TENTATIVE RULINGS

DEPT C34

JUDGE H. SHAINA COLOVER

LAW AND MOTION IS HEARD ON THURSDAY AT 1:30 P.M.

Tentative Rulings: The Court endeavors to post tentative rulings on the Court's website by 10:00 a.m. in the morning, prior to the afternoon hearing. However, ongoing proceedings may prevent posting by that time. Do not call the Department for tentative rulings if none are posted. Tentative rulings may not be posted on every case. The Court will not entertain a request to continue the hearing or the filing of further documents once a tentative ruling has been posted.

Submitting on Tentative Rulings: If all counsel intend to submit on the tentative ruling and do not desire oral argument, please advise the Courtroom Clerk or Courtroom Attendant by calling **(657) 622-5234.** If all sides submit on the tentative ruling and so advise the Court, the tentative ruling shall become the Court's final ruling and the prevailing party shall give notice of the ruling and prepare an order for the Court's signature, if appropriate, under Cal. R. Ct. 3.1312.

Non-Appearances: If no one appears for the hearing and the Court has not been notified that all parties submit on the tentative ruling, the Court shall determine whether the matter is taken off calendar or the tentative ruling becomes the final ruling. 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.)

Appearances: Remote and In-Person Proceedings. Department C34 **(NOT N6- Please no reserving/filing of motions in N6)** conducts non-evidentiary proceedings, such as law and motion, remotely, by Zoom videoconference pursuant to CCP §367.75 and Orange County Local Rule (OCLR) 375. All counsel and self-represented parties appearing remotely for the Law and Motion Calendar must check-in online through the Court's website at https://www.occourts.org/media-relations/civil.html, prior to the commencement of their hearing. Once the online check-in is completed, participants will be prompted to join the courtroom's Zoom hearing session. Check-in instructions and instructional video are available at https://www.occourts.org/media-relations/aci.html. Parties preferring to appear in-person for law and motion hearings may do so pursuant to CCP §367.75 and OCLR 375.

Court Reporters: Official court reporters (i.e., court reporters employed by the Court) are NOT typically provided for law and motion matters in this Department. If a party desires a record of a law and motion proceeding, it must provide a court reporter. The Court's policy on privately retained court reporters is available on the Court's website at: Privately-Retained Court Reporter Policy.

Public Access: The courtroom remains open for all evidentiary and non-evidentiary proceedings.

No filming, broadcasting, photography, or electronic recording is permitted of the video session pursuant to California Rules of Court, rule 1.150 and OCLR 180.

TENTATIVE RULINGS

Date: April 17, 2025

#	Case Name	Tentative
1.	**30-2024-01398797** **Callahan & Blaine, APLC vs. Purifying Systems, Inc.**	**1. Case Management Conference** **2. Motion to Compel Arbitration** Based on applicable law, Plaintiff Callahan & Blaine, APLC's Motion to Compel Arbitration is **GRANTED** as follows. The Court finds that Plaintiff met its initial burden of establishing an agreement to arbitrate exists and that Plaintiff's claims are within the scope of the arbitration provision. Plaintiff produces evidence that in or around August 2020, it entered into the Retainer with Defendants. (See, Van Ackeren Decl., ¶ 2, Exh. A.) Defendants, in Opposition, do not dispute that they entered into the Retainer. (See Magana Decl., ¶ 4.) Defendant Jaine Magana ("Magana") only states that he was not a sophisticated consumer of legal services, that he was never informed he should seek independent legal advice regarding the Retainer, that he was never informed that by signing the Retainer, he was waiving rights against Plaintiff and that he would need to proceed with arbitration, and that had he known the Retainer took his right to sue for malpractice, fraud, etc., and that he would have to proceed with a private arbitrator, he would not have agreed to the terms. (See Magana Decl., ¶¶ 5-8.) This testimony does not negate that Defendants signed the Retainer. As such, Defendants are bound by its terms. (See *Stewart v. Preston Pipeline Inc.* (2005) 134 Cal.App.4th 1565, 1588 ["It is well established, in the absence of fraud, overreaching or excusable neglect, that one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it.")] Moreover, Plaintiff's claims for breach of the Retainer and Common Count for Defendants' failure to remit payment for services rendered in Plaintiff's representation of Defendants is within the scope of the arbitration provision. The Retainer states that "all controversies" concerning the "Agreement or its breach, including without limitation disputes concerning fees, costs, malpractice and professional misconduct, or any combination thereof, shall be submitted to binding arbitration." (See *supra*.) Accordingly, the Court finds that Plaintiffs met its initial burden of establishing an agreement to arbitrate exists. The Court also finds that Defendants did not meet their burden of establishing that a defense to enforcement of the arbitration provision exists. <u>Unconscionability</u> An agreement must be both procedurally and substantively unconscionable to permit the court to refuse to enforce the agreement or a given clause as unconscionable. (See *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1533.) "[T]hese elements, however, need not be present in the same degree. '[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.'" (*Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174.)

Unconscionability has a procedural and a substantive element: the procedural element focuses on the existence of oppression or surprise and the substantive element focuses on overly harsh or one-sided results. (*Armendariz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83, 114; see *Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1281.)

The *Armendariz* factors to use to determine whether an agreement is substantively unconscionable focus on bilaterality, a neutral arbitrator, adequate discovery, a written award, the availability of all types of relief that would be otherwise available in court, and payment by the employer of the arbitration fees beyond what the employee would have to pay in court. (See *supra*; *Armendariz*, 24 Cal.4th at 102-103.)

Here, Defendants do not contend that the Retainer is either procedurally or substantively unconscionable. Rather, they merely argue the entire Retainer is unconscionable because: (1) it does not comply with California Rules of Court, Rule 1.8.1 because this rule requires that if an adverse interest is taken by the attorney, the terms must be "fair and reasonable;" (2) it "shifts blame and responsibility for the firm's actions onto the client" because the Retainer states that "Client also acknowledges … that Client may be required to reimburse the opposing party's attorney's fees and costs, … as well as court-ordered sanctions resulting from motions brought or defended on Client's behalf. Under such circumstances, Client shall be solely responsible for payment of the Attorney's fees, costs and/or sanctions so awarded, if any" and under this language Defendants could have been liable for the mistakes of the firm in bringing and/or defending motions that resulted in sanctions against it; (3) it excludes work on "post-trial motions, appeals, writs or collection activities …." which places the onus of collecting on any judgment on the client and Plaintiff blocked or interfered with the recovery of funds thereby breaching their obligations to client; and (4) it provides there is no guarantee of success when Plaintiff was providing Defendant Magana with a case value estimate of $3.2 million. (See Opposition, ¶¶ 20-27.) Accordingly, Defendant's have not shown how these provisions are either procedurally or substantively unconscionable under the law.

<u>Waiver</u>
On July 25, 2024, the California Supreme Court addressed waiver in arbitrations in *Quach v. California Commerce Club, Inc*. (2024) 16 Cal.5th 562. This case overruled *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187 which required prejudice in determining whether a party waived it's right to arbitration.

"[I]n determining whether a party to an arbitration agreement has lost the right to arbitrate by litigating the dispute, a court should treat the arbitration agreement as it would any other contract, without applying any special rules based on a policy favoring arbitration. That is, courts should apply the same procedural rules that they would apply to any other contract. [Citation.]" (*Quach*, supra, 16 Cal.5th 562.) Determining whether a party has lost its right to compel arbitration as a result of its litigation-related conduct is governed by generally applicable state law contract principles, and these principles do not require a showing of prejudice to establish waiver. (*Id.*)

"To establish waiver under generally applicable contract law, the party opposing enforcement of a contractual agreement must prove by clear and convincing evidence that the waiving party knew of the contractual right and intentionally relinquished or abandoned it. [Citations.]" (*Id*.)

		"Under the clear and convincing evidence standard, the proponent of a fact must show that it is 'highly probable' the fact is true. [Citation.] The waiving party's knowledge of the right may be 'actual or constructive.' [Citation.]" (*Id.*) "Its intentional relinquishment or abandonment of the right may be proved by evidence of words expressing an intent to relinquish the right or of conduct that is so inconsistent with an intent to enforce the contractual right as to lead a reasonable factfinder to conclude that the party had abandoned it. [Citation.]" (*Id.*) "The waiver inquiry is exclusively focused on the waiving party's words or conduct; neither the effect of that conduct on the party seeking to avoid enforcement of the contractual right nor that party's subjective evaluation of the waiving party's intent is relevant. [Citations.]" (*Id.*) "This distinguishes waiver from the related defense of estoppel, 'which generally requires a showing that a party's words or acts have induced detrimental reliance by the opposing party.' [Citations.]" (*Id.*) "To establish waiver, there is no requirement that the party opposing enforcement of the contractual right demonstrate prejudice or otherwise show harm resulting from the waiving party's conduct. [Citations.]" (*Id.*) Here, Plaintiff filed its Motion on 2/4/2025 approximately four months after it filed its Complaint on 10/10/2024. There is nothing to suggest that Plaintiff waived its right to arbitrate. Accordingly, the Court finds that Plaintiff did not waive its right to arbitration. <u>The Retainer Is Not Void</u> Defendants contend the Retainer is voidable as violative of public policy because California Rules of Professional Conduct, Rule 1.8.1, has certain guidelines when an attorney takes a pecuniary interest that is adverse to the client's interest, and the Retainer includes only boilerplate language about seeking independent legal advice related to attorney lines and said language is buried in the Retainer; that there is no evidence that Plaintiff obtained "informed written consent" from Defendants in relation to the lien taken by the firm; that Plaintiff's firm's attorney, Justin Farkas, interfered with efforts by Defendant MAGANA to recover on a judgment awarded in the Kern County Superior Court case; that Plaintiff took a pecuniary interest that was adverse to that of its client without properly forewarning them; that Retainer disavows any potential claim that it is a contingency agreement; and thus the Retainer is "voidable as violative of important public policies designed to protect consumers such as Defendants." Rule 1.8.1 referred to by Defendants states: "A lawyer shall not … knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied: (a) the transaction or acquisition and its terms are fair and reasonable to the client. (b) the client either is represented in the transaction … or the client is advised in writing to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice…. (c) the client thereafter provides informed written consent…." Here, the Retainer specifically states as follow: "Further, Client hereby grants to Attorney a lien for payment of fees, costs and other sums owed by Client to Attorney. Attorney's lien shall attach to all funds paid in settlement of any of Client's claims or satisfaction of any judgment entered on Client's behalf, whether obtained in this or in any other matter in which Attorney represents or has represented Client. Client is hereby advised of its right and possible need for independent representation and legal

		counsel regarding the grant of this lien and has either taken the opportunity to seek such independent legal representation before signing this Agreement or, given Client's level of sophistication and business experience, has chosen not to do so." Defendants signed the Retainer. There is no evidence of fraud or duress or that Defendants were forced to execute the Retainer. There is no evidence to support Defendants' contention that the Retainer violates public policy. <u>Other Grounds in Opposition</u> Defendants contend that Plaintiff prevented them from collecting funds awarded in the underlying litigation, the Kern County case, and that such conduct bars equitable relief. However, "unclean hands," as alleged, is not a defense to a motion to compel arbitration. Defendants contend that Code of Civil Procedure section 1281.2(c) permits denial of this Motion due to the "risk of inconsistent rulings." Defendants contend they filed suit in Kern County Superior Court alleging professional negligence, fraud, etc.; that the Complaint and Summons have not yet been served; and ordering arbitration runs the risk of conflicting opinions and rulings. Although C.C.P. section 1281.2(c) allows for denial of a motion to compel arbitration due to a risk of inconsistent rulings, here, the Kern County action has not even been served, and there is no evidence that same would result in the risk of inconsistent rulings. Lastly, Defendants contend that they were not advised of the Retainer and the arbitration provision and the possible consequences thereof and thus it should not be enforced. Defendants cite to *Lawrence & Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501 as legal authority. Here, unlike in *Lawrence*, the Retainer specifically states that claims involving breach of the Retainer and disputes concerning fees and costs "shall" be submitted to binding arbitration. As such, this argument is not a defense to arbitration. As set forth above, Defendants were provided the Retainer and they executed it. Again, "[i]t is well established, in the absence of fraud, overreaching or excusable neglect, that one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it." (See *Stewart*, supra, 134 Cal.App.4th at 1588.) There is no "duty" by a law firm to advise its clients of the impact of signing an agreement that contains an arbitration provision. The Court **GRANTS** the petition and **ORDERS** this action stayed pursuant to C.C.P. section 1281.4 and sets a Status Conference re Arbitration for **October 23, 2025 at 10:30 am in Dept. C34.** Moving Party is to give notice.
2.	**30-2023-01361390** **Norris vs. Chavez-Nambo**	**Motion to Be Relieved as Counsel of Record** The unopposed motion of attorney Fernando Vargas of Law Offices of Fernando D. Vargas to be relieved as counsel for Plaintiff Diona Shunte Norris is **GRANTED**. Service on the client and on all other parties who have appeared in the case was proper and all required forms containing the requisite information were filed pursuant to California Rules of Court, rule 3.1362.

		The order will take effect once moving attorney files proof of service of the signed order (MC-053) on the client. **Moving attorney to provide notice.**
3.	**30-2022-01296297** **Atkins vs. TLH Enterprises, LLC**	**Motion for Leave to Amend** The Motion for Leave to Amend brought by Plaintiff Sonia Atkins is **DENIED**. Plaintiff neglected to attach a proposed pleading, as required by California Rules of Court rule 3.1324. (Cal. Rules of Court rule 3.1324(a)(1); See also *Hataishi v. First American Home Buyers Protection Corp.* (2014) 223 Cal.App.4th 1454, 1469.) The Court notes, however, that both Plaintiffs have submitted Declarations which indicate their desire to remove "John Doe" and the Defendants "Does 1-100" from the Complaint. (¶6 of Sonia Atkins Declaration and ¶4-¶6 of Christopher Atkins Declaration.) The Court is inclined to treat this motion and the attached declarations as a written request for dismissal of said defendants made pursuant to Code of Civil Procedure section 581, subdivision (b)(1) and to grant the same. "An action may be dismissed…[w]ith or without prejudice, upon written request of the plaintiff to the clerk, filed with papers in the case, or by oral or written request to the court at any time before the actual commencement of trial, upon payment of the costs, if any." (Code Civ. Proc., § 581, subd. (b)(1).) "The proposition that a trial court may construe a motion bearing one label as a different type of motion is one that has existed for many decades." (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 187, 193.) " 'The nature of a motion is determined by the nature of the relief sought, not by the label attached to it." (*Ibid*.) Based on the above, and consistent with Plaintiffs' request, **John Doe and Doe Defendants 1-100 are ORDERED dismissed, without prejudice**. **Court to give notice.**
4.	**30-2022-01282583** **Arend vs. Coast Community College District**	**Motion to Compel Compliance with Deposition Subpoena** Defendant Coast Community College District's ("District") motion to compel Nonparty CalOptima Health ("CalOptima") to comply with the District's Deposition Subpoena for Production of Business Records pertaining to CalOptima's treatment of Plaintiff Veronica Arend is **CONTINUED to May 29, 2025 at 1:30 p.m. in Department C34**. The Proof of Service filed in connection with CalOptima's Objection to the Motion to compel Production of Records does not list Moving Party Defendant Coast Community College District ("District") on the Service List. (See ROA 219.) The District did not file a Reply and instead filed a Notice of Non-Opposition (ROA 223), suggesting that the District was not served with the Objection/Opposition. **CalOptima shall serve the District with a copy of the Objection and the accompanying Declaration filed as nos. 219 and 220 in the Register of Actions *within 7 days of service of this order.*** The District may file a reply in accordance with the Code of Civil Procedure. **Defendant Coast Community College District to give notice.**

5.	**30-2024-01413861** **City of Laguna s. Hong**	**Motion to Appoint Receiver** Plaintiff/Petitioner City of Laguna Beach ("Plaintiff" or the "City") petitions the Court for an order appointing GS Strategies, Inc. as receiver to rehabilitate the real property located at 988 Noria Street pursuant to Health & Safety Code section 17980.7. Alternatively, the City requests a preliminary injunction ordering Defendant/Respondent Luis Hong ("Defendant") to bring the property up to code within 60 days. A receivership is a harsh, time-consuming, expensive and potentially unjust remedy and thus is available only where a more "delicate," alternative remedy (i.e., injunction, writ of possession, attachment, provisional director, lis pendens, and other enforcement of judgment mechanisms) is inadequate. (See *City & County of San Francisco v. Daley* (1993) 16 Cal.App.4th 734, 745; *Medipro Med. Staffing LLC v. Certified Nursing Registry, Inc.* (2021) 60 Cal.App.5th 622, 628-629.) Since a receivership is an equitable remedy, the equitable considerations in an injunction proceeding apply—i.e., there must be a showing of irreparable injury and inadequacy of other remedies. (*Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp*. (1953) 116 Cal.App.2d 869, 872.) On 4/4/23, a Notice of Violation for Unpermitted Construction/Maintenance Issues was issued and mailed to Defendant via first class mail. (Declaration of Nicole Bovey ¶ 10.) Two more Notices of Violations were issued in May and June of 2023. (Id. ¶¶ 11-12.) The property was inspected on 4/18/24 and a Legal Notice and Order to Repair or Abate was issued on 5/6/24, directing Defendant to repair unsafe conditions such as the rotted and structurally unsound deck, unpermitted electrical and plumbing modifications, unpermitted bathroom and kitchen construction, dilapidated interior walls, and signs of possible mold. (Id. ¶¶15-16.) As of the date this Motion was filed, the dangerous substandard conditions at the property continued to exist. (Id. ¶ 25.) Defendant purchased the property with the intention of remodeling and selling it. (Declaration of Luis Hong ¶ 5.) When he discovered that his intended repairs would require permitting, he thought it may be more beneficial to significantly remodel the property prior to selling it. (Id. ¶ 7.) Around that time, he fell ill and spent time in the hospital and his mother also fell ill in late 2023, requiring him to spend extended periods of time abroad. (Id. ¶¶ 8-9.) He then decided to try and sell the property in April 2024 instead of doing any remodel because he decided the project was too much to deal with. (Id. ¶ 10.) Since being served with the Complaint, he has communicated with Ms. Bovey regarding the work required to bring the property up to code and has taken some action, such as removing a satellite dish and adding padlocks to access doors. (Id. ¶¶ 11-25.) Further, though no formal plans have been submitted, Defendant has provided the City with three sets of plans for review. (Declaration of Kate Kazama ¶¶ 5, 7.) Under the current circumstances, it appears that Defendant is taking concrete steps to work with the City to address the hazard concerns with the property. While the City contends that Defendant has been aware of the nuisance conditions since 2021, the first notice of violation was not issued until 2023. Defendant has certainly delayed in addressing the City's concerns. However, the Court notes that some health issues contributed to that delay and it seems that he is now working with the City in good faith. In this light, the Court finds a receiver, which is "harsh," time-consuming, and expensive, to be unwarranted at this time.

		Instead, the Court finds the City's alternative request for a preliminary injunction ordering Defendant to correct the violations to be more appropriate. In cases involving a legislatively declared nuisance per se, an injunction may issue without proof of irreparable injury. (*People ex rel. Dept. Pub. Works v. Adco Advertisers* (1973) 35 Cal.App.3d 507, 511-512.) "[T]o be considered a nuisance per se the object, substance, activity or circumstance at issue must be expressly declared to be a nuisance by its very existence by some applicable law. [Citation.] [W]here the law expressly declares something to be a nuisance, then no inquiry beyond its existence need be made. [Citation.] Nuisances per se are so regarded because no proof is required, beyond the actual fact of their existence, to establish the nuisance. [Citation.]" (*City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1163-1164, internal quotations omitted.) The Laguna Beach Municipal Code section 7.24.020(a) defines a public nuisance as, among other things, any use or condition of property that poses a danger to human life or is unsafe or detrimental to the public health, safety, or welfare. Therefore, the noted substandard conditions which are dangerous, such as a rotted and structurally unsound deck, unpermitted and illegal electrical and other construction, and exposed electrical switches and outlets, constitute a public nuisance per se. Defendant does not dispute this point. In light of the above, the City's request for a **preliminary injunction is GRANTED** and Defendant is **ORDERED to bring the subject property into compliance with the Laguna Beach Municipal Code *within 90 days from the date of this order***. **City to give notice.**
7.	**30-2023-01329772** **Jing vs. Di Luzio**	**Motion for Sanctions** Based on applicable law, Defendant Andrew Diluzio's ("Defendant") Motion for Sanctions is **DENIED**. Defendant seeks monetary sanctions pursuant to CCP §128.7 against Plaintiffs and their counsel on the grounds that the claims in the Complaint were not warranted under existing law, nor under a good-faith argument that the law should be changed or extended. By presenting a pleading to the court, an attorney or unrepresented party is certifying that, to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances that all of the following conditions are met: (1) it is not being presented primarily for an improper purpose; (2) the claims, defenses, or other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support, or if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

		(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. (CCP §128.7(b).) If a pleading does not meet those conditions, a party may bring a motion for sanctions. (CCP §128.7(c)(1).) The purpose of permitting such a motion is remedial, not punitive. The goal is not to punish the offender but to promote compliance and deter frivolous filings. (Malovec v. Hamrell (1990) 70 Cal.App.4th 434, 440.) The determination of violation is made under an objective standard. (*Bockrath v. Aldrich Chem. Co., Inc.* (1999) 21 Cal.4th 71, 82.) A claim is "objectively unreasonable" if any reasonable attorney would agree that it is totally and completely without merit. (*Peake v. Underwood* (2014) 227 Cal.App.4th 428, 440.) Here, Defendant served a safe harbor letter with a copy of the motion attached on Plaintiffs on 10/3/24. (Ainslie Decl. ¶6, Exh. 3.) While the court notes that the motion is not attached to the copy of the letter that was supplied to the court, the court assumes for purposes of this ruling that the motion was properly attached. Plaintiffs have not raised any objections to the service of the safe harbor letter. Defendant contends that filing and prosecuting the Complaint was objectively unreasonable because it was barred in its entirety by res judicata. While it is true that on 1/9/25 this Court granted Defendant's Motion for Judgment on the Pleadings, finding that the action is barred by res judicata based on an earlier small claims action, the Court does *not* find that filing and prosecuting the Complaint was objectively unreasonable. (ROA 68.) The determination as to whether res judicata applied in this instance was not straightforward. It was not objectively unreasonable to attempt to pursue Plaintiffs' claims. Accordingly, the motion is **DENIED**. Defendant's requests for judicial notice are **granted**. **Defendant to give notice.**
8.	**30-2022-01252770** **Brown vs. Azera**	**1. Motion to Compel Answers to Form Interrogatories** **2. Motion to Compel Production** 3. **Motion to Deem Facts Admitted** Plaintiff moves to compel Responses to Requests for Production, Set One and Form Interrogatories – Construction Litigation, Set One, and to deem Requests for Admission, Set Two, admitted against Defendant Martin Thibault. Plaintiff requests $1,000 in sanctions for the motion to compel production. Plaintiff does not request sanctions for the other two motions. In opposition, Defendant argues that the discovery responses were timely provided. The Court agrees.

		Plaintiff propounded all three discovery sets at issue on December 18, 2024. Pursuant to Code, discovery responses must be served 30 days after the discovery is propounded. (See Code Civ. Proc., §§ 2030.260, 2031.260, and 2033.250.) 30 days after December 18, 2024 is Friday, January 17, 2025. Pursuant to Code of Civil Procedure section 1010.6(a)(3)(B), when a document is served electronically, "[a]ny period of notice, or any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which time period or date is prescribed by statute or rule of court, *shall be extended after service by electronic means by two court days*, but the extension shall not apply to" certain notices that are not relevant here. (Code Civ. Proc., § 1010.6, subd. (a)(3)(B).) Thus, because service was completed by email, the deadline for Defendant to provide discovery responses was extended by two court days. Two court days after Friday, January 17, 2025 is Wednesday, January 22, 2025. Defendant served responses to the discovery at issue on Wednesday, January 22, 2025 and, therefore, the responses were timely and objections were not waived. Defendant also provided evidence that supplemental discovery responses were provided – further making this motion MOOT. The Motions are **DENIED** as MOOT as timely responses were provided to the discovery and supplemental discovery responses have since been provided. Since responses were provided, these motions should have been filed as motions to compel *further* responses, *with the requisite separate statement*. (Code Civ. Proc., §§ 2030.300, 2031.310, and 2033.290 and Cal. Rules of Court, rule 3.1345.) To the extent the 45 day deadline to file a motion to compel further has passed for the discovery requests at issue, Plaintiff is given **20 days** leave to file motions to compel *further* responses as to the discovery responses at issue in Requests for Production, Set One and Form Interrogatories – Construction Litigation, Set One, and Requests for Admission, Set One. No sanctions are awarded. The Court also notes that all filings shall be served on the parties who have appeared in this case pursuant to Code of Civil Procedure section 1014. **Defendant to give notice.**

9.	**30-2022-01299791** **Pada vs. Radnet Management, Inc.**	**1. ADR Review Hearing** **2. Motion to Vacate** **3. Petition to Confirm Arbitration Award** Plaintiff Grace Pada ("Plaintiff") and Defendant Radnet Management, Inc. ("Defendant") arbitrated Plaintiff's claims in this action. Before the Court are (1) Plaintiff's petition to vacate the arbitration award and (2) Defendant's petition to confirm the arbitration award. For the reasons set forth below, and based on applicable law, Plaintiff's petition to vacate is **DENIED**, and Defendant's petition to confirm is **GRANTED**. **Petition to Vacate** Legal Standard 1. FAA Under the FAA, a court may vacate an arbitration award "where the arbitrator[] exceeded [his] powers." (9 U.S.C. § 10(a)(4).) This is a "high hurdle. It is not enough for [Plaintiff] to show that the [arbitrator] committed an error—or even a serious error. [Citations.] '"It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable."' (*Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 559 U.S. 662, 671.) Per the Ninth Circuit, "an arbitrator's manifest disregard of the law remains a valid ground for vacatur of an arbitration award under § 10(a)(4) of the Federal Arbitration Act." (*Comedy Club, Inc. v. Improv West Associates* (9th Cir. 2009) 553 F.3d 1277, 1281.) "We have stated that for an arbitrator's award to be in manifest disregard of the law, '[i]t must be clear from the record that the arbitrator [ ] recognized the applicable law and then ignored it.'" (Id., at p. 1290.) 2. CAA Under the CAA, a court may vacate an arbitration award when "[t]he arbitrator[] exceeded [his] powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted." (CCP § 1286.2(a)(4).) Again, this is a high hurdle. "[A]n arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 6.) "There are, however, limited exceptions to this general rule." (Ibid.) "Numerous courts have since construed *Moncharsh* to stand for the proposition that an arbitrator exceeds its powers within the meaning of Code of Civil Procedure section 1286.2 by issuing an award that violates a party's statutory rights or 'an explicit legislative expression of public policy.'" (*Ahdout v. Hekmatjah* (2013) 213 Cal.App.4th 21, 37.) Analysis Plaintiff contends that the Arbitrator exceeded his powers by manifestly disregarding the law and making irrational decisions in ruling on her claims for (1) failure to engage in a timely, good faith, interactive process and (2) for failure to reasonably accommodate Plaintiff's disabilities. Plaintiff also contends that the Award cannot be confirmed as a matter of public policy. //

		<u>Failure to Engage in Interactive Process</u> Plaintiff pursued her interactive process claims under two theories. Plaintiff contends that the Arbitrator exceeded his powers in considering both theories. Plaintiff's first theory of liability for failure to engage in the interactive process was that Defendant's "Transfer Policy" violated FEHA. Plaintiff contends that the Arbitrator exceeded his powers when he acknowledged that Defendant's "Transfer Policy" violated FEHA, but then found it excusable because Defendant made an exception to the Policy for Plaintiff. Plaintiff contends that the Arbitrator could not have found that Defendant made an exception because, elsewhere in the Award, the Arbitrator described the exception as a "half-hearted" offer to transfer Plaintiff to another position, which the Arbitrator found was not sufficient to constitute engaging in the interactive process. Plaintiff also contends that the Arbitrator exceeded his powers when he found that the Transfer Policy did not violate FEHA because Plaintiff was not qualified for a transfer. Plaintiff's brief mischaracterizes the Arbitrator's findings. The Arbitrator did not characterize Defendant's transfer offer as half-hearted, but rather used that phrase in describing Plaintiff's argument. (Award at 34:8-14.) The Arbitrator found that both parties failed to engage in the interactive process, and that Defendant's violation was due to "raising and then not fully discussing a possible remove Schedule job for [Plaintiff]." (Award at 33:14-19.) Thus, it appears that the Arbitrator's finding was that Defendant did not properly continue to engage in the interactive process—but that Defendant did not apply the Transfer Policy to Plaintiff. For example, the Arbitrator found that Defendant did not provide Plaintiff with a copy of the Scheduler position, despite Plaintiff's request. (Award at 35:3-8.) Plaintiff contends that the Arbitrator's finding that Plaintiff was not qualified for a transfer because she did not demonstrate that she could perform the Scheduler position violates *Roby v. Mckesson Corp*. (2009) 47 Cal.4th 686. According to Plaintiff, *Roby* stands for the proposition that corporate policies that limit FEHA obligations is a FEHA violation, regardless of discriminatory intent. (Pet. at 13:23-25.) The Court in *Roby* was considering the propriety of an award of punitive damages. The Court explicitly stated that it was the application of the Defendant's rigid attendance policy that gave rise to Defendant's liability, not the mere adoption of the policy itself. (Roby at 713-714, fn. 11.) Plaintiff's argument appears to be mixing apples and oranges. At the arbitration, Plaintiff contended that the Transfer Policy was violated FEHA because it required voluntary transfer policies to be in good standing. (Award at 38:23-26.) The Arbitrator did not run afoul of *Roby* because the Arbitrator found that Defendant did not apply the Transfer Policy to Plaintiff. On the other hand, the Arbitrator found that Plaintiff did not show damages for failure to engage in the interactive process because Plaintiff did not demonstrate at the time of the hearing that she would have been able to perform the essential functions of the potential Scheduler position. (Award at 38:1-6.) This latter theory is discussed in further detail below. Plaintiff's second theory of liability for failure to engage in the interactive process was that Defendant violated its duty by failing to communicate with Plaintiff for four months between April 1, 2022 and August 12, 2022.

Plaintiff contends that the Arbitrator manifestly disregarded the law because he found that there was no violation because Plaintiff did not prove that there was a position available that she could have performed. Plaintiff contends that the Arbitrator misapplied the standard enunciated in *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986 because that case stands for the proposition that a plaintiff mush show that a reasonable accommodation was available—not that there was another position available. While it is true that *Scotch* discusses reasonable accommodations, the Arbitrator did not appear to manifestly disregard the law. Although Plaintiff asked for accommodations for her position, Defendant was not able to provide all of them, and Plaintiff explicitly requested that if Defendant did not give her everything she requested "then at least allow me to stay on leave." (Award at 33:8-13.) Thus, Plaintiff was on an indefinite leave of absence due to her apparent inability to perform her current position. Thus, logically, in this instance Plaintiff needed to demonstrate that there was an available position that she could perform. In other words, the reasonable accommodation that Plaintiff ultimately sought was the Scheduler position.

Plaintiff also contends that the Arbitrator's damages findings were irrational. Plaintiff attempts to have this Court re-examine the underlying evidence concerning emotional distress damages, but that is not proper on a motion to vacate an Arbitrator's award. Plaintiff also takes issue with the Arbitrator's finding that no economic damages were suffered because Plaintiff began working with another company on April 8. Plaintiff contends that date is wrong. The Arbitrator cites to Plaintiff's brief for the date. This Court does not have that record before it and its task is not to review the Arbitrator's findings of fact. The cited portion of the Arbitration Award discusses an email that Defendant sent on April 1. The Arbitrator points out that Defendant failed to respond to Pada's April 8 email. Conceivably, the Arbitrator found that the failure to respond to the email began the period of failure to engage in the interactive process. Elsewhere in the Arbitration Award, the Arbitrator characterizes the April 1 letter as including reasonable counter-proposals to Plaintiff's requests for accommodation. (Award at 32:20-33:3.)

Plaintiff also contends that the Arbitrator's ruling is inconsistent with *Nadaf-Rahrov v. Neiman Marcus Group* (2008) 166 Cal.App.4th 952, 985, but the Court disagrees. The Arbitrator found that Plaintiff resigned almost immediately after Defendant resumed the interactive process, so her loss of employment was not caused by Defendant's four month failure to engage in the interactive process. (Award at 40:3-6.) This is not a manifest disregard of the law.

<u>Failure to Reasonably Accommodate Disabilities</u>
Plaintiff contends that the Arbitrator manifestly disregarded the law by recognizing that employers have an affirmative duty to seek out vacant positions for reassignment, citing to testimony that demonstrated Defendant never looked for a position for Plaintiff, and then holding that Defendant did not violate FEHA.

Reviewing the Award, the Court disagrees with Plaintiff's characterization. The testimony cited by the Arbitrator concerns whether Defendant had an open remote Scheduler position; not whether Defendant was looking for a position for Plaintiff. (Award at 14:15-28; 15:25-26.) Thus, the Court does not find merit to Plaintiff's argument.

		Public Policy Plaintiff contends that the Award cannot be enforced because Defendant's employment contract contravenes public policy through its Transfer Policy. As discussed above, the Arbitrator found that Defendant was not enforcing that policy because it was looking for a Scheduler position for Plaintiff. Therefore, enforcing the Award does not contravene public policy; it does not enforce the allegedly unlawful policy. Plaintiff also contends that the Award should not be confirmed because it creates an appearance of impropriety. Plaintiff argues that the Armendariz rule—that an employer must pay all arbitration fees in a FEHA dispute with an employee—conflicts with the canons of judicial ethics because because of this appearance of impropriety. (*Armendariz v. Found. Health Psychcare Servs., Inc*. (2000) 24 Cal.4th 83, 113.) Plaintiff has not submitted any evidence that she objected in any way to proceeding before the Arbitrator under the terms of the employment agreement, which are consistent with *Armendariz*. In fact, Plaintiff did not even oppose the motion to compel arbitration and instead filed a notice of non-opposition. (ROA 22.) Plaintiff's non-opposition was filed more than two years ago. To allow a party to proceed with arbitration all the way through its final conclusion before raising an argument that the entire proceeding was improper would operate to undermine the entire arbitration process. Plaintiff waived this argument by failing to raise it at any prior time. Accordingly, based on the foregoing, Plaintiff's petition to vacate the award is **DENIED**. **Petition to Confirm** If a petition to confirm an arbitration award "is duly served and filed, the court shall confirm the award as made . . . unless in accordance with this chapter it corrects the award and confirms it as corrected, vacates the award or dismisses the proceedings." (CCP § 1286.) There is no dispute about the proper filing and service of Defendant's petition to confirm. Plaintiff's petition to vacate has been denied. There is no request to otherwise correct or dismiss the award. As a result, the petition to confirm the award is **GRANTED**. **Defendant to give notice of both rulings.**
11.	**30-2023-01367697** **Seifpoor vs. Goldberg**	**Motion for Summary Judgment and/or Adjudication** Plaintiffs Mahnaz Seifpoor and Karim Ashkpoor allege two causes of action against moving Defendant Glenn I. Goldberg, D.O.: (1) professional negligence and (2) loss of consortium. Defendant moves for summary judgment as to both causes of action. The elements of a cause of action for professional negligence (medical malpractice) are: "(1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of the duty; (3) a proximate causal connection between the negligent conduct and the injury; and (4) resulting loss or damage." (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968.)

		"The standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony." (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 606–607, as modified (Nov. 29, 1999).) "[E]xpert opinion testimony is required to prove or disprove that the defendant performed in accordance with the prevailing standard of care [citation], except in cases where the negligence is obvious to laymen." (*Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 741.) In fact, "California courts have incorporated the expert evidence requirement into their standard for summary judgment in medical malpractice cases." (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 607, as modified (Nov. 29, 1999).) "When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence." (*Hanson*, supra, 76 Cal.App.4th at 606-607; *Webster v. Claremont Yoga* (2018) 26 Cal.App.5th 284, 289.) An expert's opinion must be based on authenticated hospital records. (*Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 742.) "Without those hospital records, and without testimony providing for authentication of such records, [the expert's] declaration had no evidentiary basis" and therefore "no evidentiary value." (*Garibay*, supra, 161 Cal.App.4th at 742.) "[E]xpert opinions ... are worth no more than the reasons and factual data upon which they are based." (Hanson v. Grode (1999) 76 Cal.App.4th 601, 607.) "A properly qualified expert may offer an opinion relating to a subject that is beyond common experience, if that expert's opinion will assist the trier of fact." (*Garibay*, supra, at 742–743 [citing Evid. Code, § 801, subd. (a)].) "Even so, the expert opinion may not be based on assumptions of fact that are without evidentiary support or based on factors that are speculative or conjectural, for then the opinion has no evidentiary value and does not assist the trier of fact." (*Ibid*.) Still, expert declarations need not be "a model of specificity" in order "to raise a triable issue of fact." (*Shugart v. Regents of University of California* (2011) 199 Cal.App.4th 499, 506.) Here, Plaintiffs allege that, on December 8, 2022, Defendant treated Plaintiff Mahnaz Seifpoor to "remove skin lesions above her right eyelid using two injections including Lidocaine." Plaintiff alleges that Defendant's below standard treatment "resulted in severe pain, numbness on the right side of her face, dizziness, headaches, and twitching in her right upper eyelid." Defendant carried his initial burden to establish that his conduct fell within the community standard of care and did not cause the injuries Plaintiff alleges. Defendant proffered expert testimony from (1) Patrice Healey, M.D., who is a board-certified dermatologist, and (2) Benjamin Frishberg, M.D., who is board-certified Neurologist. Both doctors opined that the treatment rendered to Plaintiff by Defendant fully complied with the applicable standard of care and that no act or omission by Defendants caused or contributed to Plaintiff's alleged injuries.

		However, Plaintiffs filed competing expert declarations wherein Plaintiffs' experts (1) Kenneth Martinez, M.D., a board certified neurologist, and (2) Stuart Shear, M.D., a board-certified dermatologist, created triable issues of material fact. Dr. Shear presented conflicting evidence and opined that Defendant's conduct fell below the community standard of care and was a substantial factor in causing Plaintiff's injuries. As such, there are triable issues of material fact as to Plaintiff's claims. In the reply, Defendant argues that Plaintiff did not properly authenticate the medical records on which her experts relied because "[m]edical records are properly authenticated as the hospital's business records when they are provided with the declaration of the hospital's custodian of records." (*Wicks v. Antelope Valley Healthcare Dist.* (2020) 49 Cal. App. 5th 866, 876.) Importantly, however, a party opposing summary judgment is not required to file duplicate copies of the medical records on which the opposing expert relied in forming a disputed expert opinion if they are already before the court in support of the motion. (See *Shugart v. Regents of University of California (*2011) 199 Cal.App.4th 499, 506.) Here, Plaintiff's expert Stuart Shear, M.D. relies on the evidence submitted by Defendant and therefore a significant portion of Plaintiff's medical history under Defendant's care is already before the Court. Plaintiff's expert also reference Plaintiff's full medical history under Defendant's care, which Plaintiff's counsel testified is contained in the medical records that Defendant produced in discovery. The medical records produced by Defendant in support of his motion for summary judgment and those additional records produced by Plaintiff contain the same bates stamp label and business header, supporting Plaintiff's contention that such records were produced by Defendant during discovery. "Documents obtained in discovery in response to a request for production of documents may be used to support or oppose a motion for summary judgment, but must be presented in admissible form." (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 855.) "This means the evidence must be (1) properly identified and authenticated, (2) admissible under the secondary evidence rule, (3) nonhearsay or admissible under some exception to the hearsay rule, and (4) a complete record, not selected portions of the document." (*Ibid*.) Accordingly, the Court finds that there is sufficient evidence to find that the medical records are those "that the proponent of the evidence claims" them to be such that they are sufficiently authenticated and admissible. (Evid. Code, §§ 1271 and 1400.) Thus, the Court is not persuaded by Defendant's attempt to discredit Plaintiffs' expert declarations. The Motion for Summary Judgment is **DENIED** in its entirety. Defendant's objections are **OVERRULED**. The Court finds that there are triable issues of material fact. The Dr. Shear declaration alone creates triable issues of material fact regarding the standard of care and causation and, as discussed above, the court finds that the medical records discussed in the Dr. Shear declaration are sufficiently authenticated. **Plaintiff to give notice.**