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Appendix A

**Court of Appeal of California
Second Appellate District, Division Four**

No. B302449

Peter Kleidman,
Plaintiff-appellant,

v.

RFF Family Partnership, LP,
Defendant-respondent.

Filed April 14, 2022

Before: Willhite, Collins, Currey,
Court of Appeal Justices

OPINION

APPEAL from postjudgment orders of the Superior Court of Los Angeles County, Elaine W. Mandel, Judge. Affirmed.

Peter Kleidman, in pro. per., for Plaintiff and Appellant

Parcells Law Firm and Dayton B. Parcells III for Defendant and Respondent.

INTRODUCTION

Plaintiff Peter Kleidman, in *propria persona*, appeals from the trial court's order awarding

defendant RFF Family Partnership, LP attorney fees incurred post-judgment and on appeal pursuant to Civil Code section 1717. Plaintiff also challenges the court's issuance of a protective order that defendant need not respond to plaintiff's discovery request. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This court previously addressed the merits of this case in *Kleidman v. RFF Family Partnership, LP* (July 10, 2018, B268541). As explained in our prior opinion, plaintiff sued defendant (and others) for, among other claims, breach of contract, alleging that he had been overcharged interest, fees, and other expenses in connection with numerous loans. The loan agreement between defendant and plaintiff had a clause awarding attorney fees to the prevailing party. He failed to appear at trial and judgment was entered against him. In the prior appeal, we affirmed the judgment, affirmed the post-judgment order denying plaintiff's motions to set aside the judgment and for a new trial, and affirmed the post-judgment order awarding attorney fees to defendant. After remittitur issued, defendant filed a motion in the trial court for additional attorney fees incurred post-judgment and on appeal. Defendant also filed a motion for protective order related to discovery propounded by plaintiff. The trial court granted defendant's motions. The court awarded defendant \$38,572.50 in attorney fees and issued an order that defendant need not respond to plaintiff's belated discovery request. This appeal followed.

DISCUSSION

A. Motion for Attorney Fees

Plaintiff contends the trial court erred in awarding attorney fees to defendant and that the amount awarded was unreasonable. We disagree.

As noted, this Court previously affirmed the underlying judgment and postjudgment orders in favor of defendant. (*Kleidman v. RFF Family Partnership, LP* (July 10, 2018, B268541).) In pertinent part, we concluded that defendant was the prevailing party, as it obtained a judgment relieving it of liability on plaintiff's contract claims. Thus, defendant was the prevailing party in the trial court and on appeal. (*Mustachio v. Great Western Bank* (1996) 48 Cal.App.4th 1145, 1150; see Code Civ. Proc., § 1032.) A prevailing party is entitled to recover costs in any action or proceeding, “[e]xcept as otherwise expressly provided by statute.” (Code Civ. Proc., § 1032, subd. (b).) “These costs, however, do not include the attorney fees the prevailing party has incurred in the litigation unless (1) an agreement between the parties provides for the recovery of those fees, or (2) a statute creates a right of recovery.” (*Butler-Rupp v. Lourdeaux* (2007) 154 Cal.App.4th 918, 923; see Code Civ. Proc., §§ 1021, 1033.5, subd. (a).)

Here, defendant sought attorney fees pursuant to Civil Code section 1717, which provides generally that, “[i]n any action on a contract” with an attorney fees provision, the party “prevailing on the contract” shall be entitled to reasonable attorney fees in addition to other costs. (Civ. Code, § 1717, subd. (a).) In our prior opinion, we

determined that the fee provision in the parties' loan agreement provided for recovery of attorney fees to the prevailing party pursuant to Civil Code section 1717. Therefore, we conclude the trial court did not abuse its discretion in finding defendant was the prevailing party and awarding defendant attorney fees incurred postjudgment and on appeal.¹⁵ (See *Roden v. AmerisourceBergen Corp.* (2007) 155 Cal.App.4th 1548, 1578.)

Defendant submitted to the trial court the declaration of its lead attorney (Dayton B. Parcells III) and a summary of the invoices sent to, and paid by, defendant to support its request for attorney fees. In the declaration, Parcells averred that his and his associates' rates were the prevailing rates for similar work by attorneys with comparable experience in Los Angeles County. He further stated that the total number of hours spent postjudgment (specifically, responding to plaintiff's

¹⁵ During the pendency of the prior appeal, plaintiff filed a motion for the correction of a clerical error in the judgment. The trial court had granted defendant's motion to compel arbitration, in part, as to plaintiff's conversion cause of action only. This cause of action was "ordered stayed pending further order of the Court after resolution of Plaintiff's five other claims against Defendant." Because the judgment inadvertently disposed of the entire action against defendant, the court granted plaintiff's motion, and corrected the judgment by interlineation to reflect that the conversion cause of action was still pending arbitration. However, plaintiff subsequently dismissed the conversion cause of action with prejudice in exchange for defendant waiving all requests for costs and fees in connection with this claim. Therefore, to the extent plaintiff challenges this court's determination that defendant was the prevailing party, it is moot given plaintiff's dismissal of this remaining claim with prejudice.

motions for new trial) and on appeal was 77.85, at the hourly billing rates of \$600 (for Parcells) and \$350 (for his associates). This declaration alone was sufficient to support the fee award. (*Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, 698 [“[i]t is well established that ‘California courts do not require detailed time records, and trial courts have discretion to award fees based on declarations of counsel describing the work they have done and the court’s own view of the number of hours reasonably spent”]; *Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, 1375; *Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 512 [attorney declarations attesting to hours worked and hourly rates sufficient to support fee award]; *Weber v. Langholz* (1995) 39 Cal.App.4th 1578, 1586–1587.) By granting the fees largely as requested,¹⁶ the trial court impliedly found the request credible and reasonable. Plaintiff’s various contentions challenging the reasonableness of the attorney fees award would require us reweigh (sic) the evidence, something we decline to do. (*G.R. v. Intelligator* (2010) 185 Cal.App.4th 606, 620 [“We may not reweigh on appeal a trial court’s assessment of an attorney’s declaration”].) Given the broad discretion vested in the trial court when determining an attorney fee award, we find no abuse of that discretion. (See *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096.)

¹⁶ The trial court agreed with plaintiff’s challenge that 2.5 hours requested by defendant for correcting pagination of a brief was excessive and therefore subtracted the value of 2.5 hours (\$1,500) from defendant’s total award.

B. Motion for Protective Order

On appeal, plaintiff also challenges the trial court's granting of defendant's motion for protective order. The challenge is meritless.

More than three years after the discovery cut-off (March 21, 2015) and after remittitur was issued in the subsequent appeal, plaintiff propounded a request for production of documents on November 26, 2018. After failed meet and confer efforts with plaintiff, defendant filed a motion for a protective order prohibiting discovery based, in part, on the lateness of the request. We conclude the trial court did not abuse its discretion in granting the motion. (See Code Civ. Proc., § 2024.020, subd. (a) [generally, a party is "entitled as a matter of right to complete discovery proceedings on or before the 30th day ... before the date initially set for the trial of the action"].) Plaintiff has failed to put forth any persuasive authority to permit discovery beyond the discovery cutoff in this case.

DISPOSITION

The postjudgment orders are affirmed. Defendant shall recover its costs on appeal.

**NOT TO BE PUBLISHED
IN THE OFFICIAL REPORTS**

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Appendix B

In the Supreme Court of California

No. S274740

Peter Kleidman,
Plaintiff-Appellant,

v.

RFF Family Partnership, LP,
Defendant-Respondent.

Filed July 13, 2022

En Banc

ORDER

The petition for review is denied.

Appendix C

**Superior Court of California
County of Los Angeles**

No. SC121303

**Peter Kleidman,
*Plaintiff,***

v.

**RFF Family Partnership, LP,
*Defendant.***

Filed September 19, 2019

**Before, Hon. Elaine W. Mandel
*Superior Court Judge***

ORDER

NATURE OF PROCEEDINGS

Defendant's Motion for Attorney Fees;
Defendant's Motion for Protective Order

The Order Appointing Court Approved Reporter
as Official Reporter Pro Tempore is signed and
filed.

Matter is called for hearing.

The court issues a written tentative ruling and
hears oral argument.

After hearing from both sides, the court takes
the motions under submission.

Plaintiff requests a statement of decision.

LATER: Out of the presence of counsel/parties:
the court issues its final rulings as follows:

RULINGS

This breach of contract action arises out of a loan agreement/promissory note. Judgment for defendant was entered in April 2015; the Court of Appeal affirmed in October 2018 (see exhibits to motion). Both the trial court and Court of Appeal found defendant to be the prevailing party.

Defendant's Motion for Attorney's Fees — Civil Code 1717

Plaintiff argues the fees claim should be disregarded because defendant failed to supply a "cognizable line of reasoning or ratiocination applying Civil Code §1717(a)'s first sentence to the alleged facts[.]" No "reasoning or ratiocination" is required. Plaintiff does not dispute the existence of an attorney's fees clause.

Plaintiff also argues the court should treat Mr. Parcell's (sic) declaration with skepticism because an Ohio bankruptcy court questioned his credibility. A court may not take judicial notice of the truth of matters stated in other court papers, as plaintiff requests. Furthermore, this court cannot rely on conclusions reached under different circumstances in a separate matter to pass judgment on the credibility of declarations filed here.

Plaintiff offers constitutional objections, arguing judicial determination of attorney's fees motions violates his right to due process because it does not permit full discovery. He also argues the motion should be decided by jury trial. Plaintiff provides

no authority that due process in determining post-litigation fee awards requires access to the tools of pre-trial discovery. No jury trial is available since the motion does not constitute an action separate from the underlying breach of contract claim.

Defendant requests \$600/hour for Parcells' work and \$350/hour for more junior attorneys' work (Mehdian and Claybon). These amounts are in line with counsels' experience and work provided. The hours requested (77.85) for work post-judgment and on appeal are not unreasonable. Defendant does have the burden of proving the fees requested are reasonable and necessary. Defendant's evidence submitted in support of the fee request includes Parcells' declaration in support of the motion, signed 11/16/18, paras. 6-11, and declaration in support of the sanctions motion, para. 10, as well as the invoice (Exh. 3). The only line entry challenged is 2.5 hours requested for correcting pagination of a brief. The court agrees this seems excessive for this task. The court will subtract the value of 2.5 hours (\$1,500.00) from defendant's total award.

The court will also rely on the \$40,072.50 requested in the notice (and Exh. 3 to the motion). Defendant is awarded \$38,572.50 in attorney's fees.

**Defendant's Motion for Protective Order and
Sanctions**

On November 26, 2018 plaintiff filed requests for production of documents on defendant, seeking information corroborating defendant's claimed attorney's fees. Defendant moves for a protective order stating that it need not respond to these

discovery requests on the grounds that they were filed long after the discovery deadline passed.

The cut-off date for completion of discovery is 30 days before the trial date. Code of Civ. Proc §2024.020. When a party is served with a request for production of documents, the party may move for a protective order stating that some or all of the categories in the demand need not be produced. A party unsuccessfully opposing a motion for protective order is subject to sanctions unless the party acted with substantial justification. Code of Civ. Proc. §2031.060(a), (b), (h).

Plaintiff argues due process requires that he be able to obtain the requested information. Plaintiff provides no authority that his rights would be violated or that he is entitled to such discovery following conclusion of trial and appeal.

Motion GRANTED. Plaintiff did not act with "substantial justification" in seeking these documents years after the discovery deadline passed, so sanctions are warranted. The request for \$4,561 is excessive. \$1,000.00 in sanctions will be awarded.

Extensive oral argument was had. Plaintiff Kleidman appeared telephonically, in pro per. Parcells appeared for defendant. A court reporter was present. The matter was taken under submission, and the court issues this final ruling. Plaintiff orally requested a statement of decision. As this was not a trial, neither Code Civ. Proc. 632 nor Cal. Rules of Court 3.1590 applies. This is the ruling of the court.

*** END OF FINAL RULING OF THE COURT***

Appendix D

In the Supreme Court of California

No. 274740

Peter Kleidman,
Plaintiff and Appellant,

v.

RFF Family Partnership, LP,
Defendant and Respondent.

Filed May 24, 2022

PETITION FOR REVIEW

§I. Issues Presented

The primary issue is the following:

Does the summary adjudication of contractual attorney fees under Civil Code §1717 violate the equal protection clause? After all, other types of contract disputes are adjudicated plenarily; and other types of attorney-fee disputes are adjudicated plenarily. Why, then, should the adjudication of contractual attorney fees under Civil Code §1717 be adjudicated summarily?

In the instant case, the trial court awarded RFF Family Partnership, LP (“RFF”) attorney fees under Civil Code §1717 in a summary procedure.

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Why wasn't Kleidman (petitioner) allowed to defend himself with the full procedural protections afforded by plenary proceedings?

A related issue is:

Does a party have the right to conduct discovery to defend itself in post-trial proceedings under CCP §2017.010, even though the discovery cutoff has passed relative to the trial?

§II. Grounds for Review

Review is appropriate under Rule 8.500(b)(1) to settle an important question of law. When a litigant is asserting a contractual right to attorney fees under Civil Code §1717, should not the opposing party defending against the claim have the right to plenary proceedings under the equal protection clause?

§III. Statement under Rule 8.504(b)(3)

Petitioner Kleidman did not file a petition for rehearing in the Court of Appeal

§IV. Discussion – excerpts taken from the record below

Below are some of the arguments that petitioner Kleidman presented to the trial court and the court of appeal. Neither the trial court nor the court of appeal made any mention of these issues.

§A. Excerpts from the trial court briefing

The following is taken from Kleidman's papers in the trial court.

"To the extent a party defending against a contractual claim for attorney fees is forbidden from conducting discovery, whereas parties de-

fending against other types of contract claims can conduct discovery, there is a violation of the equal protection clauses. (14th Amend.....) There is no rational reason for invidiously discriminating against parties defending against contractual claims for attorney fees (as opposed to other types of contract claims) by prohibiting them from conducting discovery to defend against claims.” (4:CT:684:11-16)¹⁷

“Most contractual claims are asserted by filing a suit, whereby the defendant is afforded due process procedural protections, including (inter alia) ample time to develop defenses, for discovery, a full-blown trial with live testimony (and a jury trial when claims are legal), and where the plaintiff bears the burden to prove that to which it is entitled. But contractual claims for attorney fees are summary proceedings without the panoply of procedural protections afforded to claimees in other types of contractual judicial actions. This classification into two types of contract claims – claims for attorney fees and other types of contract claims – violates the equal protection clause. (14th Amend.....) It invidiously discriminates against claimees resisting contractual attorney fees, vis-à-vis claimees resisting other types of contract claims.

“There is no rational justification for this classification. The only feature peculiar to contractual attorney fee claims is that they are intimately linked to prior proceedings giving rise to the attorney fees. While it might be justifiable to allow the

¹⁷ Clerk's transcript, Volume 4, page 684, lines 11-16.

court to retain jurisdiction to adjudicate the contractual attorney fee claims (without the needs for a new case number an issuance of a new summons), it does not follow that the attorney fees can be adjudicated summarily. The justification cannot be based on judicial economy, as the law could well be that all contractual claims must be adjudicated summarily, which it is not. To be rational, there must be some peculiar feature of contractual attorney fees claims distinguishing them from other types of contractual claims, thereby warranting summary adjudication. Parties defending against contractual attorney fee claims should be on equal footing with parties resisting other types of contractual claims. For instance, claimees generally have rights to have factual disputes over whether there even exists a contractual right to the claim to be tried by a jury after full discovery. These precious rights (to jury trial and discovery) should not be vitiated merely because the contractual claims are for attorney fees. Assuming there is contractual liability, parties generally have rights to have factual disputes as to the claim's amount to be tried by jury after full discovery. Again, these precious rights should not be vitiated merely because the claim is for attorney fees.

[¶]

"To the extent a party is deprived of a jury trial merely because the contractual claims are based on attorney fees, the classification is an invidious discrimination against claimees resisting attorney fee claims, violative of the equal protection clauses. It cannot be based on judicial economy, for the constitutional and statutory law could well be that

all contractual claims are adjudicated sans jury trial." (4:CT:655:14·656:21.)

§B. Excerpts from the briefing in the Court of Appeal

The following is taken from Kleidman's Opening Brief in the Court of Appeal.

"§VII. Appellant was denied equal protection because the proceedings occurred summarily

"A party's equal protection rights include rights to have its "cause tried and determined in accordance with ... procedures ... applied in other cases of like character." ([*In re Watson* (1979) 91 Cal.App.3d 455, 461].) Appellant argued below that the summary proceedings violated his equal protection rights. (4:CT:655·658.) Appellant now elaborates thereon.

"§A. Other attorney-fee litigations have procedural protections in the fact-finding process

"In other attorney-fee litigations, parties have cross-examination rights (*City of Oakland v. Oakland Raiders* (1988) 203 Cal.App.3d 78, 81, 82, 83·84 [witnesses gave testimony on attorney fees, implying such witnesses were subject to cross-examination]; *Fed-Mart Corp. v. Pell Enterprises, Inc.* (1980) 111 Cal.App.3d 215, 222 ['three days of hearings with extensive testimony from ... counsel as to work performed,' suggesting live testimony with cross-examination]; discovery rights (*Save Open Space Santa Monica Mountains v. Superior Court* (2000) 84 Cal.App.4th 235, 250 [discovery permitted to determine whether §1021.5's

conditions exist]; [*Mir v. Charter Suburban Hospital* (1994) 27 Cal.App.4th 1471, 1487-1488] [discovery permitted regarding fees sought under Bus. & Prof. Code §809.9 at 'conclusion of the action']; [*Oak Grove School Dist. v. City Title Ins. Co.* (1963) 217 Cal.App.2d 678, 689] [depositions permitted respecting attorney-fee litigation under [CCP] §1268.610])¹⁸, rights to jury trials. (*Fivey v. Chambers* (1962) 199 Cal.App.2d 457, 463 [attorney may recover fees on quantum meruit] (*Fivey*); *Jogani v. Superior Court* (2008) 165 Cal.App.4th 901, 903-904 [right to jury trial in quantum meruit action].)

“§B. Other disputes over attorney fees for services rendered in prior court proceedings are adjudicated plenarily

“Other disputes over attorney fees for services rendered in prior court proceedings are adjudicated plenarily. (*Owen v. Meade* (1894) 104 Cal. 179, 180 [attorney sued client for contractual fees earned in prior case]; *Jeffry v. Pounds* (1977) 67 Cal.App.3d 6, 8-9 [same]; *Chambers v. Kay* (2002) 29 Cal.4th 142, 145 [dispute between attorneys over fees for services rendered in prior case]; *Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1551 [attorney fees incurred in prior case caused by another's tort]; *Fivey*, 463 [attorney may recover for services rendered in prior case on quantum meruit]; *Mabie v. Hyatt* (1998) 61

¹⁸ *Oak Grove* references former [CCP] §1255a, the relevant portion of which is now [CCP] §1268.610. (*County of Madera v. Forrester* (1981) 115 Cal.App.3d 57, 62.)

Cal.App.4th 581, 591-592 [malicious prosecution plaintiff can recover attorney fees incurred defending prior case]; *Steiner v. Eikerling* (1986) 181 Cal.App.3d 639, 643-644 [plaintiff in malicious prosecution action can recover attorney fees incurred defending prior case]; *Green v. Sherritt* (1936) 17 Cal.App.2d 732, 733-734 [jury trial on attorney-client fee dispute for services rendered in prior case]; [*Copenbarger v. Morris Cerullo World Evangelism, Inc.* (2018) 29 Cal.App.5th 1, 3-4] [attorney fees incurred in prior case recoverable as damages for breach of contract for failing to honor settlement agreement and dismiss that prior case].)

“§C. There is no rational reason for adjudicating RFF’s fee claim summarily, whereas other such claims are adjudicated plenarily

“Since other attorney-fee litigations afford parties procedural protections (e.g., cross-examination, discovery, jury trials) and plenary adjudications ..., there is no rational reason for adjudicating RFF’s claims against Appellant summarily and without the aforementioned protections.

“What justification could there possibly be for adjudicating RFF’s claims summarily and without the procedural protections permitted in other fee litigations? If courts are too busy and want quick adjudications, then all attorney-fee litigations should be quickly, summarily adjudicated. It makes no sense to deprive Appellant of procedural protections, whereas other attorney-fee litigations afford such protections.

"Insofar as RFF seeks contractual fees, it is senseless to adjudicate RFF's claim differently from other contractual claims – Appellant deserves plenary adjudication. The mere fact that RFF's claim pertains to attorney fees for services rendered in prior court proceedings is not a legitimate basis for summary adjudication. ...

RFF sought damages. ... Generally, the extent of damages is determined plenarily. (*Farrell v. City of Ontario* (1919) 39 Cal.App. 351, 357 ["parties ... entitled to a jury trial upon ... issues as to damages"]); [*Dorsey v. Barba* (1952) 38 Cal.2d 350, 356.] There is no rational reason that RFF's damages should be determined summarily, whereby Appellant is deprived of procedural protections to mount his defense." (Appellant's Opening Brief, at 62-64.)

§V. Conclusion

Based on the foregoing, Kleidman respectfully requests that this Court grant this petition for review.

Dated: May 24, 2022

Respectfully,

/s/ Peter Kleidman

Peter Kleidman

plaintiff, appellant, petitioner,
in propria persona

Appendix E

Court of Appeal of California
Second Appellate District, Division Four

No. B302449

Peter Kleidman,
Plaintiff-appellant,

v.

RFF Family Partnership, LP,
Defendant-respondent.

Filed April 12, 2021

Before: Willhite, Collins, Currey,
Court of Appeal Justices

EXCERPTS FROM APPELLANT'S OPENING
BRIEF

**§VI. Appellant was denied due process because the
proceedings occurred summarily**

Appellant argued below that the summary proceedings violated his equal protection rights. (4:CT:653-657.) Appellant now elaborates thereon.

§A. RFF's fee claim was an action

“Action” need not always have “the technical meaning ... as defined in the Code of Civil Procedure.” (*Best v. Cal. Apprenticeship Council* (1987) 193 Cal.App.3d 1448, 1460; Rule 1.6(1).)

“Action” has been equated with “suit.” (*In re Rose* (2000) 22 Cal.4th 430, 452; *People v. Yartz* (2005) 37 Cal.4th 529, 536, 538; *Salawy v. Ocean Towers Housing Corp.* (2004) 121 Cal.App.4th 664, 673, fn. 6 (*Salawy*).) In turn, “suit” may be defined as a “process in a court for the recovery of a right or claim” (*Fireman’s Fund Ins. Co. v. Superior Court* (1997) 65 Cal.App.4th 1205, 1216), or ““any legal ‘proceeding of a civil kind....’” (*Mir v. Charter Suburban Hospital* (1994) 27 Cal.App.4th 1471, 1480-1481, fn. 4 (*Mir*).) Thus RFF’s fee claim was an action, for it was a court process for a claim of moneys which Appellant allegedly owed RFF. (4:CT:659.)

Alternatively, an action is “any judicial proceeding, which, if conducted to a determination, will result in a judgment....” (*Salawy*, 673, fn. 6.) Here, RFF’s fee claim resulted in a judgment (*supra*, 17-18), so the proceedings leading thereto were an action, i.e., RFF’s fee claim was an action. (4:CT:659.)

There can be distinct actions within the same superior court case. (*Ruiz v. Podolsky* (2009) 175 Cal.App.4th 227, 244 [referring to §1281.2 proceedings as an “action”]; *Prentice v. Roberts* (1959) 171 Cal.App.2d 313, 318 [complaint and cross-complaint are separate actions]; *Cole v. BT & G, Inc.* (1983) 141 Cal.App.3d 995, 996, 998 [motion to set aside judgment by confession is an “action”]; *CDF Firefighters v. Maldonado* (2011) 200 Cal.App.4th 158, 166, 167 [claims for \$22,000 and \$734 separate actions within same case].)

Here, Appellant’s claims against RFF are distinct from RFF’s claims for fees. They are distinct actions within the same superior court case.

§B. The fee proceedings were a trial

§1. The term “trial” encompasses proceedings other than traditional trials of formal complaints

The term “trial” encompasses proceedings other than traditional trials of plaintiffs’ complaints in the sense of §422.10, for instance, determinations of restitution under §908 (*Hendershot v. Superior Court* (1993) 20 Cal.App.4th 860, 864-865) and motions to quash writs of execution. (*In re Marriage of Beilock* (1978) 81 Cal.App.3d 713, 720-721 (*Beilock*)).

§2. These fee proceedings were a trial since RFF’s Fee Motion was a pleading

Generally, trials are “determination[s] of ... issue[s] presented by the pleadings....” (*Mass v. Superior Court* (1961) 197 Cal.App.2d 430, 434.) A “pleading” is “a formal document in which a party to a legal proceeding ... sets forth or responds to allegations, claims, denials, or defenses.” (Black’s Law Dict. (10th ed. 2014) p. 1339.) The term “pleading” can be broadly construed to do justice. (*Beilock*, 720-721; *Oak Grove School Dist. v. City Title Ins. Co.* (1963) 217 Cal.App.2d 678, 711 [referring to memorandum of costs and motion to tax costs as “pleadings” apropos post-judgment cost litigation] (*Oak Grove*); *Collins v. Superior Court* (1957) 150 Cal.App.2d 354, 364 [affidavits charging contempt serve as complaint] (*Collins*); *Sanchez v. Superior Court* (1988) 203 Cal.App.3d 1391, 1397 [formal statutory definitions need not be exclusive].) (4:CT:660; 4:CT:664.)

Here, RFF's Fee Motion is a pleading, as it is a formal document in a judicial proceeding making a monetary claim, and these proceedings constitute a trial of these substantial issues presented in the case. (4:CT:660; 4:CT:664.)

§3. Motion proceedings can be trials

Generally, trials are proceedings directly resulting in judgments. (*Smith v. City of Los Angeles* (1948) 84 Cal.App.2d 297, 304-305; *O'Day v. Superior Court* (1941) 18 Cal.2d 540, 544-545.) Here, the Fee Order is a judgment (*supra*, 17-18), so adjudication of RFF's Fee Motion was a trial.

Trials can occur in motion proceedings. (E.g., motions under §437c and §425.16 (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 868; *State Farm Mut. Auto. Ins. Co. v. Superior Court* (2004) 121 Cal.App.4th 490, 501); §1281.2 (*City of Pasadena v. Superior Court* (1931) 212 Cal. 309, 314); demurrers (*Bice v. Stevens* (1954) 129 Cal.App.2d 342, 354); motion to quash writ of execution (*Beilock*, 720-721); motion to add judgment debtor (*Gruendl v. Oewel Partnership, Inc.* (1997) 55 Cal.App.4th 654, 660 (*Gruendl*)).

Even motion proceedings adjudicating attorney fees have been deemed trials. (*Pfeiffer Venice Properties v. Superior Court* (2003) 107 Cal.App.4th 761, 767-768; *First Federal Bank of Cal. v. Superior Court* (2006) 143 Cal.App.4th 310, 315 [“there was a trial, even limiting the examination to the attorney’s fees motion”].)

§C. Appellant was denied the right to cross-examine Parcells

Appellant had the due process right to compel

Parcells to provide live testimony so that the fact-trier could see his demeanor and he could be cross-examined. (*NLRB v. Walton Mfg. Co.* (1962) 369 US 404, 408; *Wright v. West* (1992) 505 US 277, 296; *Elkins v. Superior Court* (2009) 41 Cal.4th 1337, 1359 (*Elkins*).) (4:CT:654.)

Due process entails “the right not to be deprived of one’s property ... without ... an opportunity to cross-examine those whose evidence is given against him.” (*In re Watson* (1979) 91 Cal.App.3d 455, 461 (*Watson*).) “In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to ... cross-examine adverse witnesses.” (*Goldberg v. Kelly* (1970) 397 US 254, 269-270.) Cross-examination is the “greatest legal engine ... for the discovery of truth” (*California v. Green* (1970) 399 US 149, 158), and “the principal means by which the believability of a witness and the truth of his testimony are tested.” (*Davis v. Alaska* (1974) 415 US 308, 316.) “[T]he right to confront and cross-examine witnesses is a fundamental aspect of procedural due process.” (*Jenkins v. McKeithen* (1969) 395 US 411, 428-429; *Greene v. McElroy* (1959) 360 US 474, 496, 497, & fn. 25 [cross-examination is “vital feature of the law,” a “basic ingredient[] in a fair trial,” and a “safe-guard for testing the value of human statements”]; *Willner v. Committee on Character & Fitness* (1963) 373 U.S. 96, 103; *Pointer v. Texas* (1965) 380 US 400, 404 [cross-examination “one of the safeguards essential to a fair trial”]; *Elkins*, 1358 [“pretty difficult to weigh credibility without seeing the witnesses”]; *Ashburn v. AIG Financial Advisors, Inc.* (2015) 234 Cal.App.4th 79, 98

[“court had to hold an evidentiary hearing ... as there was significant dispute about what appellants signed”]; *Pacific Mut. Life Ins. Co. v. McConnell* (1955) 44 Cal.2d 715, 730 [due process afforded as experts testifying regarding valuation were available for cross-examination]; *Asbestos Claims Facility v. Berry & Berry* (1990) 219 Cal.App.3d 9, 24 [“counsel should ... be available for cross-examination”].)

Rights to cross-examination exist even in collateral or ancillary proceedings, when there is a “new finding of fact ... that was not an ingredient” of the principal proceeding. (*Specht v. Patterson* (1967) 386 US 605, 608-609, 610 [party has “right to cross-examine” on “distinct issue”]; *Collins*, 364 [right to cross-examine in contempt proceeding even though “ancillary to the annulment action”].)

Here, Appellant’s due process rights were violated since he could not cross-examine Parcells. (4:CT:654.)

§D. Parcells’ declaration is entirely inadmissible hearsay, since proceedings determining disputed facts and resulting in judgment must be tried by live testimony – §2009 is inapplicable

Parcells’ declaration is entirely inadmissible because §2009 is inapplicable “at a contested trial leading to judgment.” (*Elkins*, 1355.) Here, the fee proceedings were a trial and the Fee Order a judgment. (*supra*, 17-18, 56-57.)

§2009 “has no application to the proof of facts which are directly in controversy in an action.” (*Lacrabere v. Wise* (1904) 141 Cal. 554, 556.) Here, RFF’s fee claim is an action (*supra*, 55-56), so RFF

cannot invoke §2009 to prove facts through Parcells' ex parte declaration. (Id., 556.) §2009 "only applies to matters of procedure ... and has no relation to proof of facts the existence of which are made issues in the case, and which it is necessary to establish to sustain a cause of action." (Id., 556-557.) Here, this principle was violated, for the trial court erroneously allowed RFF to use Parcells' ex parte declaration to sustain its cause of action, i.e., to sustain its "right to relief in court." (*Klopstock v. Superior Court* (1941) 17 Cal.2d 13, 18 [cause of action is "right to relief in court"].) (4:CT:660; 4:CT:665:13-28.19)

§E. Appellant was deprived of the opportunity to conduct discovery

Due process rights include rights to discovery to protect one's rights. (*Hendershot v. Ready to Roll Transportation, Inc.* (2014) 228 Cal.App.4th 1213, 1225; *Martin-Bragg v. Moore* (2013) 219 Cal.App.4th 367, 393 (*Martin-Bragg*); *Hackley v. Roudebush* (DC Cir. 1975) 520 F.2d 108, 148-149 ["tools of discovery" are part of "fair and complete judicial fact-finding process"]; *Klund v. High Tech. Solutions, Inc.* (SD Cal. 2005) 417 F.Supp.2d 1155, 1160 [right to present evidence encompasses right to discovery]; *ICC*, 93 [party has rights to "inspect documents" in its defense].) (4:CT:654:9-16.)

Appellant had (but was denied) due process rights to conduct discovery to mount his defense to RFF's fee claim – the trial court issued a protective order barring Appellant from obtaining discovery.

¹⁹ The argument here was repeated throughout the evidentiary objections. (4:CT:666:7-13, etc.)

(*infra*, 65; 4:CT:842-843.) The trial court erred in depriving Appellant of his discovery rights.

Martin-Bragg held that a party was denied a fair trial because its quiet title action was consolidated with the summary adjudication of an unlawful detainer action. “[T]he trial court ... insisted upon a summary trial of the parties’ dispute as to title, without the discovery and preparation that the law affords for ordinary civil actions.” (*Martin-Bragg*, 387.) “It would obviously be unfair to require the defendant-tenant to defend against ordinary civil actions under the constraints of the summary procedure in unlawful detainer actions.” (*Id.*, 393.) *Martin-Bragg* reversed. (*Id.*, 395-396.) Likewise here, the trial court required a summary trial of RFF’s attorney fee action, without full due process protections, including discovery.

§F. Insofar as RFF sought contractually-owed fees, Appellant was entitled to a jury trial under §592

In this section §VI.F (*infra*, 61-62), Appellant assumes that RFF’s Fee Motion rested on alleged contractual-owed fees. Based on this assumption, Appellant had rights to a jury trial under §592. (4:CT:658-659.)

§592 states:

“In actions ... for money claimed as due upon contract, or as damages for breach of contract, ... an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered....”

Here, nothing in the record suggests that a jury trial was waived, or that a reference was ordered.²⁰

§1. RFF's fee claim was an action

As above, RFF's claim was an action. (*supra*, 55-56.) Furthermore, doubts should be resolved in favor of jury trials. (*Central Laborers' Pension Fund v. McAfee, Inc.* (2017) 17 Cal.App.5th 292, 345; *People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 300 [right to jury trial "not ... narrowly construed"] (*Chevrolet*.) Consequently, §592 should be construed broadly, providing for jury trials in claims for contractual attorney fees.

That §1717(a)'s first sentence codifies rights to contractual attorney fees does not curtail parties' rights to jury trial. (*Chevrolet*, 287, 299 [Legislature cannot "abridge" or "infringe upon" rights to jury trial]; *Mendoza v. Ruesga* (2008) 169 Cal.App.4th 270, 285-286.)

§2. §592 applies

Since (by assumption) RFF claimed contractually-owed fees, it claimed "money due upon contract" and/or "damages for breach of contract." (§592; *supra*, 50-51; *Borgonovo v. Henderson* (1960) 182 Cal.App.2d 220, 231 [contractual breach gives injured party right to damages].)

§VII. Appellant was denied equal protection because the proceedings occurred summarily

²⁰ Appellant bears no burden to prove these exceptions are absent. (*Simpson*, 24, 25.)

A party's equal protection rights include rights to have its "cause tried and determined in accordance with ... procedures ... applied in other cases of like character." (*Watson*, 461.) Appellant argued below that the summary proceedings violated his equal protection rights. (4:CT:655-658.) Appellant now elaborates thereon.

§A. Other attorney-fee litigations have procedural protections in the fact-finding process

In other attorney-fee litigations, parties have cross-examination rights (*City of Oakland v. Oakland Raiders* (1988) 203 Cal.App.3d 78, 81, 82, 83-84 [witnesses gave testimony on attorney fees, implying such witnesses were subject to cross-examination]; *Fed-Mart Corp. v. Pell Enterprises, Inc.* (1980) 111 Cal.App.3d 215, 222 ["three days of hearings with extensive testimony from ... counsel as to work performed," suggesting live testimony with cross-examination]; discovery rights (*Save Open Space Santa Monica Mountains v. Superior Court* (2000) 84 Cal.App.4th 235, 250 [discovery permitted to determine whether §1021.5's conditions exist]; *Mir*, 1487-1488 [discovery permitted regarding fees sought under Bus. & Prof. Code §809.9 at "conclusion of the action"]; *Oak Grove*, 689 [depositions permitted respecting attorney-fee litigation under §1268.610])²¹, rights to jury trials. (*Fivey v. Chambers* (1962) 199 Cal.App.2d 457,

²¹ *Oak Grove* references former §1255a, the relevant portion of which is now §1268.610. (*County of Madera v. Forrester* (1981) 115 Cal.App.3d 57, 62.)

463 [attorney may recover fees on quantum meruit] (*Fivey*); *Jogani v. Superior Court* (2008) 165 Cal.App.4th 901, 903-904 [right to jury trial in quantum meruit action].)

§B. Other disputes over attorney fees for services rendered in prior court proceedings are adjudicated plenarily

Other disputes over attorney fees for services rendered in prior court proceedings are adjudicated plenarily. (*Owen v. Meade* (1894) 104 Cal. 179, 180 [attorney sued client for contractual fees earned in prior case]; *Jeffry v. Pounds* (1977) 67 Cal.App.3d 6, 8-9 [same]; *Chambers v. Kay* (2002) 29 Cal.4th 142, 145 [dispute between attorneys over fees for services rendered in prior case]; *Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1551 [attorney fees incurred in prior case caused by another's tort]; *Fivey*, 463 [attorney may recover for services rendered in prior case on quantum meruit]; *Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 591-592 [malicious prosecution plaintiff can recover attorney fees incurred defending prior case]; *Steiner v. Eikerling* (1986) 181 Cal.App.3d 639, 643-644 [plaintiff in malicious prosecution action can recover attorney fees incurred defending prior case]; *Green v. Sherritt* (1936) 17 Cal.App.2d 732, 733-734 [jury trial on attorney-client fee dispute for services rendered in prior case]; *Copenbarger*, 3-4 [attorney fees incurred in prior case recoverable as damages for breach of contract for failing to honor settlement agreement and dismiss that prior case].)

§C. There is no rational reason for adjudicating RFF's fee claim summarily, whereas other such claims are adjudicated plenarily

Since other attorney-fee litigations afford parties procedural protections (e.g., cross-examination, discovery, jury trials) and plenary adjudications (*supra*, 62-63), there is no rational reason for adjudicating RFF's claims against Appellant summarily and without the aforementioned protections.

What justification could there possibly be for adjudicating RFF's claims summarily and without the procedural protections permitted in other fee litigations? If courts are too busy and want quick adjudications, then all attorney-fee litigations should be quickly, summarily adjudicated. It makes no sense to deprive Appellant of procedural protections, whereas other attorney-fee litigations afford such protections.

Insofar as RFF seeks contractual fees, it is senseless to adjudicate RFF's claim differently from other contractual claims – Appellant deserves plenary adjudication. The mere fact that RFF's claim pertains to attorney fees for services rendered in prior court proceedings is not a legitimate basis for summary adjudication. (*supra*, 63.)

RFF sought damages. ... Generally, the extent of damages is determined plenarily. (*Farrell v. City of Ontario* (1919) 39 Cal.App. 351, 357 ["parties ... entitled to a jury trial upon ... issues as to damages"]; *Dorsey*, 356.) There is no rational reason that RFF's damages should be determined

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summarily, whereby Appellant is deprived of procedural protections to mount his defense.

Appendix F

**Superior Court of California
County of Los Angeles**

No. SC121303

**Peter Kleidman,
*Plaintiff,***

v.

**RFF Family Partnership, LP,
*Defendant.***

File September 4, 2019

**Before, Hon. Elaine W. Mandel
*Superior Court Judge***

**EXCERPTS FROM PLAINTIFF'S OPPOSITION
TO
THE MOTION FOR ATTORNEY'S FEES**

**§IV. The summary adjudication of attorney fees
violates Plaintiff's constitutional rights to
due process and equal protection under the
14th Amendment and Article 1, §7**

The Court has the duty to interpret and enforce
the constitutions. (*In re Marriage Cases* (2008) 43
Cal.4th 757, 849-850; *Robb v. Connolly* (1884) 111
US 624, 637.) The right to due process is the right

to "fundamental fairness." (*Lassiter v. Dept. of Social Servs. of Durham Cty.* (1981) 452 US 18, 24-25.) The summary adjudication of attorney fees, occurring here, violates Plaintiff's constitutional rights to due process (14th Amend; Art. 1, §7) because it materially impairs Plaintiff's ability to mount his defense. RFF's sole source of evidence is the Parcells' Declaration. It is unconstitutional for the Court to enter a substantial monetary judgment against Plaintiff based on this evidence. Plaintiff has the due process right to compel Mr. Parcells to provide his statement through live testimony so that the trier of fact can see his demeanor and he can be cross-examined. (*NLRB v. Walton Mfg. Co.* (1962) 369 US 404, 408; *Wright v. West* (1992) 505 US 277, 296; *Goldberg*, 270; *Elkins v. Superior Court*, 41 Cal.4th 1337, 1359 (*Elkins*).) "Cross-examination is the right of the party against whom the witness is called, and the right is a valuable one as a means of separating hearsay from knowledge, error from truth, opinion from fact, and inference from recollection." (*The Ottowa* (1865) 70 US 268, 271.)

Plaintiff has the due process right to conduct discovery on Parcells' statements in his declaration. (*Goldberg*, 269-270.) For instance, Parcells's declares, "I presently charge my Client's (sic) at my customary rate of \$750 per hour." (Parcells Decl. ¶6.) Plaintiff has the due process right to conduct discovery on this statement, to (inter alia) clarify the statement's meaning and determine if it is even true. Likewise, Plaintiff deserves the opportunity to conduct discovery on all of Parcells' statements, including (inter alia) subpoenaing UCLA Extension and Santa Monica

College to ascertain the nature of Parcells' teaching experience, and obtaining records on his purported experience in trials, mediating and arbitrating. (Parcells Decl., ¶6.)

Summary proceedings with a substantial discretionary component, where the judge can unilaterally choose within a wide range of values, are prone to be unfair (hence undue) because such procedures confer unchecked, unfettered power to a singular person who can select any figure from a wide range with impunity. (*INS v. Chadha* (1983) 462 US 919, 959). Reversal on appeal is only a remote possibility, especially as to attorney fees, since reviewing standards are so disparate, fragmented and unrigorous, appellate review by and large boils down to the imposition of judicial will. For instance, this Court might be biased against Plaintiff and thence choose the upper end of a range, not because RFF proved as much, but because the Court favors RFF's interests over Plaintiff's, even if subconsciously. Mr. Parcells' tack is to paint Plaintiff in a bad light to turn the Court's sentiment against him so that it will choose the high end of a range. Parcells made derogatory comments against Plaintiff at the April 5, 2019 hearing, and has done so throughout this case. RFF and Parcells have likely succeeded in turning sentiment against Plaintiff. The Court might have also disapproved of Plaintiff's conduct on April 5, 2019 because he requested a final judgment and a jury trial in these attorney fee proceedings. Once a judge acquires sentiments regarding the parties based on prior conduct in the litigation, it becomes unfair for that judge to have such profound, unchecked power to choose among

a wide range of values when adjudicating attorney fees, for those sentiments impinge on impartiality, even if subconsciously. (*In re Murchison* (1955) 349 US 133, 138-139 (*Murichson*); *Morrissey v. Brewer* (1972) 408 US 471, 485-486 (*Morrisey*).) The only fundamentally fair way to conduct proceedings with a substantial discretionary component is to have the matter determined by a jury or judge who has not been exposed to the parties' prior conduct, since such conduct is not relevant and exposure thereto is prone to unfairly influence the decision maker's decision-making. Plaintiff fears the worst here, viz., that negative sentiment has turned against him based on his past conduct, and that he will suffer a large adverse judgment, not because RFF proves it is so entitled, but because of negative sentiment. (*Estate of Buchman* (1954) 123 Cal.App.2d 546, 559-560 ["Due process of law does not mean according to ... will of a judge"].)

Most contractual claims are asserted by filing a suit, whereby the defendant is afforded due process procedural protections, including (inter alia) ample time to develop defenses, for discovery, a full-blown trial with live testimony (and a jury trial when claims are legal), and where the plaintiff bears the burden to prove that to which it is entitled. But contractual claims for attorney fees are summary proceedings without the panoply of procedural protections afforded to claimees in other types of contractual judicial actions. This classification into two types of contract claims – claims for attorney fees and other types of contract claims – violates the equal protection clause. (14th Amend.; Art. I, §7.) It invidiously discriminates against claimees resisting contractual attorney

fees, vis-à-vis claimees resisting other types of contract claims.

There is no rational justification for this classification. The only feature peculiar to contractual attorney fee claims is that they are intimately linked to prior proceedings giving rise to the attorney fees. While it might be justifiable to allow the court to retain jurisdiction to adjudicate the contractual attorney fee claims (without the needs for a new case number an issuance of a new summons), it does not follow that the attorney fees can be adjudicated summarily. The justification cannot be based on judicial economy, as the law could well be that all contractual claims must be adjudicated summarily, which it is not. To be rational, there must be some peculiar feature of contractual attorney fees claims distinguishing them from other types of contractual claims, thereby warranting summary adjudication. Parties defending against contractual attorney fee claims should be on equal footing with parties resisting other types of contractual claims. For instance, claimees generally have rights to have factual disputes over whether there even exists a contractual right to the claim to be tried by a jury after full discovery. These precious rights (to jury trial and discovery) should not be vitiated merely because the contractual claims are for attorney fees. Assuming there is contractual liability, parties generally have rights to have factual disputes as to the claim's amount to be tried by jury after full discovery. Again, these precious rights should not be vitiated merely because the claim is for attorney fees.

One special feature of a claim for attorney fees is that a judge may have personal knowledge on the issues, and, arguably, might be an expert. But a judge's knowledge or expertise is not grounds to violate rules of evidence, including Evidence Code §703. If a party wants a judge to provide facts or opinion, said matter should be introduced as evidence via live testimony, subject to Evid. Code §703. Facts cannot be fairly established under the guise of 'judicial knowledge.' That the judge might peculiarly have evidence does not mean the matter should be adjudicated summarily. Another feature is that the value of attorney fees might be difficult for the jury to decide. However, just because a matter is difficult does not mean it should be decided summarily and without a jury trial.

To the extent a party is deprived of a jury trial merely because the contractual claims are based on attorney fees, the classification is an invidious discrimination against claimees resisting attorney fee claims, violative of the equal protection clauses. It cannot be based on judicial economy, for the constitutional and statutory law could well be that all contractual claims are adjudicated sans jury trial.

Adjudication of contractual attorney fees claims apparently allows trial courts to introduce matter (facts, evidence, expert opinion) *sua sponte*, not introduced by claimants themselves. Apparently judges can act as their own expert witnesses, *sua sponte*, even without testifying and without being subjected to cross-examination. This procedure is peculiar to attorney fees adjudications and is an invidious discrimination which unduly favors the claimant, because the claimant can thereby be

awarded attorney fees even though it was never able to prove its entitlement to those fees on its own. This procedure violates due process and the equal protection clause. A claim for contractual attorney fees, like any other contract claim, should be successful only to the extent of what the claimant proves, without assistance from the judge taking sides to help the claimant with an award of fees the claimant was itself unable to prove. Just because a judge might have knowledge or expert opinion to help the claimant, the rules of evidence and expert testimony should apply equally to attorney fee adjudications. Evidence Code §703 should apply uniformly to attorney fee adjudications (Art. IV, §16), hence it should apply equally to attorney fee adjudications, limiting a judge's power to be an expert witness for him/herself. Likewise, Evidence Code §500 should apply uniformly to attorney fee adjudications, and the trial court should never relieve the claimant from its burden of proof by supplying it with facts or evidence that the claimant itself was unable to prove and/or never introduced. Should the judge draw on his/her own experience, due process rights are violated to the extent all facts materially affecting the judge's decision are not disclosed to the claimee and subject to challenge. (*ICC*, 91-93 ["finding without evidence is ... arbitrary"]; *Abilene*, 288.)

Generally when a party makes a claim for money due on a contract, the claimant bears the burden of proof on all issues pertaining to its claim and is entitled to only as much money as to which it proves it is entitled. The Court does not help the claimant by providing new facts, evidence and/or

argument that the claimant itself did not introduce or make. To the extent claims for attorney fees are treated differently, whereby the Court can act as an expert to help the claimant, such special treatment violates the equal protection clause, since claimees attempting to resist and defend against claims of money due under a purported contractual attorney fee provision should be treated no differently than claimees attempting to resist claims of money due under any other types of contractual provisions.

RFF attempts to establish characteristics of Parcells other than the actual work performed in this case. (Mot., 4:5-7.) To the extent the law deems these characteristics relevant, it violates the equal protection clause. Claimees resisting attorney fees claims should not have to pay more merely because the attorneys happen to be more experienced. Otherwise, there is a classification based on the attorney's experience – a party facing an experienced attorney has to pay more than a party facing an inexperienced attorney, even if those two attorneys perform the exact same work. That classification is irrational. Characteristics of the attorney should not bear on the amount the claimant is entitled to receive; rather, the claimant should receive an amount based solely on the work performed. Thus the fact that Parcells allegedly taught and acted as mediator/arbitrator should be irrelevant. If the law deems it relevant, then such law violates the equal protection clause, as there is no rational justification for imposing more fees on a claimee facing an attorney who taught and acted as a mediator/arbitrator, as opposed to a claimee facing an attorney performing

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the exact same work but who did not so teach or act. Plaintiff objects to Parcells Decl., ¶6, p.6:27-7:1 as irrelevant. (Evid. Code §350.)

Appendix G

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

U.S. Constitution, Fourteenth Amend., Sec. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Civil Code § 1655

Stipulations which are necessary to make a contract reasonable, or conformable to usage, are implied, in respect to matters concerning which the contract manifests no contrary intention.

California Civil Code § 1717

(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the

negotiation and execution of the contract, and the fact of that representation is specified in the contract.

Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract which is entered into after the effective date of this section. Any provision in any such contract which provides for a waiver of attorney's fees is void.

(b)

(1) The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section.

(2) Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section.

Where the defendant alleges in his or her answer that he or she tendered to the plaintiff the full amount to which he or she was entitled, and thereupon deposits in court for the plaintiff, the amount so tendered, and the allegation is found to be true, then the defendant is deemed to be a party prevailing on the contract within the meaning of this section.

Where a deposit has been made pursuant to this section, the court shall, on the application of any party to the action, order the deposit to be invested in an insured, interest-bearing account. Interest on the amount shall be allocated to the parties in the same proportion as the original funds are allocated.

(c) In an action which seeks relief in addition to that based on a contract, if the party prevailing on the contract has damages awarded against it on causes of action not on the contract, the amounts awarded to the party prevailing on the contract under this section shall be deducted from any damages awarded in favor of the party who did not prevail on the contract. If the amount awarded under this section exceeds the amount of damages awarded the party not prevailing on the contract, the net amount shall be awarded the party prevailing on the contract and judgment may be entered in favor of the party prevailing on the contract for that net amount.

California Civil Code § 3281

Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages.

California Civil Code § 3300

For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.

California Code of Civil Procedure § 592

In actions for the recovery of specific, real, or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this Code. Where in these cases there are issues both of law and fact, the issue of law must be first disposed of. In other cases, issues of fact must be tried by the Court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this Code.

California Code of Civil Procedure § 1032

(a) As used in this section, unless the context clearly requires otherwise:

- (1) "Complaint" includes a cross-complaint.
- (2) "Defendant" includes a cross-defendant, a person against whom a complaint is filed, or a party who files an answer in intervention.
- (3) "Plaintiff" includes a cross-complainant or a party who files a complaint in intervention.
- (4) "Prevailing party" includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief,

and a defendant as against those plaintiffs who do not recover any relief against that defendant. If any party recovers other than monetary relief and in situations other than as specified, the "prevailing party" shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed, may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under Section 1034.

(b) Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.

(c) Nothing in this section shall prohibit parties from stipulating to alternative procedures for awarding costs in the litigation pursuant to rules adopted under Section 1034.

California Code of Civil Procedure § 1033.5

(a) The following items are allowable as costs under Section 1032:

(1) Filing, motion, and jury fees.

(2) Juror food and lodging while they are kept together during trial and after the jury retires for deliberation.

(3)

(A) Taking, video recording, and transcribing necessary depositions, including an original and one copy of those taken by the claimant and one copy of depositions taken by the party against whom costs are allowed.

(B) Fees of a certified or registered interpreter for the deposition of a party or witness who

does not proficiently speak or understand the English language.

(C) Travel expenses to attend depositions.

(4) Service of process by a public officer, registered process server, or other means, as follows:

(A) When service is by a public officer, the recoverable cost is the fee authorized by law at the time of service.

(B) If service is by a process server registered pursuant to Chapter 16 (commencing with Section 22350) of Division 8 of the Business and Professions Code, the recoverable cost is the amount actually incurred in effecting service, including, but not limited to, a stakeout or other means employed in locating the person to be served, unless those charges are successfully challenged by a party to the action.

(C) When service is by publication, the recoverable cost is the sum actually incurred in effecting service.

(D) When service is by a means other than that set forth in subparagraph (A), (B), or (C), the recoverable cost is the lesser of the sum actually incurred, or the amount allowed to a public officer in this state for that service, except that the court may allow the sum actually incurred in effecting service upon application pursuant to paragraph (4) of subdivision (c).

(5) Expenses of attachment including keeper's fees.

(6) Premiums on necessary surety bonds.

(7) Ordinary witness fees pursuant to Section 68093 of the Government Code.

(8) Fees of expert witnesses ordered by the court.

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(9) Transcripts of court proceedings ordered by the court.

(10) Attorney's fees, when authorized by any of the following:

- (A) Contract.
- (B) Statute.
- (C) Law.

(11) Court reporter fees as established by statute.

(12) Court interpreter fees for a qualified court interpreter authorized by the court for an indigent person represented by a qualified legal services project, as defined in Section 6213 of the Business and Professions Code, or a pro bono attorney, as defined in Section 8030.4 of the Business and Professions Code.

(13) Models, the enlargements of exhibits and photocopies of exhibits, and the electronic presentation of exhibits, including costs of rental equipment and electronic formatting, may be allowed if they were reasonably helpful to aid the trier of fact.

(14) Fees for the electronic filing or service of documents through an electronic filing service provider if a court requires or orders electronic filing or service of documents.

(15) Fees for the hosting of electronic documents if a court requires or orders a party to have documents hosted by an electronic filing service provider. This paragraph shall become inoperative on January 1, 2022.

(16) Any other item that is required to be awarded to the prevailing party pursuant to statute as an incident to prevailing in the action at trial or on appeal.

(b) The following items are not allowable as costs, except when expressly authorized by law:

(1) Fees of experts not ordered by the court.

(2) Investigation expenses in preparing the case for trial.

(3) Postage, telephone, and photocopying charges, except for exhibits.

(4) Costs in investigation of jurors or in preparation for voir dire.

(5) Transcripts of court proceedings not ordered by the court.

(c) An award of costs shall be subject to the following:

(1) Costs are allowable if incurred, whether or not paid.

(2) Allowable costs shall be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation.

(3) Allowable costs shall be reasonable in amount.

(4) Items not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion.

(5)

(A) If a statute of this state refers to the award of "costs and attorney's fees," attorney's fees are an item and component of the costs to be awarded and are allowable as costs pursuant to subparagraph (B) of paragraph (10) of subdivision (a). A claim not based upon the court's established schedule of attorney's fees for actions on a contract shall bear the burden of proof. Attorney's fees allowable as costs pursuant to subparagraph (B) of paragraph (10) of subdivision (a) may be fixed as follows: (i) upon a noticed motion, (ii) at the time a

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statement of decision is rendered, (iii) upon application supported by affidavit made concurrently with a claim for other costs, or (iv) upon entry of default judgment. Attorney's fees allowable as costs pursuant to subparagraph (A) or (C) of paragraph (10) of subdivision (a) shall be fixed either upon a noticed motion or upon entry of a default judgment, unless otherwise provided by stipulation of the parties.

(B) Attorney's fees awarded pursuant to Section 1717 of the Civil Code are allowable costs under Section 1032 as authorized by subparagraph (A) of paragraph (10) of subdivision (a).

California Code of Civil Procedure § 2009

An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, and in uncontested proceedings to establish a record of birth, or upon a motion, and in any other case expressly permitted by statute.