanita's Foods* (2022) 85 Cal.App.5th 740, 752-753 [in employment action, where arbitration had already commenced but defendant failed to timely pay fees due, Appellate Court explained "the statute's language establishes a simple bright-line rule that a drafting party's failure to pay outstanding arbitration fees within 30 days after the due date results in its material breach of the arbitration agreement"].) <u>Waiver</u> Finally, Defendants argue that Plaintiff waived his right to withdraw from arbitration by continuing to participate in arbitration. However, on January 11, 2024, less than 48 hours after receiving notice that the JAMS arbitrator would not set a discovery conference date because Defendant failed to pay the arbitration fees, Pontes elected to withdraw from the court ordered arbitration per CCP § 1281.98. The January 9, 2024, email was the first time Pontes received notice from JAMS that it would not proceed with the arbitration process because Defendant did not pay the November 20, 2023, invoice. (See, Plaintiff's Exhibit 11.) Defendant provided no evidence in its Opposition that Pontes intended to remain in arbitration after the January 9, 2024. Moreover, Pontes was never notified or otherwise informed that Defendant failed to pay any invoices prior to the 11/20/23 invoice. But even if Pontes was aware of the prior breaches, Defendant does not present any authority that would preclude Pontes from electing to withdraw from arbitration after the latest material breach.

		Monetary Sanctions CCP § 1281.99 states in relevant part: (a) The court shall impose a monetary sanction against a drafting party that materially breaches an arbitration agreement pursuant to subdivision (a) of Section 1281.97 or subdivision (a) of Section 1281.98, by ordering the drafting party to pay the reasonable expenses, including attorney's fees and costs, incurred by the employee or consumer as a result of the material breach. Here, Pontes seeks monetary sanctions of $3,345 against Defendant Intelliloan, Inc. The Declaration of Lakesha Robinson declares that counsel's hourly rate is $450/hr. and 7.3 hours were spent preparing the motion, for a total of $3,285. In addition, a $60 motion filing fee was also incurred. In total, Plaintiff seeks **$3,345** from Defendant in costs and fees related to the preparing, filing, and drafting of this motion. No other fees associated or incurred during the arbitration were requested. Defendant does not challenge these fees. Accordingly, sanctions in the amount of **$3,345** is awarded to Plaintiff Pontes, which shall be paid within 60 days of the notice of ruling. Plaintiff is ordered to give notice of this ruling.
3	30-2021-01195122 Fouse vs. Core Lending, Inc.	Defendants Core Lending, Inc., Darius Guernsey, and Stela Guernsey's unopposed Demurrer to the remaining causes of action of the Fourth Amended Complaint is **OVERRULED**. **As to 2nd cause of action for breach of contract**, this cause of action is not sufficiently pled. The elements of the cause of action are the existence of the contract, performance by the plaintiff or excuse for nonperformance, breach by the defendant and damages. (*First Commercial Mortgage Co. v. Reece* (2001) 89 Cal.App.4th 731, 745.) Defendants demur to the breach of contract cause of action on the ground it is not sufficiently pled because Plaintiffs cannot allege their performance under the contract and fail to allege any damages resulting from any purported breach by Defendants since

		Plaintiffs were damaged by their own conduct and inability to meet their obligations under the loan received from Defendants. Here, the 4AC alleges that on April 19, 2018, Plaintiffs and Defendant CORE as to a $300,000/$400,000 beneficial interest and Defendants D. GUERNSEY and S. GUERNSEY, as joint tenants as to a $100,000/$400,000 beneficial interest, entered into an agreement for a hard loan for $400,000; that the purpose of the loan was for the Plaintiffs to start a restaurant; that the loan had a term of 35 months payable in the interim at 10% interest only payments of $3,333.33 per month with a maturity date of 5/1/2021; that about a year later, Plaintiff missed two monthly payments to CORE and became delinquent; that Plaintiff asked CORE to give them an opportunity to find another lender so they could refinance their first loan and pay off the Loan with CORE, but CORE never responded and instead, on or around April 2, 2019, recorded a Notice of Default and Election to Sell under Deed of Trust on their property; that Defendants breached the written loan agreement on two separate and distinct occasions by (1) failing to satisfy the notice requirements contained within paragraph 11 of the loan agreement which required them to specify a date, not less than 30 days from the date the notice is given to borrower, by which the default must be cured; and (2) by adding numerous vague charges such as attorneys fees, foreclosure fees and litigation fees of approximately $18,000. (*See* 4AC, ¶¶ 16-19, 48, and 50-59.) The 4AC alleges that the lack of specificity in the Notice of Default caused Plaintiffs to be uncertain as to the particulars of curing the default; that "Plaintiffs were ready willing and able to pay what was lawfully owned, attempted with Defendant Core Lending through Lending Star Capital"; that Defendant CORE arbitrarily hiked up the payoff amount which totaled $538,255.63 which included a charge of $33,333.20 for a "rider" that was not authorized by the note and deed of trust; and that "they were excused from performance because this charge was not authorized according to the deed of trust, note and riders". (*See* 4AC, ¶¶ 56-58.) Civil Code section 1511 sets forth several examples where non-performance is excused including where performance is (1) "prevented or delayed by the act of the creditor, or by the operation of law," (2) "prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States," and (3) "when the debtor is induced

		not to make it, by any act of the creditor intended or naturally tending to have that effect." Here, Plaintiffs' allegation that a $33,333.20 rider was added to the payoff amount satisfies the third prong above. The requirement of a substantial additional charge would naturally cause a debtor to hesitate to pay off a loan even if the debtor was willing and able to do so. While "excuses must be pleaded specifically" (See *Hale v. Sharp Healthcare* (2010) 183 Cal.App.4th 1373, 1388), the assertion of the exact amount of the rider added to the payoff (which must be accepted as true at this stage) and that the amount was unauthorized by the contract (rather than merely extrinsic to it) is sufficient to plead an excuse for lack of performance. Thus, the 4AC passes muster as to the breach of contract cause of action. **As to the 3rd cause of action for wrongful foreclosure**, this cause of action is sufficiently pled. Defendants demur to the wrongful foreclosure cause of action on the grounds it is not sufficiently pled because Plaintiffs have not sufficiently alleged an illegal, fraudulent, or willfully oppressive sale; Plaintiffs do not allege that they unconditionally tendered the amount of their debt, or that they have suffered actual harm. Defendants also contend that even if Plaintiffs could somehow overcome these deficiencies, "mere technical violations of the foreclosure process" will not give rise to a claim and "the foreclosure must have been entirely unauthorized on the facts of the case." Under a claim for wrongful foreclosure, a trustee or mortgagee may be liable to the trustor or mortgagor for damages sustained where there has been an illegal, fraudulent or willfully oppressive sale of property under a power of sale contained in a mortgage or deed of trust. (*Miles v. Deutsche Bank National* Trust (2015) 236 Cal.App.4th 394, 408.) The basic elements of a tort cause of action for wrongful foreclosure track the elements of an equitable cause of action to set aside a foreclosure sale. (*Miles v. Deutsche Bank National Trust, supra,* 236 Cal.App.4th at 408.) These elements are: (1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering. (*Id*.) However, mere technical violations of the foreclosure process will not give rise to a tort

		claim; the foreclosure must have been entirely unauthorized on the facts of the case. (*Id.*) Here, the 4AC alleges that Plaintiffs are informed and believe that Defendants caused a wrongful and improper foreclosure because the amount charged was materially incorrect; that Plaintiff "John Fouse fulfilled the element of tender when he requested the total amount due under the loan and was ready, willing and able to pay off what was owed around December 11, 2020"; that "the loan became illegal, fraudulent and/or oppressive because Darius Guernsey intentionally added a rider charge of$33,333.20 at the last minute claiming that it was a rider charge to the note"; that "on information and belief, that Defendant Core Lending created a defect in the foreclosure sale proceeding when it conducted a private sale of the Subject Property with Sierra Bonita Villa"; and that "they have been damaged including but not limited to proximately caused damages that include loss of equity, loss of rent, attorney's fees, in an amount to be proven at trial, but not less than $600,000." (*See* 4AC, ¶¶ 64-71.) These allegations are sufficient to allege a cause of action for wrongful foreclosure and are not mere technical violations as Defendants contend. Moving Party is ordered to give notice of this ruling and to file an answer to the complaint within 10 days of this hearing.
4	30-2021-01205193 Tye vs. Bordonali	The motion by defendants Marc Bordonali, Property Management Professionals LLC ("PMP") and Avenue One Community Association, Inc. ("HOA") for summary judgment, or alternatively for summary adjudication, as to plaintiff Tye Bordonali's third amended complaint ("TAC") is **GRANTED in part and DENIED in part**, as set forth herein. <u>I. MSJ BY BORDONALI AND PMP</u> <u>A. Nuisance Cause of Action – as to PMP and Bordonali</u> The nuisance cause of action is based on the allegation that, between March and November, the common area trash dumpsters "create a major nuisance as a source of fruit flies." (TAC at ¶59) Plaintiff does not assert that the defendants put food or other items in the dumpsters which attracted fruit flies. Instead, plaintiff alleges that "defendants' efforts to abate the nuisance were completely inadequate." (TAC at ¶66) This requires proof of negligence. "[T]hat proof of negligence may

		be essential to a claim of nuisance where the alleged nuisance involves a failure to act—is not unique. Elsewhere it has been noted that '[t]he duty of defendant with respect to a dangerous condition which he did not intentionally originate is not absolute, but only to exercise such a degree of care and diligence as the danger demands [ ]' and that 'where liability for the nuisance is predicated on the omission of the owner of the premises to abate it, rather than on his having created it, then negligence is said to be involved.[ ]'" (*Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 Cal. App. 3d 92, 104–05) "The existence of a duty is a question of law for the court." (*Claxton v. Atl. Richfield Co.* (2003) 108 Cal.App.4th 327, 335.) Here, the CC&Rs did not create a duty as it relates to PMP or Bordonali. Bordonali is an employee of PMP. (Bordonali Decl. at ¶3) PMP is the management company hired by the HOA to perform work at the property. (Bordonali Decl. at ¶4) Plaintiff does not submit evidence that he was a party to, or an intended third party beneficiary of, the contract between PMP and the HOA. Plaintiff therefore cannot allege a breach of a duty under that contract. (*Berryman v. Merit Property Management, Inc.* (2007) 152 Cal.App.4th 1544 – "The problem with these allegations is that plaintiffs are not parties to the contract with Merit—the associations are. Even assuming the allegations are true, plaintiffs are at best incidental beneficiaries and have no standing to recover under the contract.") Also, neither PMP nor Bordonali owned the property. "[T]he duty to take affirmative action flow[s] not from the landowner's active responsibility for a condition of his land that causes widespread harm to others or his knowledge of or intent to cause such harm but rather, and quite simply, from his very possession and control of the land in question." (*Leslie Salt Co. v. San Francisco Bay Conservation etc. Com.* (1984) 153 Cal. App. 3d 605, 622) The Court finds that PMP and Bordonali have met their burden of showing that they did not owe a duty to the plaintiff as it relates to the fruit fly allegations upon which the Nuisance cause of action is based. Once the defendants meet their initial burden, the burden shifts to the plaintiff to establish, by means of competent and admissible evidence that a triable issue of material fact still remains. (Code Civ. Proc., § 437c

		(p)(2); *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 850–851.) In opposition, Plaintiff cites no case holding that a property management company (or its employee) that is hired by an HOA would owe a duty to a tenant of a unit to abate a nuisance in the HOA's common area. Plaintiff also fails to submit evidence establishing a duty owed to him by the defendants as it relates to the fruit flies. Although plaintiff relies extensively on the Court's 4/25/22 ruling at the demurrer stage, the Court did not rule that PMP and Bordonali owed him a duty to maintain the common area dumpsters and abate the fruit flies. In light of the lack of admissible evidence or legal authority establishing a question of fact as to duty, the motion is **GRANTED** as to the Nuisance cause of action asserted against PMP and Bordonali. Furthermore, it is noted that the additional reasons for granting this motion as to the nuisance cause of action set forth in section IIA below (having to do with the HOA) apply with equal force to PMP and Bordonali and provide an additional basis to grant the motion. <u>B. Conversion Cause of Action – as to PMP and Bordonali</u> Conversion is the wrongful exercise of dominion over the property of another. (*Hodges v. County of Placer* (2019) 41 Cal.App.5th 537, 551.) The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. (Id.) Defendant submits evidence that neither Bordonali nor PMP towed the plaintiff's vehicle and that instead it was the HOA that towed the vehicle. (Bordonali Decl. at ¶¶6-7) Based on these facts, defendants meet their burden of showing they did not convert the vehicle. The burden therefore shifts to plaintiff to submit admissible evidence showing a question of material fact exists. In Opposition, plaintiff fails to submit evidence showing a question of material fact. While plaintiff claims that Bordonali did not establish who actually authorized the tow, such was not required. Also, merely because Bordonali works for PMP who

		contracts with the HOA does not lead to the conclusion that he is the one who called the tow company as plaintiff argues. In fact, in plaintiff's supplemental declaration, he submits the deposition testimony of Jason Ip wherein Mr. Ip testified that it was the security company and not Mr. Bordonali who called the tow company. (Depo of Jason Ip at 398-399) As a result of plaintiff's failure to establish a question of material fact, the motion is **GRANTED** as to the conversion cause of action. <u>C. Negligence Cause of Action – as to PMP and Bordonali</u> The Negligence c/a is based in part on the same fruit flies allegations as made in support of the Nuisance c/a. As discussed above, the plaintiff has failed to show a duty owed. With regard to the communications regarding the parking policy, Bordonali states that PMP is contracted to manage the property. The CC&Rs set forth the parking rules and Bordonali's communications of the policy is a natural part of the job of managing the property. Bordonali/PMP's duty to perform under the contract is a duty owed to the HOA and not to plaintiff. There is no evidence of a special relationship between plaintiff and Bordonali or PMP. Plaintiff has failed to cite any authority which creates a triable issue of fact as to a duty being owed to him by Bordonali or PMP. Accordingly, the motion is **GRANTED** as to the Negligence cause of action. <u>II. MOTION FOR SUMMARY ADJUDICATION OF ISSUES</u> <u>A. MSAI by HOA re Nuisance</u> To prevail on a claim for nuisance, one element plaintiff must prove is that the invasion of plaintiff's interest in his property was substantial. "First, the plaintiff must prove an interference with his use and enjoyment of its property. Second, the invasion of the plaintiff's interest in the use and enjoyment of the land must be substantial, i.e., it caused the plaintiff to suffer substantial actual damage. Third, the interference with the protected interest must not only be substantial, it must also be unreasonable, i.e., it must be of such a nature, duration, or amount as to constitute unreasonable interference with the use and enjoyment of the land." (*Today's IV, Inc. v. Los Angeles*

		County Metropolitan Transportation Authority (2022) 83 Cal.App.5th 1137, 1176.) The HOA submits evidence about steps it took to keep the trash area clean by way of the Bordonali declaration. Mr. Bordonali's statements are supported by the deposition of Jason Ip submitted by plaintiff which shows that the HOA sprays every two weeks, even during the winter when there are apparently no flies. (431:21-432:3) They also installed an "air curtain." (432:23-25) The entire trash compactor is taken off site and washed every two weeks. (433:21-434:4) They pay an extra fee to have the compactor power-washed. (434:9-10) They installed a commercial bug zapper in the compactor room and the trash chute room. (434:16-23) They put gaskets around the roll-up doors and double doors. (435:6-15) They utilize a deodorizing system for the trash area to lower the potential of bugs being attracted to the area. (435:16-436:6) They increased the frequency of emptying the compactor from every three weeks to every two weeks. (437:16-20) They also utilized fly strips which are regularly replaced. (438:5-7) They have a process by which the inside of the trash chute is washed with detergent on a routine basis. (438:16-439:7) The HOA has met its burden of showing that the impact, if any, of the fruit flies coming from the trash dumpsters was neither unreasonable nor substantial. In opposition, plaintiff submits only his own declaration. There are no declarations from any other residents or witnesses to the alleged fruit fly issues. The plaintiff did not even submit a declaration from his girlfriend who is also a resident of the unit. In addition, there is no expert witness regarding fruit fly control. Further the deposition of Jason Ip which plaintiff submitted contains testimony that Mr. Ip was only aware of one other complaint about fruit flies in plaintiff's building. (Ip depo at 410) Although plaintiff's declaration re-states paras 58-70 from the TAC, the declaration does not meet plaintiff's burden. The allegations do not describe how the *plaintiff's* use of his residence was "substantially" interfered with or how the interference was unreasonable. First, there is no statement that the plaintiff himself was actually affected. Instead, paragraph 63 only describes how a person would be affected but does not say that the plaintiff himself was so affected. Second, the plaintiff does not say when, how frequently or how many times he was affected by fruit flies. Third, plaintiff

		also does not describe how he was personally impacted. Finally, even if plaintiff had reworded his declaration to site a personal impact, this rewording would not change the result as it would still be unique to plaintiff alone. *San Diego Gas and Electric v. Superior Court of Orange County* (1996) 13 Cal.4th 893, 938 ("If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncrasies of the particular plaintiff may make it unendurable to him."). Accordingly, the MSAI is **GRANTED** as to the Nuisance c/a against the HOA. <u>B. MSAI by HOA re Conversion</u> The HOA submits evidence showing that towing the plaintiff's vehicle was authorized under the CC&Rs because the vehicle was not properly registered. However, the plaintiff submits contrary evidence stating that he did in fact enroll his vehicle with the HOA. The Court finds this sufficiently creates a question of material fact. Accordingly, the MSAI by the HOA as to the Conversion cause of action is **DENIED**. <u>C, MSAI by HOA re Negligence</u> Plaintiff's negligence claims against the HOA are premised on his assertion that the HOA owed him a duty to maintain the common areas. Plaintiff alleges that the negligent acts as to the HOA were the failure to abate the fruit flies. (TAC ¶104.2) Plaintiff alleges the fruit flies come from the trash dumpsters and that the HOA failed to clean the area sufficiently. (TAC ¶65-66) It is not disputed that the HOA has a duty to maintain the common area. The HOA's obligations to maintain the common area arises from the CC&R's. Mr. Ip states that the HOA was created to manage the common areas and that its only duties with respect thereto are contained in the CC&R's. (Ip Decl ¶12) Plaintiff does not dispute that the purpose of forming the HOA was to manage the community. (UMF 12) The obligations set forth in the CC&R's are a form of a contract between the unit owners and the HOA. (*Frances T. v. Vill. Green Owners Assn.* (1986) 42 Cal. 3d 490, 512) "Civil Code section 1355 provides that prior to the conveyance of any

		condominium in a project the owners of the project must 'record a declaration of restrictions relating to such project, which restrictions shall be enforceable equitable servitudes where reasonable, and shall inure to and bind all owners of condominiums in the project.' The servitudes may provide for, among other things, the establishment of a management body and for delineation of management's responsibilities, and any condominium owner has the right to enforce the servitudes. (Civ.Code, § 1355.)" (*Frances T. v. Vill. Green Owners Assn.* (1986) 42 Cal. 3d 490, 512) Plaintiff's claims against the HOA are premised on the duties owed by the HOA under the CC&Rs. The duty created by the CC&Rs are duties owed by the HOA to the unit owners. Plaintiff is not a unit owner. "By law under the Davis–Stirling Act and equitable servitude principles applicable to the CC & Rs, only owners are members of the [HOA]." (*Martin v. Bridgeport Cmty. Assn., Inc.* (2009) 173 Cal. App. 4th 1024,1037) A duty to maintain common grounds does not arise from common law but rather from the Davis-Stirling Act and the CC&Rs. (Id. at 1037.) Further, the HOA did not own the common area where the trash cans were located which gave rise to the fruit flies. The CC&Rs state that "The Association will own the real property comprising the Avenue One Community along with all the Improvements located thereon, excluding, however, the Residential Units and the Common Area." (Recitals at ¶E; see also Ip Decl. at ¶¶9-10) In opposition, plaintiff fails to cite any authority which holds that an HOA owes a duty to maintain common areas to a non-owner. Accordingly, the MSAI by the HOA as to the Negligence cause of action is **GRANTED**. <u>D. MSAI by HOA re Punitive Damages</u> Summary adjudication on a punitive damages claims is properly granted when plaintiff fails to present clear and convincing evidence of tortious conduct that was malicious, fraudulent or in blatant violation of law or policy. (*Food Pro Internat., Inc. v. Farmers Ins. Exchange* (2008) 169 Cal.App.4th 976, 995; *see Pacific Gas and Electric Company v. Superior Court* (2018) 24 Cal.App.5th 1150, 1170 [Punitive damages are appropriate if the defendant's acts are

		reprehensible, fraudulent or in blatant violation of law or policy.].) Under California law, to establish malice, it is not sufficient to show that the defendant's conduct was negligent, grossly negligent or even reckless, since such findings will not support a claim for punitive damages. (See, *Flyers Body Shop Profit Sharing Plan v. Ticor Title Ins. Co.* (1968) 185 Cal.App.3d 1149, 1154-55.) Under California law, to establish malice, it is not sufficient to show that the defendant's conduct was negligent, grossly negligent or even reckless, since such findings will not support a claim for punitive damages. (See, *Flyers Body Shop Profit Sharing Plan v. Ticor Title Ins. Co.* (1968) 185 Cal.App.3d 1149, 1154-55.) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. (Civ. Code, § 3294, subd. (c)(1).) Despicable conduct is conduct that is "so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people. Such conduct has been described as having the character of outrage frequently associated with crime." (*Butte Fire Cases* (2018) 24 Cal.App.5th 1150, 1159). In light of the foregoing ruling, the remaining basis for punitive damages is plaintiff's claim that the HOA wrongfully towed his vehicle on 7/9/21 while it was parked in the long term vehicle parking. Defendant submits evidence that *multiple* warnings were given in advance of the tow. (Bordonali Decl. at ¶¶11-12) Plaintiff even concedes that shortly before the tow, "Bordonali emailed the owner Mary Robinson which stated: 'Please inform your tenant(s) or whoever is residing at your unit 2276 Scholarship, that no more warnings will be given and their vehicle will be towed." (Tye Decl. at ¶12) It was the HOA's apparent belief that the plaintiff's vehicle was not permitted to be parked on the roof and the HOA acted based on its belief. In plaintiff's supplemental declaration, he submits the deposition of Jason Ip who testified that plaintiff's vehicle was registered at the HOA "from prior to 2021 onward." (Ip. Depo at 172:22) Mr. Ip also testified that the 7/9/21 tow was "wrongful." (Ip. Depo at 178:13-15) However, Mr. Ip also testified that the tow may have resulted because a security guard "misunderstood the enforcement policies" and that the tow resulted from the system identifying the car as improperly parked when it was not. (Ip depo at 342:12-344:15)

		The foregoing is far from demonstrating fraud, oppression or malice on the part of the HOA. Accordingly, the MSAI is **GRANTED** as to punitive damages being alleged against the HOA. III. PLAINTIFF'S OBJECTIONS TO EVIDENCE Plaintiff asserts objections to 17 paragraphs in the two declarations submitted by defendants. The Court OVERRULES the objections as to 1-9 & 12-16. As to the remainder of the objections to the declarations, the Court declines to rule on objection nos. 10, 11 & 17 as not material to the disposition of the motion (Code Civ. Proc. §437c(q)). The Court SUSTAINS the objections as to Exhibits 3, 4 and 6 (lack of authentication). IV. DEFENDANTS' OBJECTIONS TO EVIDENCE The Court SUSTAINS the following Objection Nos.: 10 (foundation), 14 (foundation), 19 (foundation, improper opinion), 20 (foundation), 21 (as to second sentence – foundation/improper opinion), 22 (relevance/foundation), 24 (hearsay), 25 (foundation/relevance), 26 (hearsay), 27 (hearsay/ relevance/ foundation), 28 (hearsay), 29 (relevance/hearsay), 30 (hearsay/ relevance/ foundation). The Court OVERRULES the following Objection Nos.: 12 (overruled as to quoted text of email and sustained as to the rest), 32, 33, The Court declines to rule on Objection Nos. 3, 4, 6, 7, 8, 9, 13, 18, 31, 34, 35 (CCP §437c(q).) There are no Objection Nos. 1, 2, 5, 11, 15, 16, 17 & 23. V. DEFENDANTS' OBJECTIONS TO SUPPLEMENTAL DECLARATION Defendants object to the supplemental declaration submitted by plaintiff on 4/11/24 to the extent it goes beyond what the Court allowed in its 3/25/24 order. The objections to paras. 6, 9, 10, and 16 are SUSTAINED as to the inclusion of additional argument or evidence not authorized by the prior Court order. The remaining objections are OVERRULED.

		In summary, the Motion for Summary Judgment is GRANTED as to Bordonali and PMP. The Motion for Summary Adjudication by the HOA as to the Nuisance and Negligence causes of action, as well as the claim for punitive damages, is GRANTED. The Motion for Summary Adjudication by the HOA as to the Conversion cause of action is DENIED. Counsel for the defendants is ordered to give notice of this ruling and to provide an order regarding defendants PMP and Bordonali.
5	30-2021-01209852 Kelly vs. Tow	The "Motion to Compel Production to Jin K. Hymers," etc., filed by Plaintiff Gregory Kelly ("Plaintiff") is **DENIED**. On April 15, 2024, the Court continued this motion to ensure that Plaintiff received proper statutory notice of Ms. Hymers' Opposition, which was served on Plaintiff by mail on March 25, 2024, and to permit Plaintiff an opportunity to reply to the Opposition and request for sanctions on the merits. On May 6, 2024, Plaintiff filed an amended supplemental reply to the Opposition. Plaintiff reiterates the arguments made in his original reply that the motion is moot because Ms. Hymers was not personally served and there was no agreement for email service. Plaintiff is correct that personal service on Ms. Hymers was required for this motion. (C.R.C. 3.1346.) Plaintiff concedes he never personally served Ms. Hymers. As such, Plaintiff cannot obtain any relief on this motion and the motion is thus denied. However, there is still the matter of Ms. Hymers' sanctions request. Plaintiff has now received proper statutory notice of the Opposition and the Court may rule on Ms. Hymers' sanctions request. The Court finds that the motion was made without substantial justification and thus sanctions against Plaintiff are warranted. (C.C.P. § 1987.2.) Plaintiff was repeatedly told by Ms. Hymers' counsel that request Nos. 1-3 were unintelligible and Plaintiff refused to clarify the requests. (Vick Decl., ¶ 7, Ex. F.) Accordingly, the Court grants Ms. Hymers' request for monetary sanctions against Plaintiff in the requested amount of $2,925. These sanctions are to be paid to Ms. Hymers, through her attorney, Mr. Vick, within 60 days of the date of this order.

		Counsel for Plaintiff is ordered to give notice of this ruling.
7	30-2021-01229444 Thompson vs. Coast Urological Medical Group, Inc.	The Motion for Summary Judgment, etc., filed by defendants Dr. William Taylor Naftel ("Naftel") and Coast Urological Medical Group, Inc. ("Group") (collectively here, "Defendants"), as to the First Amended Complaint ("FAC") filed by Plaintiff Carl Thompson ("Plaintiff") on 11/1/2, is **GRANTED**. On a medical negligence claim, when a defendant moves for summary judgment and supports the motion with an expert declaration that the defendant's conduct fell within the community standard of care, or did not cause or contribute to the injury, the defendant is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence. (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 607; *Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 984-985.) Here, Defendants have met their initial burden. The expert opinion of Dr. Gazzaniga states that Defendants to a reasonable medical probability met the standard of care in all respects in the care and treatment provided to Plaintiff, and that there was nothing Defendants did or failed to do in violation of the standard of care that caused or contributed to any injury alleged by Plaintiff. (ROA 110, ¶¶ 9, 15; UF 33-38, 40-42, and 44-46.) The burden thus shifts to Plaintiff to show that there was a deviation from the standard of care and causation. Plaintiff has not met that burden here. Plaintiff's expert, Dr. Danoff, did not provide any opinions about causation. His vague reference to Dr. Naftel's "subsequent actions are under a cloud" does not suffice. With regard to causation, the plaintiff must offer an expert opinion that contains a reasoned explanation showing why the facts have convinced the expert, and therefore should convince the jury, that it is more probable than not the negligent act was a cause-in-fact of plaintiff's injury. (*Fernandez v. Alexander* (2019) 31 Cal.App.5th 770, 781.) That standard is not met here, even if the Danoff Decl. is liberally construed. Plaintiff's medical negligence claim thus cannot withstand the instant Motion.

		Plaintiff's negligent misrepresentation claim also fails here. The FAC asserts that Dr. Naftel negligently represented to Plaintiff that he was suffering from testicular cancer and that, as a result, removal of his left testicle was a "medically necessary procedure," without reasonable grounds for believing those assertions to be true. (FAC ¶¶ 37 - 39.) But Defendants have presented evidence to show both that Dr. Naftel did have reasonable grounds for any such assertion and that there was no causal connection between any such alleged misrepresentation and any resulting damage. (UF 48-49; Gazzaniga Decl. at ¶ ¶ 6(e) and 11.) Plaintiff has offered no evidence to demonstrate a disputed issue of material fact for this cause of action. Plaintiff's informed consent claim also fails here. Defendants have presented evidence to show that informed consent was sought and that there was a 95% chance that Plaintiff's mass was cancerous, while Dr. Naftel allegedly asserted that it was 100%. Thus, no lack of informed consent is shown. (UF 48, 53, 64.) Nor is causation shown. (UF 70-73.) Plaintiff here has failed to show any triable issue of material fact related thereto. The Motion is therefore granted. The evidentiary objections filed by Defendants ROA 148 are **SUSTAINED** on Obj. No. 1 [relevance, foundation], No. 2 [improper opinion; foundation; speculation], No. 3 [for the last two sentences beginning with "Using …"; relevance, foundation], and No. 4 [for the portion beginning at "These …"; foundation, improper opinion].) Defendants are ordered to give notice of this ruling and to provide a proposed order, which can attach this ruling.
9	30-2023-01301021 Samrjian vs. Hanna	Before the Court at present is the Demurrer filed by Defendant Wag Labs, Inc. ("Wag Labs") on 12/20/23, as to the First and Fifth Causes of Action asserted in the First Amended Complaint filed on 11/22/23 (the "FAC") by Plaintiffs Rita and Aren Samrjian, through their guardian ad litem, Kanarik Mardikian (Plaintiffs"). The Demurrer as to both causes of action is **SUSTAINED** with 30-days leave to amend. The FAC again fails to articulate the factual basis for the claims against Wag Labs. It asserts in ¶ 3, on information and belief, that: "Defendant, LINA HUL,

		was contracted by WAG LABS, INC. hired by MARKOS S. HANNA and AIMEE HANNA to walk their DOG," and in ¶ 13, that: "Defendant, LINA HUL, was contracted by WAG LABS, INC. hired by MARKOS S. HANNA and/or AIMEE HANNA to walk their DOG." In addition to being unintelligible, both of these assertions fail to state the nature of the relationship between the parties, and thus the factual predicate for the claims against Wag Labs. The Opposition suggests that Plaintiffs' intent was to claim that Defendant Hul was an employee of Wag Labs – but, again, that is not alleged. The FAC also now includes allegations at ¶ 16 and ¶ 68 that: Wag Labs had a duty to "vet" its dog walkers and the dogs themselves. But the factual basis for that assertion is missing. Whether a duty exists is an issue of law. (*Chee v. Amanda Goldt Property Management* (2006) 143 Cal.App.4th 1360, 1369.) In a landlord-tenant context, courts have held that unless a landlord had actual knowledge that a tenant's dog was dangerous, the landlord owed no duty to protect third persons from the tenant's dog. (Id. at 1370.) But the FAC does not allege that Wag Labs had any knowledge of dangerous propensities for the dog at issue here. Nor has Plaintiff identified authority in the Opposition to show that a claim of duty may be based on what has been alleged. In the absence of specific authority, courts may assess issues of duty based on the standards articulated in *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650. But, again, a factual predicate is necessary to consider whether a duty should be found using those standards. It is thus insufficient to simply assert here that a duty existed, without identifying the factual predicate for that claim. *American States Insurance Company v. National Fire Insurance Company of Hartford* (2011) 202 Cal.App.4th 692 fn.5 ("on demurrer a court does not accept as true contentions, deductions or conclusions of law."). The Demurrer is therefore sustained with 30 days leave to amend. Defendant Wag Labs is ordered to give notice of this ruling.
10	30-2023-01303891 Donner vs. Callahan & Norrell, Inc.	**Off Calendar**

11	30-2023-01367061 Winthrop vs. Dameshek	**A. Motions to Set Aside** Before the Court are four applications to set aside right to attach order, quash writ of attachment, and release attached property filed by Defendants Evan P. Dameshek and TriPharma, LLC (collectively "Defendants"). For the reasons set forth below, the motions are **DENIED**. Defendants move, pursuant to Code of Civil Procedure section 485.240, to set aside the four Right to Attach Orders issued on January 2, 2024, and quash the eight Writs of Attachment issued on January 17, 2024. "[A]lthough in a motion under section 485.240 the defendant is the moving party, the plaintiff nevertheless continues to have the burden of proving (1) that his claim is one upon which an attachment may be issued and (2) the probable validity of such claim, the same burden he must meet under section 484.090." (*Loeb & Loeb v. Beverly Glen Music* (1985) 166 Cal.App.3d 1110, 1116.) Defendants contend their motions should be granted because (1) Plaintiffs Reid A. Winthrop and Winthrop Law Group PC (collectively "Plaintiffs") failed to give written notice of Defendants' right to mandatory fee arbitration, as required by the Mandatory Fee Arbitration Act (MFAA), Business and Professions Code section 6201(a); (2) Plaintiffs cannot prove that the attachments were based upon a claim for which an attachment may issue because Plaintiff's fee contracts are void and unenforceable; and (3) Plaintiffs cannot meet their burden to prove that the total dollar amount sought was fixed or readily ascertainable, as required by Code of Civil Procedure section 483.010(a). Each of these arguments is discussed below. ***1. Argument re Mandatory Fee Arbitration Act*** Defendants contend Plaintiffs' failure to provide the mandatory notice under section 6201 "deprived Defendants' of their statutory right under the MFAA to promptly stay this action and obtain the full protections of the Act, before issuance of the writs and attachments" and said failure permits this Court to set aside the attachment orders, pursuant to Bus. & Prof. Code, § 6201, subd. (a). Plaintiffs argue that nothing in the MFAA prevents Plaintiffs from seeking the provisional remedy of writ of attachment in court before or after a client invokes the right to fee arbitration.

		Plaintiffs have the better argument. Plaintiffs rely on *Loeb & Loeb v. Beverly Glen Music, Inc.* (1985) 166 Cal.App.3d 1110. In *Loeb*, the appellate court affirmed the issuance of the attachment order and the denial of the motion to set it aside. (Id. at p. 1122.) The appellant in *Loeb* contended the trial court improperly issued the right to attach order in violation of the mandatory stay of superior court proceedings during the pendency of the attorney fee arbitration. The appellate court in *Loeb* found that the trial court properly heard the motion for right to attach order, despite the stay of judicial proceedings. The court explained: > [N]owhere in that article do we find authority for the arbitrators to issue an attachment or other provisional remedy to secure payment of any award or judgment that may be recovered in the action. Nor may such authority be found in the attachment law, which instructs that an application for attachment is to be filed in the *court* in which the action is brought. (Code Civ. Proc., § 484.010.) Respondent's entitlement to a right to attach order was an ancillary part of the main action which was not amenable to arbitration and, under the authority of Business and Professions Code section 6201, subdivision (c), the trial court properly lifted the stay of that portion of the proceeding to consider and rule on respondent's application for an attachment. [¶] We find no justification for denying respondent access to this protection during the delay in judicial proceedings necessitated by the Mandatory Fee Arbitration. (*Loeb* at p. 1117-1118.) Accordingly, as Plaintiffs argue, *Loeb* made clear that there is no law prohibiting Plaintiffs from seeking attachment orders as a provisional remedy before or during the MFAA arbitration. Thus, even if Plaintiff had sent the notices before obtaining the attachment orders and Defendants had initiated the arbitration, the Court would have been able to lift the stay and proceed with the attachment applications. Therefore, the failure to provide the written notice prior to obtaining the attachment orders does not mandate that the orders be set aside. Defendants' cited authority, *Huang v. Cheng* (1998) 66 Cal.App.4th 1230, holds only that attorneys are required to provide their clients with written notice of the right to arbitrate only after a fee dispute has arisen, not with their initial billing

		statements. The *Huang* case did not involve right to attach orders or writs of attachment. Defendants' argument in the Reply that *Loeb* is not binding on this Court because it is from a different appellate district is incorrect. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state."].) In addition, the MFAA provides that the attorney must give notice "prior to ***or*** at the time of service of summons." (Bus. & Prof. Code, § 6201, subd. (a) [emphasis added].) Here, Plaintiffs filed the ex parte applications before the deadline to serve the summons and thus at that time were under no obligation to serve Defendants with written notice under the MFAA. Based on the foregoing, Defendants' argument regarding the MFAA fails. ***2. Argument re Plaintiffs' Fee Contracts*** Defendants contend Plaintiffs' fee contracts are void and unenforceable because they do not comply with Business and Professions Code section 6148, subdivision (a), which requires that "[i]n any case…in which it is reasonably foreseeable that total expense to a client, including attorney fees, will exceed one thousand dollars ($1,000), the contract for services in the case shall be in writing. At the time the contract is entered into, the attorney shall provide a duplicate copy of the contract signed by both the attorney and the client[.]" Regarding Contract Nos. 1 and 3, the Winthrop Declaration reflects that said contracts were in fact signed by Defendants and fully executed copies of the contracts were provided to Defendants. (Winthrop Decl., ¶¶ 15, 24, 88, 90; Exhs. 1, 3, 11.) Thus, Defendants' argument that said contracts do not comply with section 6148 fails. Defendants' argument that Contract No. 1 is unenforceable because neither Plaintiff is a party to that contract also fails. Contract No. 1 was entered into by Winthrop Law Group, which is a d/b/a of Plaintiff Reid A. Winthrop. (Winthrop Decl., ¶ 3.) "*Doing business under another name does not*

		*create an entity distinct from the person operating the business…*The business name is a fiction, and so too is any implication that the business is a legal entity separate from its owner." (*Pinkerton's, Inc. v. Superior Court* (1996) 49 Cal.App.4th 1342, 1348.) Thus, Winthrop would appear to be the appropriate party to bring the instant litigation. In addition, the Winthrop declaration states that Contract No. 1 was assigned to Winthrop Law Group PC, which is a plaintiff in this matter. (Winthrop Decl., ¶ 88.) Defendants' argument regarding Contract No. 2 also fails because, even if Defendants are correct that it was reasonably foreseeable that services under the oral contract would exceed $1,000, section 6148(a)'s requirement of a "written" fee contract would not apply here because Plaintiffs have demonstrated that the oral contract reasonably falls within the exception stated in subdivision (d)(2) of section 6148. Said subdivision provides that section 6148 does not apply to "[a]n arrangement as to the fee implied by the fact that the attorney's services are of the same general kind as previously rendered to and paid for by the client." According to Plaintiffs, Contract No. 2 was an oral contract for Winthrop Law Group PC to take over for Winthrop in performing legal services for Defendants in the Walton Case and collateral matters, which were also the subject of Contract No. 1. (Winthrop Decl., ¶¶ 15, 20.) Thus, the arrangement under Contract No. 2 did not need to be set forth in a writing because said arrangement was for services that were "of the same general kind as previously rendered to and paid for by the client." Defendants also contend the fee contracts are unenforceable because Plaintiffs did not comply with the California Rules of Professional Conduct regarding joint representation because there were actual conflicts and Plaintiffs did not obtain informed written consent as required by Rules 3-310 and 1.7. However, Plaintiffs' evidence shows that Defendants signed a broad conflict waiver in March 2019, covering past, present and future matters, and which detailed material facts relevant to the actual conflicts. (Winthrop Decl., ¶ 22, Exhibit 2.) Thus, Defendants argument in this regard fails. (See Rules Prof. Conduct, rule 3-310(A)(1) and rule 1.0.1(e); see also, *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.* (2018) 6 Cal.5th 59, 84 [To be informed, the client's consent to dual representation must be based on disclosure of all material facts the attorney knows and can reveal.])

Based on the foregoing, the Court finds that Defendants failed to establish that the fee contracts are unenforceable.

3. Argument re Fixed or Readily Ascertainable Amount

Defendants contend if Contract Nos. 1-3 are unenforceable, quantum meruit is Plaintiffs only potential recovery, and that such recovery is not fixed or readily ascertainable, as required by Code of Civil Procedure section 483.010, subd. (a). As discussed above, Defendants failed to demonstrate that the fee contracts are unenforceable. Even if Defendants had shown said contracts are void, Defendants' argument that the claims for quantum meruit are not for a readily ascertainable amount is refuted by Plaintiffs' evidence.

The Winthrop declaration provides a general description of the legal services provided to Defendants, includes a chart setting forth the amount of fees and costs incurred by Plaintiffs for work performed pertaining to the various matters on behalf of Defendants, and attaches invoices which provide a detailed description of the nature of the work performed by Plaintiffs. (Winthrop Decl., ¶¶ 30-32, 44; Exhs. 4, 6-8.) Per the Winthrop declaration, Plaintiffs had performed at least $2 million in work over the course of 10 years. (Winthrop Decl., ¶ 40.) The Winthrop declaration also sets forth the requested amounts of the attachment orders, which were $1,207,843.17 and $306,204.50 per Defendant, and which amounts were based on the work performed by Plaintiffs. The foregoing evidence appears sufficient to show that, contrary to Defendants' argument, the reasonable value of services rendered under quantum meruit is in a readily ascertainable amount, as required by Code of Civil Procedure section 483.010, subd. (a).

Defendants also contend Plaintiffs did not account for $450,000 in fees that were paid by Defendants, or for $130,000 that Plaintiffs held in trust for Defendants. This argument too is refuted by Plaintiffs. (See Winthrop Decl., ¶¶ 43-44, 93 [showing said funds were credited].)

4. All Other Statutory Requirements Are Met

Plaintiffs have demonstrated that the claim sued upon is one upon which an attachment may be issued, the attachment is not sought for a purpose other than the recovery on the claim upon

		which the attachment is based, and the amount to be secured by the attachment is greater than zero. (See Code Civ. Proc., §§ 483.010 and 484.020; Winthrop Decl., ¶¶ 15, 20, 24, 28-29, 47, 77-80; Exhs. 1 and 3.) Plaintiffs have also established the probable validity of the claim upon which the attachment is based. (See Winthrop Decl., ¶¶ 15, 20, 24, 30-47; Exhs. 1 and 3.) Despite Defendants' vigorous efforts to find a technical defense, they do not even try to refute the fundamental facts -- that Plaintiffs performed legal services and Defendants did not pay for them. Thus, Plaintiff is very likely to succeed in fee arbitration. Based on the foregoing, the Court finds that Plaintiffs are entitled to the right to attach orders and writs of attachments and thus Defendants' motions to set aside said orders and writs are **DENIED**. Plaintiffs' request for judicial notice is **GRANTED** as to the existence and clear legal effect of the records, but not as to any disputed facts asserted therein. (Evid. Code §§ 452(c), (d), and (h); *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117; *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264-265.) Plaintiffs' evidentiary objections are **OVERRULED**. Defendants' evidentiary objections are **OVERRULED**. Defendants objected to the declaration of Reid A. Winthrop and all exhibits thereto submitted in support of Plaintiffs' opposition to the motions. Defendants' only objection is that said declaration improperly attempts to offer evidence in support of Plaintiffs' original applications for attachment order. Defendants argue that, had Plaintiffs filed noticed motions for attachment (as opposed to ex parte applications), Defendants would have noted the evidentiary deficiencies in their opposition, and Plaintiffs could not have then submitted new evidence with their reply. While it is true that, as a general rule, a party is not permitted to submit new evidence with their reply brief, an exception to this general rule is "for points that are strictly responsive to arguments made for the first time in the opposition to the motion." (*Golden Door Properties, LLC v. Superior Court of San Diego County* (2020) 53 Cal.App.5th 733, 774.) Here, as an initial matter, much of Plaintiffs' declaration and evidence was submitted with its original ex parte applications. (See

		ROA 18.) To the extent Plaintiffs' declaration offers new evidence, the Court finds said evidence is strictly responsive to Defendants' arguments regarding potential defenses to enforceability of the fee contracts, made for the first time in the motions to set aside (which are essentially Defendants' opposition to the applications). Thus, Defendants' objection is **OVERRULED**. Counsel for Plaintiffs is ordered to give notice of this ruling. **B. Motions to Seal** No tentative ruling. Counsel are to come to the hearing prepared to discuss the preparation of a sealing order, approved as to form and content by counsel for both parties.
12	30-2023-01337468 Rodriguez vs. Priorityworkforce, Inc.	Before the Court is a Motion by Priority Workforce, Inc. ("Priority") to Compel Binding Arbitration of the Complaint filed by plaintiff Nelson Rodriguez. There is also a joinder filed by defendant Maruchan, Inc. Both the motion and the joinder are **GRANTED**. Here, Priority attaches a copy of the Arbitration Agreement and moves to compel arbitration under both the FAA as well as CCP 1281.2. Under the FAA, the party claiming the FAA preempts state law bears the burden of proving the FAA applies. (See *Woolls v. Superior Court* (2005) 127 Cal.App.4th 197, 211.) Defendant bears the burden of proving the arbitration agreement is a "contract evidencing a transaction involving [interstate] commerce." (9 U.S.C. § 2.) "Commerce," for purposes of the FAA, generally includes employment contracts. (*Circuit City v. Adams* (2001) 532 U.S. 105, 113, 121) Priority submits evidence that as part of plaintiff's work at Maruchan, he would work on "creating, packaging and shipping Maruchan's food products" which would then be shipped "to locations throughout California and other states." (Cox Decl. at ¶4; Martinez Decl. at ¶9) Further, the agreement specifically references the FAA and says that if the parties do not agree on an arbitrator, one "shall be selected in accordance with the procedures provided by the FAA." Accordingly, Priority establishes applicability of the FAA.

		The FAA states that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) The Supreme Court has described this provision as reflecting both a "liberal federal policy favoring arbitration," and the "fundamental principle that arbitration is a matter of contract." (*AT & T Mobility LLC v.* Concepcion (2011) 563 U.S. 333.) On a motion to compel arbitration, the court's role is limited to deciding: "(1) whether there is an agreement to arbitrate between the parties; and (2) whether the agreement covers the dispute." (*Brennan v. Opus Bank* (9th Cir. 2015) 796 F.3d 1125, 1130.) If these conditions are satisfied, the court is without discretion to deny the motion and must compel arbitration. (9 U.S.C. § 4; *Dean Witter Reynolds, Inc. v. Byrd* (1985) 470 U.S. 213, 218 ["By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration."].) "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." (*Green Tree Fin. Corp. v. Randolph* (2000) 531 U.S. 79, 91.) Here, the agreement says it applies to all claims arising out of Rodriguez's employment. Priority has therefore established an agreement between the parties and that the agreement covers the claims in the complaint. With regard to the joinder, Priority is a temporary staffing agency which hired the plaintiff and placed him at Maruchan's manufacturing facility where he participated in the packaging and manufacturing of ramen noodle soup. Although not a signatory to the arbitration agreement, Maruchan asserts it is entitled to enforce the agreement based on equitable estoppel. Under the doctrine of equitable estoppel, "as applied in 'both federal and California decisional authority, a nonsignatory defendant may invoke an arbitration clause to compel a signatory plaintiff to arbitrate its claims when the causes of action against the nonsignatory are 'intimately founded in and intertwined' with the underlying contract obligations.'" (*Molecular Analytical Sys. v. Ciphergen Biosystems, Inc.* (2010) 186 Cal. App. 4th 696, 706) Plaintiff alleges the defendants were joint employers (Complaint ¶6) and refer to the two employers without distinction. (Complaint ¶9 – "Mr.

		Romero started working for Defendants in or around November 2017 as a production operator at their noodle manufacturing facility.") In his Opposition, plaintiff cites to *Barsegian v. Kessler & Kessler* (2013) 215 Cal.App.4th 446. The Court in *Garcia v. Pexco, LLC* (2017) 11 Cal.App.5th 782, on facts similar to the instant action, distinguished *Barsegian*. The Court finds that Maruchan has established that Rodriguez's claims are "intimately founded in and intertwined with his employment relationship" with Priority. (*Garcia v. Pexco, LLC* (2017) 11 Cal. App. 5th 782) Accordingly the motion to compel arbitration is granted as to both Maruchan and Priority. The moving parties also request a stay of the civil action pending resolution of arbitration. CCP §1281.4 provides, in relevant part: "If an application has been made to a court of competent jurisdiction, whether in this State or not, for an order to arbitrate a controversy which is an issue involved in an action or proceeding pending before a court of this State and such application is undetermined, the court in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding until the application for an order to arbitrate is determined and, if arbitration of such controversy is ordered, until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies." The Court orders that the action is stayed pending resolution of the arbitration and sets an arbitration review hearing for November 19, 2024 at 9:00 a.m. Counsel for Priority is ordered to give notice of this ruling.