No. 24-

IN THE

Supreme Court of the United States

MAHER MEMARZADEH,

Petitioner,

v.

LOTTIE COHEN, AND
LAW OFFICE OF LOTTIE COHEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a state court's action in issuing terminating sanctions against a civil litigant based on a medical inability to comply with discovery obligations violates due process.

II. Whether a state court's action in issuing terminating sanctions against a civil litigant on account of a disability violates the Americans with Disabilities Act.

STATEMENT OF RELATED CASES

- *Memarzadeh v. Cohen, et al.,* No. BC704662, Los Angeles County Superior Court. Judgment entered January 17, 2023.

- *Memarzadeh v. Cohen, et al.,* Nos. B327967, B329476, California Court of Appeal, Second Appellate District, Division One. Opinion issued September 23, 2024.

- *Memarzadeh v. Cohen, et al.,* No. S287722, Supreme Court of California. Order denying review entered December 31, 2024.

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JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) because this petition for writ of certiorari seeks review of a decision by the highest court of a state which involves issues of federal statutory and constitutional law. The California Supreme Court's order denying review was entered on December 31, 2024. On March 27, 2025, Justice Kagan granted a 60-day extension of time, to and including May 30, 2025, to file this petition for writ of certiorari (App. No. 24A916).

STATUTORY AND CONSTITUTIONAL PROVISIONS

U.S. Const., Amend. XIV, section 1, in relevant part:

> 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.

42 U.S.C. § 12132 (Americans with Disabilities Act)

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

INTRODUCTION

As this Court has recognized, access to the courts is a basic right protected by both the Due Process Clause of the Fourteenth Amendment and the Americans with Disabilities Act. Yet, Petitioner Maher Memarzadeh ("Dr. Memarzadeh") was denied that basic right when a state court imposed terminating sanctions against him based on his inability, due to a medical condition, to sit for a deposition on the date established by the court. This Court should grant certiorari to settle two important issues of federal law: whether such a deprivation of the right of access to the courts violates due process and whether it violates the Americans with Disabilities Act.

The answer to both of these questions is yes. This Court has long held that discovery sanctions, particularly terminating sanctions, are subject to due process constraints. *See Societe Internationale pour Participations Industrielles et Commerciales, S.A., etc. v. Rogers,* 357 U.S. 197 (1958). In *Societe Internationale,* the Court overturned a terminating sanction on due process grounds where the litigant was unable to comply with a discovery production order due to legal restraints. The same constraint applies here. Dr. Memarzadeh

was unable to comply with the requirement to sit for a deposition because of a medical condition. Yet, the California courts upheld the terminating sanction here, contrary to due process and at odds with *Societe Internationale* and its progeny. The California courts' decisions are also directly at odds with a Tenth Circuit case, which addressed precisely the same issue and held that terminating sanctions could not be imposed where a litigant was unable to complete his deposition for medical reasons. See *Gocolay v. New Mexico Federal Savings & Loan Association,* 968 F.2d 1017 (10th Cir. 1992).

Issuing terminating sanctions under these circumstances is equally violative of the Americans with Disabilities Act (ADA). The ADA has long protected the rights of those with disabilities to have the same access to the services of public entities as others. This Court has recognized that this protection includes the right of access to state courts. *See Tennessee v. Lane,* 541 U.S. 509 (2004). While *Lane* involved physical access to courthouses, the right of access to judicial proceedings is at least as fundamental. Dr. Memarzadeh plainly suffered from a disability and on account of that disability was denied access to the courts for redress of his legal wrongs. The denial of access violated his rights under the ADA.

This Court should grant certiorari to settle these two important issues of federal law. Trial courts, both state and federal, have wide discretion to impose terminating sanctions, but that discretion is bounded by the constraints of the Constitution and statutory law. This Court should grant certiorari to make clear that the denial of access to the courts based on a litigant's medical condition violates both due process and the ADA.

STATEMENT OF THE CASE

I. Factual History

After receiving a Ph.D. in history from UCLA, Dr. Maher Memarzadeh sought employment at over 60 colleges and universities. (AOB 7.) None offered him an academic position. (*Id.*) Dr. Memarzadeh believed he was the victim of employment discrimination based on his Iranian national origin and appearance. (*Id.*; see 1AA0205.)

Dr. Memarzadeh hired attorney Roger Diamond to represent him in connection with a potential employment discrimination lawsuit. (1AA0205.) Mr. Diamond contacted and interviewed one of Dr. Memarzadeh's former professors, who suggested a racist cause for his unemployment, referring to his nationality ("Iranian"), the fact that he was "very hairy" and had "a lot of hair on his neck and arms," and that he was "very conspicuous." (App. 66a.) The former professor made remarks about Dr. Memarzadeh's race, national origin, and ethnicity. (App. 67a.) Despite having cause to do so, Mr. Diamond never filed a lawsuit, and Dr. Memarzadeh believed Mr. Diamond had negligently represented him. (1AA-0205.)

Dr. Memarzadeh met with Defendant/Respondent Lottie Cohen on July 14, 2016 at her office and discussed a lawsuit against Mr. Diamond. (App. 65a.) In months of subsequent correspondence, Ms. Cohen repeatedly inquired into whether Dr. Memarzadeh had retained a substitute attorney for the professional negligence case that needed expert testimony against Mr. Diamond. (App. 64a-66a.) Ms. Cohen did not reveal to Dr. Memarzadeh that she viewed the case as based on matters of law, not fact,

and that she did not intend to conduct written discovery or Mr. Diamond's deposition. (App. 64a.) In justifiable reliance on Ms. Cohen's representations and concealments, Dr. Memarzadeh hired Ms. Cohen to file suit against Mr. Diamond for negligence/legal malpractice, breach of contract, breach of fiduciary duty, and misrepresentation. (App. 64a-65a; see also 1AA-0205.) Had Ms. Cohen revealed her true intentions, Dr. Memarzadeh would have hired different counsel. (App. 64a-65a, 81a) As a result of the conduct of both Mr. Diamond and Ms. Cohen, Dr. Memarzadeh suffered a protracted absence from gainful employment, lost wages, and interruption to his income stream. (App. 65a.)

During the pendency of the litigation against Mr. Diamond, Ms. Cohen never conducted written discovery. (App. 66a.) Had she done so, she would have discovered the racist remarks described above. (App. 66a-67a.) Ms. Cohen also never conducted a deposition of Mr. Diamond. (App. 68a.) Had she done so, she would have discovered that Mr. Diamond engaged in a breach of his fiduciary duty by developing a relationship with one of Dr. Memarzadeh's former professors in order "to prove plaintiff wrong." (App. 69a-70a.) Written discovery and a deposition would also have revealed that Mr. Diamond lacked any direct litigation experience in employment discrimination. (App. 73a.) Overall, written discovery and a deposition would have allowed Ms. Cohen to identify tangible proof of how Mr. Diamond's negligence, breaches of duty, and misrepresentations were the causes for him failing to file a lawsuit upon his retention in 2011. (App. 73a-74a.)

Written discovery and a deposition also would have informed Ms. Cohen about the need to call a standard

of care expert witness. (App. 70a-71a.) And Ms. Cohen should also have appreciated the need for an expert in university hiring practices. (App. 69a.) Instead, Ms. Cohen, contrary to her earlier statements about the need for expert testimony, focused on ruling out expert witnesses during office meetings in February 2017. (App. 71a.) Dr. Memarzadeh recalls Ms. Cohen's aggressiveness, intimidation, oppression, and coercion. (*Id.*)

Then, in her trial brief, Ms. Cohen completely changed the theory of the case from the original complaint. (App. 77a.) The complaint had alleged that Mr. Diamond was negligent and in breach of his duties for not filing a lawsuit. (App. 77a-78a.) In her trial brief, she argued that Mr. Diamond should *not* have filed the lawsuit because it lacked merit, and therefore Mr. Diamond should not have charged Dr. Memarzadeh anything for his time. (App. 77a.) Ms. Cohen made this dramatic change in theory without Dr. Memarzadeh's knowledge or consent. (App. 77a-78a.)

The case went to a bench trial. (*See* 1AA0218-0222.) Ms. Cohen presented her theory that Dr. Memarzadeh's claims were not meritorious, again without Dr. Memarzadeh's knowledge or consent. (1AA0219.) She did not call any expert witnesses. (App. 79a.) Ms. Cohen also failed to make a motion or even object to Mr. Diamond introducing the entire case file as one document. (App. 74a-75a.) Ms. Cohen also failed to hire a court reporter for trial (in California state courts, court reporters are not provided by the courts). (App. 75a.) Ultimately, given the lack of any expert testimony, the trial judge rejected Ms. Cohen's theory. (App. 79a.) In its ruling, the trial judge noted that Ms. Cohen's theory could not support a malpractice claim and that Ms. Cohen had failed to meet the burden of proof

as to any of the causes of action, specifically noting there was no way for Mr. Diamond to have suspected that Dr. Memarzadeh's claims lacked merit. (1AA0218-0222.) The trial judge entered judgment in Mr. Diamond's favor. (*Id.*)

II. Superior Court Proceedings

A. The Complaints and Demurrers

On May 1, 2018, Dr. Memarzadeh filed suit against Ms. Cohen based on her representation of him in his lawsuit against Mr. Diamond. (1AA0038-0057.) He filed a First Amended Complaint on November 9, 2018. (1AA0161-0191.) He alleged causes of action for (1) legal malpractice, (2) breach of fiduciary duty, (3) fraud (intentional misrepresentation), (4) fraud (concealment), (5) breach of contract, and (6) breach of the implied covenant of good faith and fair dealing. (*Ibid.*)

Ms. Cohen filed a demurrer as to each cause of action in the First Amended Complaint. (1AA0117-0138.) The trial court sustained the demurrer with leave to amend as to the first, third, fourth, and fifth causes of action, and overruled the demurrer as to the second and sixth causes of action. (1AA0193-0202.)

Dr. Memarzadeh then filed a Second Amended Complaint, asserting the same six causes of action. (1AA0203-0255.) Ms. Cohen demurred again to the first, third, fourth, and fifth causes of action. (1AA0256-0277.) The trial court sustained, without leave to amend, the demurrer as to the first, third, and fourth causes of action, and overruled the demurrer as to the fifth cause of action. (1AA0353-0364.) In its minute order, the court "advised"

counsel that "based on the Court's rulings on Defendants' demurrers, Plaintiff's remaining causes of action are based solely on Plaintiff's allegation that Defendants overbilled Plaintiff." (1AA0352.)

B. The Trial Court's Orders Compelling Dr. Memarzadeh's Deposition and Imposition of Terminating Sanctions

Counsel for Ms. Cohen first noticed Dr. Memarzadeh's deposition for April 21, 2022, but Dr. Memarzadeh could not appear because he was suffering from an apparent middle ear infection and could not travel from Northern California to Southern California for the deposition. (App. 6a; 1AA0500-0501.) Counsel renoticed the deposition, and the parties ultimately agreed to conduct the deposition on September 20, 2022.[1] The week before the scheduled deposition, Dr. Memarzadeh had a recurrence of severe ear pain, with dizziness and syncope (passing out), which sent him to the emergency room on September 16, 2022, and again on September 22, 2022 (2AA0783-0784; 2AA0794; 3AA1046, 3AA1050; App. 41a-44a.) The condition prevented him from traveling to Southern California, and he asked to postpone the deposition and to continue the trial. (2AA0775-0808.) Ms. Cohen's counsel refused to postpone the deposition and opposed a trial continuance. (2AA0809-0819; App. 6a.) Ms. Cohen's

1. Meanwhile, Dr. Memarzadeh moved for disqualification of the trial judge. (2AA0559-0760.) The judge refused to disqualify himself due to what he claimed was improper service, even though the statement of disqualification had been timely delivered to his courtesy copy box. (2AA0577-0584.) Dr. Memarzadeh challenged the judge's refusal to disqualify himself in the state appellate courts but does not challenge it in this petition.

counsel also applied ex parte to compel his attendance at deposition. (2AA0933-1011; App. 6a.)

On September 26, 2022, Dr. Memarzadeh opposed the application to compel, including documentary evidence of his medical condition. (3AA1018-1163.) Specifically, he pointed out that he suffered from a recurrence of a poorly diagnosed ear infection that prevented him from traveling for his deposition. (3AA1018-1163; App. 6a-7a.) He attached to his opposition, among other things, a document signed by a health care provider dated September 22, 2022, stating he should not fly for two weeks or until cleared by a doctor, as well as a document from the emergency room reflecting that he had been seen on September 22, 2022 for ear pain and an episode of passing out. (3AA1045-1052; App. 6a-7a, 42a-44a)

The trial court denied the ex parte application, as well as Dr. Memarzadeh's application to continue the trial, but set the matter for hearing on October 26, 2022. (3AA1164-1168; App. 7a.) On October 17, 2022, Dr. Memarzadeh filed a second ex parte application to continue the trial. (3AA1169-1311.) He attached a verified statement explaining that on October 3, 2022, he had seen a physician who told him he was at significant risk for cardiac arrest. (3AA1194-1196; App. 44a-49a.) He further explained that on October 11, 2022, his primary care physician advised him to go to the emergency room and seek a cardiology referral, but he was unable to go because he was unable to locate a driver. (*Id.*) Dr. Memarzadeh also attached to his application a doctor's note establishing that on October 12, 2022, he saw an otolaryngologist who ordered further evaluation and recommended that he not fly for a minimum of 12 weeks. (3AA1195; 3AA1311; App. 50a.) Ms. Cohen's counsel opposed the ex parte application. (3AA1312-1323.)

At the hearing on October 26, 2022, the court acknowledged receiving the letter from Dr. Memarzadeh's physician stating that he could not fly for 12 weeks. (RT 313.) The court stated that its tentative ruling was to continue the trial date and to compel Dr. Memarzadeh's appearance at a deposition. (App. 7a.) By this time in the hearing, the court noted that Dr. Memarzadeh, who was appearing remotely and in pro per, had dropped off the call, and he apparently never reconnected. (App. 7a.)

Ms. Cohen's counsel objected to continuing the trial, and as to Dr. Memarzadeh's deposition, stated, "We'll waive it if you start trial right now." (App. 7a.) As to the motion to compel, Ms. Cohen's counsel stated, "That motion was filed three weeks ago, ex parte, hoping the depo would happen before today. Since we're here today, we're ready to try the case. I'll just cross-examine him on the stand." (App. 7a.) Notwithstanding Ms. Cohen's counsel's express waiver of the right to take Dr. Memarzadeh's deposition, the trial court continued the trial to February 8, 2023, and notwithstanding Dr. Memarzadeh's medical orders not to fly for 12 weeks, ordered Dr. Memarzadeh to appear at a deposition either in person or by videoconference on December 9, 2022. (3AA1329-1333; App. 8a.) The court declined to order monetary sanctions. (3AA1333.)

On December 6, 2022, Dr. Memarzadeh filed a declaration stating that he could not attend his deposition in person because his ear disorder prevented him from flying and that he could not attend remotely because he was scheduled for an MRI that day and also had privacy concerns regarding the use of the Zoom platform that implicated his due process rights. (3AA1342-1343; App. 8a-9a.)

On December 7, 2022, Dr. Memarzadeh communicated with Ms. Cohen's counsel by email and explained his scheduling conflict. (App. 9a-10a.) Ms. Cohen's counsel made no offer to reschedule the deposition and instead threatened sanctions. (App. 10a.) Dr. Memarzadeh did not appear for his deposition on December 9, 2022. (App. 9a.)

On December 12, 2022, Ms. Cohen's counsel filed an ex parte application to compel Dr. Memarzadeh's attendance at his deposition and sought monetary, issue, or terminating sanctions. (3AA1371-1458; App. 9a.) Dr. Memarzadeh opposed, again pointing out that he had an MRI scheduled on the same day as the deposition and noting his communications with opposing counsel prior to the deposition date. (3AA1459-1517.) Dr. Memarzadeh also explained that symptoms had resumed, including syncope, nausea, vertigo, and vomiting, and he attached the MRI order documenting the date of his scheduled brain MRI and his symptoms. (3AA1461; 3AA1466; 3AA1470-1471.) The trial court treated the ex parte application as a motion and set a hearing for January 17, 2023 and allowed additional briefing. (4AA1519-1522; App. 10a.)

On January 3, 2023, Dr. Memarzadeh filed additional opposition to the motion and also sought a continuance of the trial, his deposition, and all related hearings due to his ongoing illness and the risk of death or irreparable harm if he were made to travel. (4AA1536-1607.) He explained and attached doctor's notes documenting that he was unable to fly to Southern California for the next three to four months while he was being diagnosed and treated and also that he had extremely high blood pressure (193/104) indicative of a hypertensive crisis, which needed to be addressed as soon as possible due to the risk of cardiac arrest or stroke.

(4AA1537-1557; App. 51a.) He also explained that he was still awaiting a proper diagnosis as he was awaiting results of an MRI, blood work, and an EKG. (4AA1554.) And he explained that his continued symptoms of dizziness, acute nerve pain, nausea, vertigo, vomiting, and syncope prevented him from reading, concentrating, and driving. (4AA1556.)

On January 13, 2023, Dr. Memarzadeh again submitted documentation of his medical condition. (4AA1628-1634.) He reiterated that he was unable to travel to Southern California for his deposition and that he was suffering from a hypertensive crisis. (4AA1628.) And he again attached medical documentation of his condition. (4AA1631.)

Notwithstanding the substantial evidence submitted documenting Dr. Memarzadeh's medical condition and his inability to sit for his deposition, on January 17, 2023, the trial court issued a written order imposing terminating sanctions pursuant to California Code of Civil Procedure § 2023.030. (App. 27a-35a.) The court found that Dr. Memarzadeh had "engaged in conduct that is a misuse of the discovery process by willfully disobeying the court's October 26, 2022 order" and failing to appear at his deposition. (App. 30a.) The court rejected Dr. Memarzadeh's contention that his illness prevented his appearance, stating that he had not produced competent medical evidence that he could not have appeared remotely, even though Dr. Memarzadeh had explained that he had an MRI scheduled on the day of his deposition and also had privacy concerns about the Zoom platform. (App. 30a-31a.)

The trial court found that Dr. Memarzadeh's failure to appear at his deposition unduly prejudiced Ms. Cohen,

even though her counsel had waived his right to take the deposition and had been willing to proceed to trial without it. (App. 33a.) The court also found that a less severe sanction would not produce compliance, even though no lesser sanction had ever been imposed. (App. 33a-34a.)

In connection with post-judgment proceedings, Dr. Memarzadeh submitted additional evidence regarding his medical condition, all of which postdated the court's hearing. He submitted a note from his doctor from an encounter on January 25, 2023 indicating that he could not fly or drive and, due to his severe nausea and vomiting, should not be "staring at anything for more than 5 to 10 minutes." (4AA1677; App. 52a.) He also submitted a letter and two declarations under penalty of perjury from one of his doctors explaining that he had experienced multiple episodes of syncope and one presyncopal episode under stressful situations and specifically noting that the stressful situations have related to the presence of a camera and recommending that "any appearance before a camera be suspended." (4AA1732; 4AA1760; 4AA1762; App. 53a-55a.) He also submitted a declaration under penalty of perjury from another doctor in May 2023, reflecting that he had "continued symptoms of syncope, vertigo, disequilibrium, severe nausea, vomiting, shortness of breath, chest pain radiating to the arms, rapid pulse rate, and pounding heart." (4AA1764; App. 56a.) The doctor further declared that his medical condition "causes him additional unusual and extreme stress well beyond what is reasonable during video recordings (i.e. Zoom Meetings)." (App. 56a.) The doctor further explained that "[u]ntil his symptoms are further evaluated, he should not fly, drive, sit for an oral deposition, or expose himself to situations and circumstances induced by appearances before a camera." (App. 56a.) The doctor stated: "The

symptoms may be a result of a more serious medical condition involving cardiac or underlying neurological causes and are potentially harmful and dangerous to his health." (App. 57a.) Finally, the doctor noted that further evaluation and testing were still being done by medical specialists. (App. 57a.) Thus, it was clear from the chronology of the doctors' notes and declarations that Dr. Memarzadeh's condition was the same condition, which had been persisting, continuing, developing, and worsening since September 2022.

III. Appellate Proceedings

Dr. Memarzadeh timely filed an appeal from the trial court's order imposing terminating sanctions. In his appeal, he challenged, among other things, the order imposing terminating sanctions. (AOB 21-22; ARB 9-10.) Dr. Memarzadeh pointed out that submitting to a videotaped deposition was not provided for under California rules and to do so would have been injurious to his health. (ARB 9.)

The Second District Court of Appeal, Division One, handed down its opinion on September 23, 2024. The court upheld the trial court's ruling ordering a terminating sanction. (App. 21a-24a.) The court dismissed the evidence that submitting to a videotaped deposition would have been injurious to Dr. Memarzadeh's health:

> Finally, in his reply brief Memarzadeh argues he never refused to sit for a deposition, only for a videotaped deposition, and Cohen "made no effort to demonstrate that [Cohen] had a right to videotape [Memarzadeh's] deposition in light of [Memarzadeh] refusing to agree to do

> so based upon his own physicians' directions." Although Memarzadeh fails to provide any record citation supporting this contention, we assume he is referring to a declaration dated May 9, 2023 attached to Memarzadeh's motion to stay execution of judgment pending appeal. The declaration, purportedly from a physician, states that Memarzadeh's "medical condition causes him additional unusual and extreme stress well beyond what is reasonable during video recordings (i.e. Zoom Meetings)." The declaration further recites, "If a video deposition of . . . Memarzadeh is taken his symptoms would re-occur," and "he should not fly, drive, sit for an oral deposition, or expose himself to situations and circumstances induced by appearances before a camera."
>
> This evidence was untimely, filed months after the trial court had imposed the terminating sanction and ordered the case dismissed. It is disingenuous for Memarzadeh to contend he did not refuse to sit for deposition, only a videotaped deposition. As summarized by the trial court, the evidence in the record indicates Memarzadeh repeatedly refused to sit for any type of deposition, and continually came up with varied excuses for doing so. At no point prior to the terminating sanction did he present evidence that he was medically unable to participate in a deposition by videoconference or recorded on video.

(App. 24a.)

The Court of Appeal's opinion became final on October 23, 2024. Dr. Memarzadeh did not file a petition for rehearing.

IV. Review in the California Supreme Court

Dr. Memarzadeh filed a timely petition for review in the California Supreme Court on November 4, 2024. In his petition, he challenged, among things, the California Court of Appeal's affirmance of the trial court's order issuing a terminating sanction. (PFR 29-41.)

Dr. Memarzadeh specifically argued that the granting of a terminating sanction in his case violated his right to be free of discrimination based on a medical disability under the Americans with Disabilities Act (ADA). (PFR 33-34; App. 39a.) He also argued that to issue terminating sanctions in such a case deprives the disabled person of access to the courts and his or her right to due process. (PFR 34; App. 40a.)

The California Supreme Court denied review in a summary order dated December 31, 2024. (App. 1a)[2]

2. Following the denial of review, Dr. Memarzadeh filed a grievance with the ADA coordinator for the California courts, arguing that the California Supreme Court's action in allowing the lower courts' rulings to stand violated his right to access to the courts under the ADA. To date, the ADA coordinator has not responded to Dr. Memarzadeh's grievance.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT ISSUING TERMINATING SANCTIONS BASED ON A MEDICAL INABILITY TO COMPLY WITH DISCOVERY OBLIGATIONS VIOLATES DUE PROCESS

This Court has recognized that due process concerns constrain a trial court's discretion to impose a terminating sanction for a discovery violation. However, the Court has not addressed the due process concerns that are implicated by issuing a terminating sanction when a litigant is unable for medical reasons to comply with discovery obligations.

This Court should grant certiorari in this case to resolve this important issue. Here, the trial court issued terminating sanctions as a first sanction against Dr. Memarzadeh, and the Court of Appeal affirmed and the California Supreme Court denied review, even though the record clearly established that any failure to comply was due, not to willfulness or bad faith, but due to Dr. Memarzadeh's medical inability to comply. The California courts' decisions in this case conflict with the relevant decisions of this Court as well as with a Tenth Circuit case directly on point. This Court should grant certiorari and clarify that issuing a terminating sanction under these circumstances violates due process.

A. This Court Has Previously Recognized that Terminating Sanctions for an Inability To Comply with Discovery Obligations Violate Due Process

Long ago, this Court recognized that the Due Process Clause of the Fifth Amendment placed constraints on trial courts' ability to impose terminating sanctions for discovery violations. *Societe Internationale pour Participations Industrielles et Commerciales, S.A., etc. v. Rogers,* 357 U.S. 197 (1958). In *Societe Internationale,* the district court dismissed a Swiss company's complaint with prejudice following its failure to comply with a pretrial order to produce documents. *Id.* at 199-203. The Swiss company failed to produce the documents, not out of bad faith, but because it was prevented by Swiss law from doing so. *Id.* at 201.

In considering the due process implications of the district court's ruling, the Court looked to two prior precedents, *Hovey v. Elliott,* 167 U.S. 409 (1897) and *Hammond Packing Co. v. State of Arkansas,* 212 U.S. 322 (1909). *Societe Int'l,* 357 U.S. at 209-10. In *Hovey,* the Court had held that due process was denied to a defendant whose answer was struck due to failure to obey a court order. *Id.* at 209. In *Hammond,* the Court had held that a state court, consistently with the Due Process Clause of the Fourteenth Amendment, could strike the answer and render default judgment against a defendant who refused to produce required documents. *Id.* at 209-10. The Court in *Societe Internationale* emphasized that due process was satisfied in *Hammond* because the court applied a presumption that "the refusal to produce material evidence '* * * was but an admission of the want of merit

in the asserted defense.'" *Id.* at 210 (quoting *Hammond,* 212 U.S. at 350-51). The Court further emphasized that in *Hammond,* "the defendant had not been penalized '* * * for a failure to do that which it may not have been in its power to do.' All the State had required 'was a bona fide effort to comply with an order * * *, and therefore any reasonable showing of an inability to comply would have satisfied the requirements * * *' of the order." *Id.* (quoting *Hammond,* 212 U.S. at 347).

The Court in *Societe Internationale* concluded:

> These two decisions leave open the question whether Fifth Amendment due process is violated by the striking of a complaint because of a plaintiff's inability, despite good-faith efforts, to comply with a pretrial production order. The presumption utilized by the Court in the Hammond case might well falter under such circumstances. Certainly substantial constitutional questions are provoked by such action.

Id. (citation omitted). In light of these constitutional concerns, the Court held that "Rule 37 [of the Federal Rules of Civil Procedure] should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner." *Id.* at 212.

The Court reaffirmed *Societe Internationale* in *National Hockey League v. Metropolitan Hockey Club,*

Inc., 427 U.S. 639, 641 (1976). On the facts of that case, however, the Court concluded that "the extreme sanction of dismissal was appropriate in this case by reason of respondents' 'flagrant bad faith' and their counsel's 'callous disregard' of their responsibilities." *Id.* at 643.

And the Court once again reaffirmed that due process constrains the imposition of discovery sanctions in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694 (1982). There, the Court concluded that "[d]ue process is violated only if the behavior of the defendant will not support the *Hammond Packing* presumption." *Id.* at 706. The Court upheld the imposition of a sanction of deeming the jurisdictional facts established in that case based on the district court's finding that the defendants "'haven't even made any effort to get this [jurisdictional] information up to this point'" and where there was no evidence of an inability to comply. *Id.* at 707-08 (quoting district court).

B. The Court of Appeal's Decision Here Is in Conflict with the Relevant Decisions of this Court

The Court of Appeal upheld the trial court's imposition of a terminating sanction, and the California Supreme Court denied review, where the evidence amply established Dr. Memarzadeh's inability to comply due to his medical condition. Imposing a terminating sanction under these circumstances, in the absence of any evidence of bad faith or the logical application of the *Hammond* presumption, is directly contrary to *Societe Internationale* and its progeny. The Court should grant certiorari to make clear that a terminating sanction cannot, consistent with due

process and consistent with this Court's precedents, be imposed where a litigant is unable to comply with his discovery obligations due to a medical condition. *See* S. Ct. R. 10(c).

Here, as set forth above, Dr. Memarzadeh never "refused" to sit for his deposition, as the Court of Appeal stated; rather, he was ***unable*** to sit for his deposition within the limited timeframe permitted by the trial court. Dr. Memarzadeh provided documentation of his medical condition in eight separate filings on May 4, 2022, September 20, 2022, September 26, 2022, October 17, 2022, December 6, 2022, December 12, 2022, January 3, 2023, and January 13, 2023 – all prior to the trial court's order imposing terminating sanctions on January 17, 2023. (1AA0493-0503; 2AA0775-0808; 3AA1018-1163; 3AA1169-1311; 3AA1334-1370; 3AA1459-1516; 4AA1560-1607; 4AA1616-1646.)

In his filings, Dr. Memarzadeh made clear he failed to appear at his initially noticed deposition due to what was initially diagnosed as a middle ear infection. (1AA0500-0501; App. 6a.) Before the rescheduled deposition, he suffered a recurrence of severe ear pain, this time accompanied by dizziness and syncope, which sent him to the emergency room twice in one week and prevented him from traveling to his deposition. (2AA0775-0808; 3AA1018-1163; App. 41a-44a.) Defense counsel nevertheless sought to compel his deposition. (2AA0933-1011; App. 6a.)

Dr. Memarzadeh thereafter was told by a physician that he was at significant risk for cardiac arrest and was also told by an ENT specialist in October 2022 not to fly for 12 weeks. (3AA1194-1195; 3AA1311; App. 46a,

50a.) Nevertheless, the court ordered him to appear for deposition on December 9, 2022. (3AA1329-33; App. 8a.) Prior to that date, Dr. Memarzadeh communicated to the court and counsel that his ear disorder prevented him from flying to attend his deposition in person and that he could not appear by Zoom because he had an MRI scheduled for that day and in any event objected to a Zoom appearance because of privacy concerns. (3AA1342-1343; App. 8a-9a.)

When defense counsel again sought to compel his attendance at a deposition and sought sanctions, Dr. Memarzadeh explained that his symptoms had resumed and worsened, now including syncope, nausea, vertigo, and vomiting. (3AA1461; 3AA1466; 3AA1470-71.) He submitted doctor's notes ordering him not to fly for three to four months while he was being diagnosed and treated, and also documenting that he had extremely high blood pressure indicating a hypertensive crisis, which put him at risk for heart attack or stroke. (4AA1537; 4AA1542; 4AA1545-1546.) He also explained that his continued and worsening symptoms of dizziness, acute nerve pain, nausea, vomiting, vertigo, and syncope prevented him from reading, concentrating, and driving. (4AA1556.)

Despite all this medical evidence establishing Dr. Memarzadeh's inability to appear for deposition, the trial court imposed a terminating sanction and dismissed the case. (App. 27a-35a.) The medical evidence before the trial court at that time amply established that Dr. Memarzadeh was unable, for medical reasons, to appear for his deposition. At no point prior to this terminating sanction was Dr. Memarzadeh not affected by the symptoms of his medical condition.

But there was more. Dr. Memarzadeh subsequently submitted several statements and declarations under penalty of perjury from doctors indicating his symptoms were persistent and severe and prevented him from appearing either in person or by videoconference. (App. 52a-57a.) Specifically, one of his doctors noted that he could not drive and should not be "staring at anything for more than 5 to 10 minutes." (4AA1677; App. 52a.) Another doctor explained that he had experienced multiple episodes of syncope under stressful situations, which included the presence of a camera, and recommended that he not appear before a camera. (4AA1732; 4AA1760; 4AA1762; App. 53a-55a.) And another doctor identified the worsening symptoms of "syncope, vertigo, disequilibrium, severe nausea, vomiting, shortness of breath, chest pain radiating to the arms, rapid pulse rate, and pounding heart" and declared that his medical condition "causes him unusual and extreme stress beyond what is reasonable during video recordings (i.e. Zoom Meetings)." (4AA1764; App. 56a.) The doctor also stated that "the symptoms may be the result of a more serious medical condition involving cardiac or underlying neurological causes and are potentially harmful and dangerous to his health." (App. 57a)[3]

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3. The Court of Appeal dismissed all of this subsequent evidence on the ground that it was submitted after the trial court's decision imposing sanctions. However, this Court has recognized that an appellate court has discretion in appropriate cases to decide an issue in the first instance. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976) ("Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, or where injustice might otherwise result.") (citations and internal quotation marks omitted). This is such a case. Dr. Memarzadeh

Thus, it was unfair, conclusory, and speculative for the appellate court to accuse or characterize Dr. Memarzadeh of being "disingenuous" in asserting that he did not refuse to sit for a deposition. The evidence contained in the four volumes of the appellate appendices do not reveal such a conclusion. Dr. Memarzadeh only requested to postpone an in-person deposition due to his temporary inability to travel. And he was unable to submit to a videotaped deposition, at first due to a scheduling conflict and subsequently based on his physicians' solemn advice not to appear in front of a camera. Dr. Memarzadeh did not make "varied excuses" but rather supplied the court with information about his medical condition as it was developing over time.

To uphold terminating sanctions under these extreme circumstances documenting an inability to comply runs afoul of this Court's decision in *Societe Internationale*. As the Court made clear there, due process prohibits the imposition of terminating sanctions where a litigant is unable to comply with discovery obligations. 357 U.S. at 209-12. At least as much as in *Societe Internationale,* where the inability to comply was caused by a legal restraint, Dr. Memarzadeh was unable to comply due to a physical restraint, namely his serious medical condition.

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was not "untimely" in presenting his evidence; he submitted the medical evidence as it evolved and developed over time. The Court of Appeal should have considered all the evidence and concluded that there was a due process violation in the dismissal of Dr. Memarzadeh's case based on the overwhelming evidence that Dr. Memarzadeh was unable to appear for his deposition due to a serious medical disability. This Court likewise should consider all the evidence in conducting its evaluation of this case.

Nor was there evidence of bad faith, as in *National Hockey League*. The medical evidence establishes that Dr. Memarzadeh's failure to appear at his deposition was due to his inability to do so, not any bad faith.[4]

Likewise, the *Hammond* presumption, applied in *Insurance Corporation of Ireland,* does not apply here. Where, as here, noncompliance is due to circumstances beyond a litigant's control, it cannot logically be presumed that it reflects an admission that a claim lacks merit. Dr. Memarzadeh's failure to appear for his deposition reflects only his inability to do so due to his medical condition, and such an inability says nothing about his assessment of the merits of his claim.

This Court should make clear that ordering terminating sanctions under these circumstances violates due process. The Court's prior precedents make clear that due process is violated when terminating sanctions are imposed under conditions where the litigant is legally restrained from complying. An even more compelling case exists for finding a due process violation when the litigant is physically restrained from complying due to a serious medical condition. This Court should grant certiorari and extend *Societe Internationale* to situations where noncompliance with discovery orders is the result of a medical inability to comply.

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4. The trial court found that Dr. Memarzadeh's failure to appear was "willful." (App. 32a.) However, that finding was clearly erroneous in light of the overwhelming medical evidence establishing Dr. Memarzadeh's inability to appear.

C. The California Court of Appeal's Opinion Is in Direct Conflict with an Opinion of the Tenth Circuit Court of Appeals

This Court should grant certiorari for the additional reason that the Court of Appeal's decision is at odds with that of a United States Court of Appeals. *See* S. Ct. R. 10(b). The need for uniformity on the issue of due process constraints on the use of terminating sanction is great. The unfairness of imposing terminating sanctions on a litigant who is unable to comply with discovery obligations due to a medical condition is only exacerbated when it is inconsistent with the rulings of other courts.

In *Gocolay v. New Mexico Federal Savings & Loan Association,* 968 F.2d 1017 (10th Cir. 1992), the Tenth Circuit addressed a nearly identical situation to the one at issue here. There, the elderly plaintiff brought suit to recover money allegedly converted from his deposits at the defendant savings and loan. *Id.* at 1018. He suffered from chronic heart, vascular, and liver diseases. *Id.* at 1019. Though he completed three days of his deposition, he was unable to complete the deposition. *Id.* Before completing the deposition, he began having severe chest pains, and several doctors warned that the deposition should not continue, warning that the stress associated with the deposition might result in the plaintiff's death. *Id.* Subsequent efforts to reschedule the deposition failed as his physician recommended against air travel. *Id.* When the deposition was rescheduled, the plaintiff's symptoms recurred and he ended up hospitalized and unable to appear. *Id.* Notwithstanding the medical evidence, the district court expressed that the plaintiff did not "'want to give his deposition and [was] hiding behind his health.'"

Id. at 1020 (quoting district court). Efforts to complete the deposition continued but failed, and ultimately a magistrate judge set a deadline to complete the deposition. *Id.* When the plaintiff was unable due to his health to complete the deposition by that date, the district court dismissed the case. *Id.*

The Tenth Circuit reversed the dismissal. The court noted that "[b]ecause dismissal is a harsh sanction involving considerations of due process, the trial court should dismiss a claim as a discovery sanction only when a party has willfully or in bad faith disobeyed a discovery order." *Id.* (internal quotation marks and citations omitted). The court concluded that the record could not support a finding of willfulness or bad faith and that "the record detailing Mr. Gocolay's inability to complete the deposition by the ordered deadline does not justify the dismissal of his lawsuit." *Id.* at 1021. The appellate court also rejected the trial court's skepticism about the plaintiff's health condition, noting that "no contrary medical evidence exists to refute Mr. Gocolay's claimed illness or his physicians' diagnosis." *Id.*

The California Court of Appeal's opinion is directly at odds with *Gocolay*. Although the trial court here made a finding of "willfulness," that finding was clearly not supported by the record establishing Dr. Memarzadeh's inability to attend his deposition for medical reasons, just as in *Gocolay*. Here, as in *Gocolay*, there was no contrary medical evidence to refute Dr. Memarzadeh's and his doctors' assessments of his medical condition. Dr. Memarzadeh's health conditions, similarly to Mr. Gocolay's, included cardiac issues that put him at risk of death, and he was similarly under orders not to travel.

Under these circumstances, the Court of Appeal's decision simply cannot be reconciled with *Gocolay*.

This split in authority indicates a need for clarity from this Court. It has been many years since the Court has spoken on the intersection of discovery sanctions and due process. The time is ripe for the Court to provide needed guidance and inform lower courts that a terminating sanction cannot be imposed, consistent with due process, where the noncompliance with discovery orders was the result, not of willfulness or bad faith, but of medical conditions precluding compliance.

II. THE COURT SHOULD GRANT CERTIORARI TO DECIDE THE IMPORTANT FEDERAL QUESTION OF WHETHER IMPOSITION OF TERMINATING SANCTIONS BASED ON A MEDICAL DISABILITY VIOLATES THE AMERICANS WITH DISABILITIES ACT

It is also important for the Court to clarify that a failure to comply based on a medical disability cannot form the basis for a terminating sanction because it implicates serious concerns of disability discrimination. Where, as here, a terminating sanction is imposed on a litigant who fails to comply with a discovery obligation due to his medical condition, it unfairly discriminates against a person with a medical disability in violation of the Americans with Disabilities Act (ADA). This Court has not yet addressed this issue, and the Court should grant certiorari to make clear that courts are not permitted to close their doors to the medically disabled on account of their disability. *See* S. Ct. R. 10(c).

A. The History and Purposes of the ADA

Long ago, Congress recognized the need for legal protections against discrimination based on physical or mental disabilities. After decades of deliberations and investigation, Congress passed the ADA by large majorities of both the House and Senate. *Tennessee v. Lane,* 541 U.S. 509, 516 (2004). Congress made extensive findings and conclusions, chief among them:

> "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society."

Id. (quoting then 42 U.S.C. § 12101(a)(7)).

The need for protections for the disabled remains critical to this day, and as Congress has further explained in the ADA:

> (1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a

> disability or are regarded as having a disability also have been subjected to discrimination;
>
> (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
>
> (3) discrimination against individuals with disabilities persists in such critical areas as . . . access to public services;
>
> * * *
>
> (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, . . . failure to make modifications to existing facilities and practices, . . . and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;
>
> * * *
>
> (8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous . . . .

42 U.S.C. § 12101(a).

In passing the ADA, Congress invoked its "power to enforce the fourteenth amendment." 42 U.S.C. § 12101(b)(4). Congress also explained that the purposes of the ADA include:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
>
> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; . . . .

42 U.S.C. § 12101(b).

B. Issuing a Terminating Sanction Based on Disability Violates the ADA

The ADA's Title II expressly prohibits discrimination based on disability in the provision of services by a public entity. Specifically, the Act provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

This Court has recognized that Title II of the ADA applies to prohibit the denial of access by the disabled to state courts. *See Lane,* 541 U.S. at 527. The Court observed that the right of access to the courts is protected by the Fourteenth Amendment, which the ADA seeks to enforce. *Id.* at 523. The Court also characterized the right of access to the courts as a "basic right." *Id.* at 528.

Lane was concerned with physical access to courthouses by the disabled. This Court has not yet addressed whether access to court proceedings is protected by the ADA. The Court should address this important issue of federal law.

Access to court proceedings, as at issue here, is at least as important as physical access to the courthouse. After all, it is not the ability to be inside a courthouse that is central to the right at issue; it is the ability to use the courts to address disputes and redress legal wrongs. Indeed, it is this type of "access" to the courts that gives rise to the due process constraints on discovery sanctions discussed above.

Here, as reflected in the medical documentation, Dr. Memarzadeh suffered from a disability. *See* 42 U.S.C. § 12102 (defining disability as "a physical or mental impairment that substantially limits one or more major life activities"). It was due to this disability that he was unable to appear for his deposition, which ultimately resulted in his loss of access to the courts. Consequently, he faced the loss of services of the public entity of the state court on account of his disability, a violation of the ADA.

The imposition of terminating sanctions here was without any compelling justification that could have overridden Dr. Memarzadeh's constitutional and statutory right to access to the court. Opposing counsel had expressly indicated he was willing to go forward without the deposition. (App. 7a.) While that was in the context of asking for a speedy trial, it is clear that opposing counsel did not believe the deposition was necessary to the defense of the case if he was willing to forego it in the interest of moving the case forward more quickly.

Moreover, the court was not without remedy if it concluded, contrary to opposing counsel's own assessment, that the deposition was necessary. The medical documentation established that Dr. Memarzadeh was still undergoing diagnosis and treatment, and the restrictions on his travel were for finite periods of time. (App. 42a, 48a, 50a, 51a.) There was no reason the case could not have been stayed while he addressed his medical issues. And even if the condition ended up being a permanent inability to appear for his deposition, the court could have imposed lesser sanctions, such as not allowing his testimony, rather than precluding him from pursuing his case altogether.[5]

In short, the trial court here unnecessarily and discriminatorily restricted Dr. Memarzadeh's right of access to the courts due to his disability. This Court should make clear that such a restriction will not be tolerated under the ADA. This Court should grant certiorari to resolve this important issue of federal law and direct that, pursuant to the ADA, trial courts may not order terminating sanctions in a way that discriminates against those with a disability.

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5. The Court of Appeal curiously concluded that precluding Dr. Memarzadeh's testimony would have been just as detrimental as dismissing the case. But the case had been limited to a case about overbilling. The primary witness to the billing practices was Ms. Cohen, not Dr. Memarzadeh.

CONCLUSION

For all the foregoing reasons, this Court should grant this petition for writ of certiorari as to both questions presented.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — ORDER OF THE CALIFORNIA SUPREME COURT, FILED DECEMBER 31, 2024

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

S287722
Court of Appeal, Second Appellate District,
Division One—No. B327967, B329476

MAHER MEMARZADEH,

Plaintiff and Appellant,

v.

LOTTIE COHEN, *et al.*,

Defendants and Respondents.

AND CONSOLIDATED CASE

The petition for review is denied.

/s/_____
Guerrero
Chief Justice

APPENDIX B — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE, FILED SEPTEMBER 23, 2024

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

B327967, B329476

MAHER MEMARZADEH,

Plaintiff and Appellant,

v.

LOTTIE COHEN, *et al.*,

Defendants and Respondents.

Filed September 23, 2024

OPINION

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert B. Broadbelt, III, Judge. Affirmed. (Los Angeles County Super. Ct. No. BC704662)

NOT TO BE PUBLISHED
IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified

for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

Plaintiff Maher Memarzadeh appeals from a judgment of dismissal in favor of defendants and respondents Lottie Cohen and Law Office of Lottie Cohen (collectively, Cohen). The trial court imposed a terminating sanction after Memarzadeh violated a court order requiring him to sit for a deposition and produce documents. On appeal, Memarzadeh argues the terminating sanction is void because the trial judge had been disqualified at the time he imposed the sanction, and, alternatively, the sanction was an abuse of discretion. He also argues the trial court erred in sustaining a demurrer to his second amended complaint.

By statute, disqualification determinations are not appealable—review must be sought by petition for writ of mandate brought within 10 days of notice of the determination. (Code Civ. Proc., § 170.3, subd. (d).) Memarzadeh never filed such a petition. His arguments concerning disqualification therefore are not properly before us.

We further conclude the trial court did not abuse its discretion in imposing a terminating sanction for Memarzadeh's discovery abuses. This conclusion renders his arguments regarding the demurrer moot.

Accordingly, we affirm.

Appendix B

BACKGROUND

1. Complaint, demurrers, and motions to disqualify

On May 1, 2018, Memarzadeh filed a complaint against Cohen, his former counsel, for legal malpractice, breach of fiduciary duty, fraud under theories of misrepresentation and concealment, breach of contract, and breach of the implied covenant of good faith and fair dealing. Following a series of demurrers, rulings, and amended complaints, the only causes of action remaining were breach of fiduciary duty, breach of contract, and breach of the implied covenant of good faith and fair dealing, and the trial court, Judge Robert B. Broadbelt, III presiding, emphasized those causes of action remained viable only insofar as they alleged that Cohen overbilled Memarzadeh. The court sustained Cohen's demurrer to the legal malpractice and fraud causes of action without leave to amend. The court denied Memarzadeh's subsequent motion for reconsideration.

On August 1, 2022, Memarzadeh, then in pro per, electronically filed a declaration purportedly in support of a "concurrently filed motion to disqualify" Judge Broadbelt (capitalization omitted), although Memarzadeh did not file a concurrent motion. As we shall address in more detail in our Discussion, *post*, Memarzadeh contends he hired a process server who on that same day attempted to personally serve a copy of the declaration on Judge Broadbelt, but instead placed the copy in a dropbox outside of the courtroom, purportedly in accordance with the rules of that particular judicial department. The declaration

asserted Judge Broadbelt demonstrated bias through his rulings on discovery and Cohen's demurrers.

On August 19, 2022, Judge Broadbelt issued an order striking Memarzadeh's declaration, which Judge Broadbelt construed as a statement of disqualification for cause under Code of Civil Procedure section 170.3. Judge Broadbelt stated that Memarzadeh had failed to personally serve him or his clerk with the statement of disqualification as statutorily required, so Judge Broadbelt did not learn of the declaration until August 17, 2022. Judge Broadbelt found the allegations of bias concerned rulings in 2019 and 2021 and therefore were untimely. Judge Broadbelt further concluded Memarzadeh's disagreement with the court's rulings or expression of views on issues in the proceeding were not a proper basis for disqualification.

Judge Broadbelt ended his order by advising the parties that rulings on disqualification were not appealable and could be reviewed only by writ of mandate sought within 10 days of service of notice of the ruling. Memarzadeh did not seek writ review of the ruling.

Memarzadeh then filed motions to disqualify Judge Broadbelt on September 2, September 7, and September 12, 2022. Judge Broadbelt issued orders striking each motion, reminding Memarzadeh in each order that review of the court's decisions on disqualification could be reviewed solely by a petition for writ of mandate. Memarzadeh did not seek writ review of these rulings.

2. Motion to compel deposition

On September 26, 2022, Cohen filed an ex parte application to compel Memarzadeh's deposition. Cohen's counsel filed a supporting declaration attesting that counsel had noticed Memarzadeh's deposition with document production for April 21, 2022, but Memarzadeh did not appear nor produce any of the requested documents purportedly because he had an undisclosed medical condition. Counsel renoticed the deposition for August 29, 2022. Two days before that scheduled deposition, Memarzadeh asked to delay the deposition, and after further discussion, the parties agreed to conduct the deposition on September 20, 2022 at a location selected by Memarzadeh. On September 14, 2022, Memarzadeh asked Cohen's counsel to take the deposition off calendar pending Memarzadeh's efforts to disqualify Judge Broadbelt. Cohen's counsel declined and stated counsel would move to compel if Memarzadeh did not appear. Memarzadeh did not appear, at which point Cohen applied ex parte to compel his attendance.

Memarzadeh opposed the application to compel his deposition. He contended his pending attempts to disqualify Judge Broadbelt justified delaying his deposition. Memarzadeh further contended he suffered from an illness, specifically ear pain, that impeded him from traveling for his deposition. In support, he attached, inter alia, a document signed by a health care provider dated September 22, 2022 stating he should not fly for two weeks or until cleared by a doctor. He also attached a document from a medical center's emergency room, also

dated September 22, 2022, indicating he had been seen for ear pain and an "episode of passing out this week," but Memarzadeh had declined "further work-up."

The trial court denied Cohen's ex parte application to compel, instead treating it as an application to shorten time to hear a motion to compel. It heard that motion at a hearing on October 26, 2022, at which the court also considered a motion from Memarzadeh to continue the trial date. Memarzadeh appeared at the hearing telephonically and pro per.

At the hearing, the court stated its tentative ruling was to continue the trial date given Memarzadeh's illness, and also to grant the motion to compel and require Memarzadeh to attend his deposition, which he could elect to do either by videoconference or in person. At this point the court realized Memarzadeh had disconnected from the hearing and there was no indication he was trying to reconnect. The court proceeded with the hearing.

Cohen's counsel objected to continuing trial, noting there had already been three trial continuances, and stated Cohen was ready to begin trial that day. The court asked if Cohen still wished to depose Memarzadeh. Cohen's counsel said, "No. We'll waive it if you start trial right now." The court reminded Cohen's counsel of Cohen's pending motion to compel. Counsel responded, "Yeah. That motion was filed three weeks ago, ex parte, hoping the depo would happen before today. Since we're here today, we're ready to try the case. I'll just cross-examine him on the stand." Counsel stated Cohen's insurance policy

"is almost exhausted," and "the more we push this out, the less likely she's going to have the funds to pay me to try this case."

The trial court stated, "I'm sensitive to all those issues and appreciate those concerns, and what I'm doing is balancing the interest on both sides based on the evidence presented." The court adopted its tentative ruling and set a trial date for February 8, 2023, in light of evidence from Memarzadeh's physician that he could not travel for 12 weeks. The court further stated, "I think [Cohen] has the right to take [Memarzadeh's] deposition." The court issued a written order directing Memarzadeh to attend his deposition on December 9, 2022, to be conducted on a videoconference platform of Cohen's choosing or, if Memarzadeh so elected, in person at Cohen's counsel's office.

3. Second motion to compel and impose sanctions

On December 6, 2022, Memarzadeh filed a declaration and verified statement, ostensibly in support of his September 7, 2022 motion to disqualify Judge Broadbelt. In the first seven pages of the declaration, Memarzadeh raised numerous objections to Judge Broadbelt's striking of his disqualification motion.

On page 8, paragraph 42 of the declaration, Memarzadeh changed topics, stating in boldface type, "If I have to bring another Ex Parte Application to correct the date of [my] deposition even though the court has now been made aware again of my medical condition as

reflected in the physician's letter, my medical condition will certainly be impacted because of the distress of the duplicative process." Memarzadeh declared he could not attend his deposition in person because his ear disorder prevented him from flying, nor could he attend remotely because he was scheduled for a medical imaging test that day. Memarzadeh further declared he could not agree to the privacy policies of the videoconference program selected by Cohen, which he contended allowed the videoconference provider to obtain and disseminate his private information.

Memarzadeh did not appear for his deposition on December 9, 2022. On December 12, 2022, Cohen filed an ex parte application to compel Memarzadeh's compliance with the trial court's October 26, 2022 order that he attend his deposition, and seeking monetary sanctions or, in the alternative, terminating or issue sanctions.

Memarzadeh opposed the ex parte application. Memarzadeh noted he had informed both the trial court and Cohen's counsel via his December 6, 2022 declaration that he could not attend his deposition because of his medical imaging test scheduled that same day, yet Cohen's counsel feigned ignorance of this in bringing the application to compel. Memarzadeh included with his opposition a medical imaging center form indicating an MRI scheduled for December 9, 2022, and a copy of his December 6, 2022 declaration.

Memarzadeh also attached an e-mail chain between himself and Cohen's counsel. In that chain, Memarzadeh

informed Cohen's counsel on December 7, 2022 of his upcoming medical examination on December 9, 2022. Cohen's counsel responded that unless Memarzadeh obtained a court order excusing him from his deposition, Cohen would move for sanctions. Memarzadeh then demanded Cohen's counsel cease threatening him, and asked that Cohen cooperate with having a new judge assigned to the case. In a later e-mail, Memarzadeh stated he did not have the "required technology" for a remote deposition "away from my usual place of residence." (Capitalization omitted.)

On December 13, 2022, the trial court construed Cohen's ex parte application as a motion to compel and seek sanctions. The court set a hearing on the motion for January 17, 2023, and allowed additional briefing from the parties.

The court also struck Memarzadeh's December 6, 2022 declaration, finding it repetitive of prior statements seeking disqualification. The court in its written order again notified the parties that review of the court's decisions on disqualification could be reviewed solely by a petition for writ of mandate. Memarzadeh did not seek writ review of the ruling.

Memarzadeh filed additional opposition to Cohen's motion to compel his deposition and impose sanctions, and in the same filing requested a continuance of trial, his deposition, and all related hearings. Memarzadeh again argued he needed additional time because of his illness, and objected to Cohen's plan to videotape his deposition.

He attached several doctor's notes advising him not to fly, the most recent dated December 21, 2022 and stating he should not fly for the next three to four months while he underwent diagnosis and treatment.

4. Trial court's ruling

The trial court, Judge Broadbelt presiding, took the matter under submission and issued a written order on January 17, 2023.[1] The court found "that [Memarzadeh] has engaged in conduct that is a misuse of the discovery process by willfully disobeying the court's October 26, 2022 order and failing to respond or submit to an authorized method of discovery," i.e., the deposition the court had ordered him to attend.

The court rejected Memarzadeh's contention that his illness prevented him from attending his deposition. The court noted that, although Memarzadeh had provided a physician's letter indicating he could not fly, he had not provided any "competent evidence from a licensed physician establishing that a medical condition prevented him from appearing remotely for deposition on the date ordered by the court." The court further noted Memarzadeh's illness had not prevented him from filing his additional statement of disqualification with supporting exhibits on December 6, 2022, or his opposition to Cohen's ex parte application on December 12, 2022.

1. It does not appear from the record the trial court held a hearing.

As for Memarzadeh's evidence that he had an MRI scheduled for the same day as the deposition, the court observed Memarzadeh had not presented evidence establishing that he underwent the MRI on that date, that it took place at the same time as the deposition, that the MRI appointment was scheduled before the court had issued its October 26, 2022 order, and that the MRI could not have been rescheduled.

The court rejected Memarzadeh's contention that technological issues prevented him from attending the deposition remotely, finding Memarzadeh had not sufficiently described the technological limitations at issue or presented any evidence those limitations prevented his appearance.

The court found Memarzadeh's violations of its orders willful, noting Memarzadeh had refused to appear for deposition "numerous times before the court issued the October 26, 2022 order," had never moved for a protective order or requested the court change the date of his deposition, and Memarzadeh "did not provide—and still has not provided—[Cohen] with alternative dates for his deposition, instead stating only that he 'may' be available at an unspecified time."

The court found Memarzadeh's failure to comply with the court's orders unduly prejudiced Cohen by preventing Cohen from preparing a defense against Memarzadeh's claims. The court further found a terminating sanction was appropriate because "a less severe sanction would not produce compliance with the discovery rules or provide

[Cohen] with an adequate remedy." The court reiterated that Memarzadeh had repeatedly refused to attend noticed depositions, did not appear for his court-ordered deposition on December 9, 2022, had never sought relief from the court to change his deposition date, and had not offered any alternative dates. "Because of [Memarzadeh's] history of abuse of the discovery process, the court finds that ordering [Memarzadeh] to appear for deposition again, or imposing other, less severe sanctions, is unlikely to result in [Memarzadeh's] appearance and production of documents at the deposition."

The court therefore ordered a terminating sanction under Code of Civil Procedure section 2023.030, subdivision (d) and dismissed the action.

On February 6, 2023, Cohen filed and served by e-mail and regular mail a memorandum of costs seeking $9,467.95. On February 27, 2023, Memarzadeh filed opposition to the memorandum, arguing inter alia that Cohen improperly sought reimbursement for jury fees, and that many of the costs related to circumstances Memarzadeh could not control due to his illness.

On April 5, 2023, the trial court amended its order of dismissal to award the costs requested by Cohen.

Memarzadeh filed notices of appeal from the original order of dismissal and the amended order adding the costs award.

Appendix B

DISCUSSION

A. The Challenge to the Striking of the Statement of Disqualification Is Not Properly Before Us

Memarzadeh argues Judge Broadbelt did not timely respond to his August 1, 2022 statement of disqualification and thus was disqualified as a matter of law. Accordingly, Judge Broadbelt's order imposing a terminating sanction is void. As we explain, this challenge is not properly before us.

1. Applicable law

Under Code of Civil Procedure [2] section 170.3, subdivision (c)(1), a party seeking to disqualify a judge "may file with the clerk a written verified statement objecting to the hearing or trial before the judge and setting forth the facts constituting the grounds for disqualification of the judge." The statement "shall be personally served on the judge alleged to be disqualified, or on his or her clerk, provided that the judge is present in the courthouse or in chambers." (§ 170.3, subd. (c)(1).) Within 10 days of filing or service, whichever is later, the judge may consent to the disqualification or file a written verified answer. (*Id.*, subd. (c)(3).) If the judge does not consent or answer within the 10 days, the judge "shall be deemed to have consented to his or her disqualification." (*Id.*, subd. (c)(4).)

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2. Further unspecified statutory citations are to the Code of Civil Procedure.

Appendix B

Section 170.4, subdivision (b) provides judges with a third option as to how to respond: "[I]f a statement of disqualification is untimely filed or if on its face it discloses no legal grounds for disqualification, the trial judge against whom it was filed may order it stricken." Although section 170.4 does not so state, case law holds that a judge exercising this authority to strike must do so within the 10-day limit imposed by section 170.3, subdivision (c)(3) and (4). (*PBA, LLC v. KPOD, Ltd.* (2003) 112 Cal.App.4th 965, 972.)

As the trial court stated repeatedly in its written orders striking Memarzadeh's disqualification motions, "[t]he determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal." (§ 170.3, subd. (d).) "The petition for the writ shall be filed and served within 10 days after service of written notice of entry of the court's order determining the question of disqualification." (*Ibid.*) Section 170.3, subdivision (d) also applies to orders striking statements of disqualification under section 170.4, subdivision (b). (See *Dumas v. Los Angeles County Bd. of Supervisors* (2020) 45 Cal.App.5th 348, 354.) Section 170.3, subdivision (d) provides "the exclusive means for seeking review of a ruling on a challenge to a judge." (*People v. Panah* (2005) 35 Cal.4th 395, 444.)

2. Analysis

Memarzadeh purports to challenge on appeal an order striking his statement of disqualification. Under section

170.3, subdivision (d), Memarzadeh could only seek review of the trial court's ruling through a petition for writ of mandate filed within 10 days of service of written notice of the ruling. As noted, the trial court specifically informed Memarzadeh in its written order striking his statement of disqualification that he had to seek review by writ, but Memarzadeh did not seek writ review of the ruling, and the time for doing so is past. Memarzadeh's appeal of the disqualification ruling therefore is not properly before us.

Memarzadeh acknowledges the requirements of section 170.3, subdivision (d), but argues they are inapplicable when a judge fails timely to respond to a statement of disqualification. Memarzadeh contends his statement was filed and served August 1, 2022, yet Judge Broadbelt did not strike the statement until August 19, 2022, outside the 10-day window mandated by section 170.3, subdivision (c)(3). Accordingly, Judge Broadbelt had already been disqualified by operation of law under section 170.3, subdivision (c)(4) by the time Judge Broadbelt purported to strike Memarzadeh's statement of disqualification.

We reject Memarzadeh's arguments on both legal and factual grounds. Memarzadeh cites *In re Marriage of M.A. & M.A.* (2015) 234 Cal.App.4th 894 (*M.A.*) for his contention that he may raise the issue of disqualification in this appeal as opposed to through the writ procedures under section 170.3, subdivision (d).

In *M.A.*, a case concerning child support, the father filed a statement of disqualification against the

commissioner overseeing the case, and the commissioner struck the statement. (*Supra*, 234 Cal.App.4th at pp. 899-900.) Several months later, the father filed a second statement of disqualification. (*Id.* at p. 901.) The court, with the same commissioner presiding, "indicated it would not 'entertain any other motion on disqualification' at that time," but "nonetheless assured father it was not biased against him and responded to some of the allegations [of bias] in the statement [of disqualification]." (*Ibid.*) The court then issued orders pertaining to child support and other matters. (*Id.* at pp. 901-902.)

On appeal, the Court of Appeal reversed the orders issued after the father had filed his second statement of disqualification, holding that the commissioner, by "impermissibly ignor[ing]" the statement, implicitly consented to it under section 170.3, subdivision (c)(4). (*M.A.*, *supra*, 234 Cal.App.4th at p. 904.) The court acknowledged that "[g]enerally, a party may only obtain review of the determination of the disqualification of a commissioner by filing a petition for writ of mandate." (*Id.* at p. 903, fn. 5.) The court nonetheless concluded the appeal was proper "because father is not challenging the propriety of the court's failure to act on his statement of disqualification. Rather, he is challenging the import of the court's failure to act on the validity of the court's subsequent orders." (*Ibid.*)

M.A. is distinguishable in that in the instant case, Judge Broadbelt did not ignore the statement of disqualification, but addressed it in a detailed written order that included instructions on how to seek review

to the extent Memarzadeh disagreed with it. Unlike the commissioner in *M.A.*, Judge Broadbelt therefore made a "determination of the question of . . . disqualification" subject to the writ requirements of section 170.3, subdivision (d). To the extent Memarzadeh believed Judge Broadbelt's response was untimely, he should have challenged it within 10 days by a petition for writ of mandate.

We also question the reasoning of *M.A.* The purpose of the writ review requirement of section 170.3, subdivision (d) is to resolve disqualification issues quickly and avoid the possibility of an appellate court later reversing orders or a judgment upon concluding a judge should, in fact, have been disqualified. (See *People v. Brown* (1993) 6 Cal.4th 322, 336 (*Brown*) [noting "the Legislature's clear intent that disqualification challenges be subject to prompt review by writ"].) This purpose is thwarted if a party on whose statement of disqualification a trial court has failed to act may simply sit on its rights, see how the court ultimately rules on subsequent matters, and then invoke the disqualification on appeal to void the court's orders. To the extent the holding of *M.A.* can be interpreted to allow such an end run of section 170.3, subdivision (d), we decline to follow it.

Assuming arguendo we may consider in this appeal the timeliness of Judge Broadbelt's response to the statement of disqualification, Memarzadeh nonetheless fails as a factual matter to establish Judge Broadbelt or his clerk personally were served with the statement of disqualification as required under section 170.3, subdivision (c)(1), a prerequisite to triggering the 10-day

period under section 170.3, subdivision (c)(3). In striking the statement of disqualification, Judge Broadbelt stated neither he nor his clerk were personally served, and he did not learn of the statement until August 17, 2022. Memarzadeh concedes in his opening brief on appeal there was no personal service—according to his brief 's statement of facts,[3] his process server left the statement of disqualification in a dropbox outside the courtroom. Memarzadeh contends this was consistent with the rules of Judge Broadbelt's department, but the list of department rules he provides in support of this contention say nothing about a dropbox, much less that the court would deem documents left in the dropbox personally served on the judge or his clerk.[4] In the absence of evidence of personal service, Memarzadeh cannot establish Judge Broadbelt's August 19, 2022 response to the statement of disqualification was untimely such that Judge Broadbelt was disqualified as a matter of law.

In his reply brief, Memarzadeh cites *Brown* for the proposition that section 170.3, subdivision (d) "does not

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3. Statements in appellate briefs may be construed as admissions against the party. (*Thompson v. Ioane* (2017) 11 Cal. App.5th 1180, 1186, fn. 4.)

4. Based on Memarzadeh's brief, it appears the department rule to which he refers requires service copies of filed documents to be placed in a box for courtesy copies. This rule does not appear in the list of rules of which Memarzadeh requested we take judicial notice. Regardless, Memarzadeh cites no authority that departmental rules regarding service copies may substitute for section 170.3's requirement of personal service of a statement of disqualification on the judge or clerk.

apply to, and hence does not bar, review (on appeal from a final judgment) of *nonstatutory* claims that a final judgment is constitutionally invalid because of judicial bias." (*Brown*, *supra*, 6 Cal.4th at p. 335.) To the extent Memarzadeh is attempting to assert a constitutional, nonstatutory basis for disqualification, that argument is forfeited for failure to raise it in his opening brief. (*Hurley v. Department of Parks & Recreation* (2018) 20 Cal.App.5th 634, 648, fn. 10.)

The argument also is without merit. Memarzadeh clearly relied on a statutory basis for disqualification, because he had stated repeatedly that Judge Broadbelt was disqualified as a matter of law under section 170.3, subdivision (c)(4).

Even if arguendo Memarzadeh properly asserted a nonstatutory, constitutional basis for disqualification, *Brown* stated, "In order to give maximum effect to the Legislature's clear intent that disqualification challenges be subject to prompt review by writ [citation], we conclude that a litigant may, and should, seek to resolve such issues by statutory means, and that his negligent failure to do so may constitute a forfeiture of his constitutional claim." (*Brown*, *supra*, 6 Cal.4th at p. 336; accord, *Tri Counties Bank v. Superior Court* (2008) 167 Cal.App.4th 1332, 1339 [in civil cases, a constitutional question such as judicial bias " 'must be raised at the earliest opportunity or it will be considered to be waived' "].)

In *Brown*, the appellant had sought a writ under section 170.3, subdivision (d) after the trial court denied

his disqualification motion, and the Court of Appeal summarily denied relief. (*Supra*, 6 Cal.4th at p. 330.) Under those circumstances, the high court concluded the appellant could assert on appeal "a constitutional due process claim that the judge who presided over his hearing was not impartial." (*Id.* at p. 336.)

In the instant case, Memarzadeh has never sought writ review of any of the disqualification rulings, despite the trial court repeatedly informing him of the necessity of doing so, and indeed never asserted his due process claim until he filed his reply brief on appeal. Under *Brown*, his "negligent failure" to follow the statutory procedures for review "constitute[s] a forfeiture of his constitutional claim." (*Supra*, 6 Cal.4th at p. 336.)

Because the issue of disqualification is not properly before us, we do not address Memarzadeh's arguments as to the merits of the trial court's order striking his statement of disqualification.

B. The Trial Court Did Not Abuse its Discretion In Granting a Terminating Sanction

Section 2023.030 empowers a court, after notice and hearing, to impose sanctions for "engaging in conduct that is a misuse of the discovery process." These include monetary sanctions, issue sanctions, evidence sanctions, and terminating sanctions. (§ 2023.030, subds. (a)-(d).) A terminating sanction may strike pleadings or parts of pleadings, stay further proceedings until a discovery order is obeyed, dismiss the action or part of the action,

or render a judgment by default against the offending party. (*Id.*, subd. (d).) "We review a trial court's decision to impose terminating sanctions for abuse of discretion, drawing all reasonable inferences in support of the court's ruling." (*Karton v. Ari Design & Construction, Inc.* (2021) 61 Cal.App.5th 734, 749.)

Memarzadeh raises three arguments as to why the terminating sanction was an abuse of discretion. First, he argues Cohen suffered no prejudice by the inability to depose Memarzadeh prior to trial, as evidenced by Cohen's counsel's statement at the October 26, 2022 hearing that he was ready to proceed with trial and would cross-examine Memarzadeh on the stand. Memarzadeh contends Cohen never "demonstrate[d] how taking the deposition or how the requested documents, even assuming they existed, were necessary to defend against Memarzadeh's claims."

Memarzadeh did not raise this argument below or seek a protective order to the extent he believed it was unnecessary for him to be deposed or to provide documents. He therefore has forfeited the argument for purposes of appeal. (*GoTek Energy, Inc. v. SoCal IP Law Group, LLP* (2016) 3 Cal.App.5th 1240, 1248 [issue forfeited if not raised in trial court]). The argument also is without merit. Cohen's counsel's later statements at the October 26 hearing make clear he was willing to forgo deposing Memarzadeh out of concern that further delays might lead to Cohen exceeding the limits of her insurance policy. In other words, Cohen's counsel did not state Memarzadeh's deposition was unnecessary or undesirable, but rather Memarzadeh's delays had put Cohen in a position of possibly running out of insurance

funds if they did not proceed to trial. To reverse the terminating sanction on this basis would be to reward Memarzadeh for his misconduct.

Memarzadeh's second argument is that the trial court abused its discretion by not imposing a lesser sanction. Again, Memarzadeh did not raise this argument below and it is forfeited.

Memarzadeh's second argument also fails on the merits. Memarzadeh asserts, "[T]he [court] could have imposed the lesser sanction of prohibiting Memarzadeh from testifying at trial or from using any document not produced prior to trial. Since the court already confined Memarzadeh's claim to one about billing, he likely would have had to rely on expert witness testimony to establish his claim. Not taking Memarzadeh's deposition would not have deprived Cohen from conducting expert witness discovery in order to present a defense."

The trial court had no opportunity to consider this option given Memarzadeh did not propose it below, further supporting our forfeiture holding. Regardless, Memarzadeh does not explain how, if he were unable to testify or offer documents into evidence, he could effectively prove his case against Cohen. He suggests somehow he could rely solely on expert testimony to prove his case, but experts presumably would need to base their opinions at least in part on evidence offered and authenticated by Memarzadeh. The sanction he proposes therefore would be as devastating to his case as a terminating sanction.

Finally, in his reply brief Memarzadeh argues he never refused to sit for a deposition, only for a videotaped deposition, and Cohen "made no effort to demonstrate that [Cohen] had a right to videotape [Memarzadeh's] deposition in light of [Memarzadeh] refusing to agree to do so based upon his own physicians' directions." Although Memarzadeh fails to provide any record citation supporting this contention, we assume he is referring to a declaration dated May 9, 2023 attached to Memarzadeh's motion to stay execution of judgment pending appeal. The declaration, purportedly from a physician, states that Memarzadeh's "medical condition causes him additional unusual and extreme stress well beyond what is reasonable during video recordings (i.e. Zoom Meetings)." The declaration further recites, "If a video deposition of . . . Memarzadeh is taken his symptoms would re-occur," and "he should not fly, drive, sit for an oral deposition, or expose himself to situations and circumstances induced by appearances before a camera."

This evidence was untimely, filed months after the trial court had imposed the terminating sanction and ordered the case dismissed. It is disingenuous for Memarzadeh to contend he did not refuse to sit for deposition, only a videotaped deposition. As summarized by the trial court, the evidence in the record indicates Memarzadeh repeatedly refused to sit for any type of deposition, and continually came up with varied excuses for doing so. At no point prior to the terminating sanction did he present evidence that he was medically unable to participate in a deposition by videoconference or recorded on video.

C. Memarzadeh's Remaining Challenges Are Moot or Forfeited

Memarzadeh argues the trial court erred in sustaining the demurrer against his second amended complaint. Because Memarzadeh's discovery abuses have led to dismissal of the action, this argument is moot.

Although Memarzadeh filed a notice of appeal after the trial court amended the dismissal order to award Cohen costs, Memarzadeh raises no arguments concerning the costs award in his appellate briefing. Any challenge to the costs award therefore is forfeited. (*Sierra Palms Homeowners Assn. v. Metro Gold Line Foothill Extension Construction Authority* (2018) 19 Cal.App.5th 1127, 1136 [issue not raised in appellate briefing forfeited].)

DISPOSITION

The judgment of dismissal is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED.

/s/_____
BENDIX, Acting P. J.

We concur:

/s/
WEINGART, J.

/s/
KLINE, J.*

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division Two, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX C — ORDER OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES — CENTRAL DISTRICT, DATED JANUARY 17, 2023

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES — CENTRAL DISTRICT
DEPARTMENT 53

Case No.: BC704662

MAHER MEMARZADEH,

Plaintiff,

vs.

LOTTIE COHEN, *et al.*,

Defendants.

Hearing Date: January 17, 2023
Time: 10:00 a.m.

[~~TENTATIVE~~] ORDER RE: MOTION TO COMPEL COMPLIANCE WITH OCTOBER 26, 2022 ORDER AND IMPOSING MONETARY SANCTIONS, OR IN THE ALTERNATIVE, TERMINATING SANCTIONS AND/OR ISSUE SANCTIONS

The court considered the moving, opposition, and reply papers filed in connection with this motion.

Appendix C

LEGAL STANDARD

If a party engages in the misuse of the discovery process, the court may impose monetary, issue, evidence, or terminating sanctions. (Code Civ. Proc., § 2023.030.) Code of Civil Procedure section 2023.010 provides, in relevant part, that "[m]isuses of the discovery process include, but are not limited to, the following: . . . (d) Failing to respond or to submit to an authorized method of discovery. . . . (g) Disobeying a court order to provide discovery."

"The trial court may order a terminating sanction for discovery abuse 'after considering the totality of the circumstances: [the] conduct of the party to determine if the actions were willful; the detriment to the propounding party; and the number of formal and informal attempts to obtain the discovery.'" (*Los Defensores, Inc. v. Gomez* (2014) 223 Cal. App. 4th 377, 390, quoting *Lang v. Hochman* (2000) 77 Cal. App. 4th 1225, 1246.) "Generally, '[a] decision to order terminating sanctions should not be made lightly. But where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction.'" (*Los Defensores, supra,* 223 Cal. App. 4th at p. 390 [citation omitted].)

"Under this standard, trial courts have properly imposed terminating sanctions when parties have willfully disobeyed one or more discovery orders." (*Los Defensores, supra,* 223 Cal. App. 4th at p. 390, citing *Lang, supra,*

77 Cal. App. 4th at pp. 1244-1246 [discussing cases]; see, e.g., *Collisson & Kaplan v. Hartunian* (1994) 21 Cal. App. 4th 1611, 1617-1622 [terminating sanctions imposed after defendants failed to comply with one court order to produce discovery]; *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 491, disapproved on other grounds in *Garcia v. McCutchen* (1997) 16 Cal. 4th 469, 478, n. 4 [terminating sanctions imposed against plaintiff for failing to comply with a discovery order and for violating various discovery statutes].)

DISCUSSION

Defendants Lottie Cohen and the Law Office of Lottie Cohen ("Defendants") move the court for an order (1) compelling plaintiff Maher Memarzadeh ("Plaintiff') to comply with the court's October 26, 2022 order that Plaintiff appear for deposition and produce the documents requested, and (2) imposing monetary sanctions against Plaintiff and in favor of Defendants in the amount of $3,898. Alternatively, Defendants move the court for an order imposing terminating, issue, or evidence sanctions against Plaintiff based on his failure to comply with the court's October 26, 2022 order.

On October 26, 2022, the court ordered Plaintiff (1) to attend and testify at a deposition to be taken by counsel for Defendants on December 9, 2022, at 10:00 a.m., to be conducted by a videoconference platform selected by Defendants (or, if Plaintiff elects, to be conducted in person at Defendants' counsel's office), and (2) to produce for inspection at the deposition the documents

described in the deposition notice that are in Plaintiff's possession, custody, or control. (Oct. 26, 2022 Order, p. 5:7-12.) Defendants filed a Notice of Ruling showing that they served a copy of the court's October 26, 2022 order on Plaintiff by electronic service on November 7, 2022. (Notice of Ruling, filed November 7, 2022.) Plaintiff did not appear for deposition on December 9, 2022, as ordered by the court. (Glaser Decl., ¶ 15.)

The court finds that Plaintiff has engaged in conduct that is a misuse of the discovery process by willfully disobeying the court's October 26, 2022 order and failing to respond or submit to an authorized method of discovery. (Code Civ. Proc., § 2023.010, subds. (g), (d).) As set forth above, the court ordered Plaintiff to appear for deposition and to produce the documents requested in the deposition notice on December 9, 2022. Plaintiff does not dispute that he did not appear for his deposition or produce the requested documents. (Opp., p. 5:2-3 ["Plaintiff was prevented from appearing at Plaintiffs Deposition on December 9, 2022"].)

The court finds that Plaintiff has not established that his failure to appear for deposition was justified, and therefore finds that Plaintiff's violation of the court's order was willful, warranting terminating sanctions.

First, the court finds that Plaintiff has not shown that he was unable to attend his December 9, 2022 deposition due to a medical condition. Although Plaintiff states in his declaration that he is "unable to prepare for and attend Plaintiffs deposition" because he is experiencing certain

symptoms, Plaintiff has not submitted competent evidence from a licensed physician establishing that a medical condition prevented him from appearing remotely for deposition on the date ordered by the court. (Memarzadeh Decl., ¶ 24.) Moreover, although Plaintiff contends that he was unable to appear for his deposition on December 9, 2022, due to his medical condition, his claim is belied by the fact that he was able to prepare and file with the court (1) a 12-page document entitled "Declaration and Verified Statement of Maher Memarzadeh" with attached exhibits on December 6, 2022, and (2) a 10-page opposition, with attached exhibits, to Defendants' ex parte application on December 12, 2022.

The court notes that Plaintiff asserts that he had an MRI scheduled for December 9, 2022, and has submitted a copy of a document from MD Imaging, Inc., indicating that Plaintiff had an MRI scheduled for December 9, 2022. (Memarzadeh Decl., ¶ 6; Memarzadeh Decl., Ex. 501.) However, Plaintiff does not present competent evidence to establish (1) that he underwent the MRI on that date; (2) at what time the MRI was scheduled to take place; (3) whether the date of the MRI was scheduled after the court made its October 26, 2022 order; or (4) that the MRI could not have been rescheduled to another date. The court further notes that Plaintiff asserts that he cannot travel to southern California "either by airplane or automobile" due to his medical condition. (Memarzadeh Decl., ¶ 21.) While the court acknowledges that Plaintiff has submitted a letter from physician Dr. Chipman stating that "it is advisable that [Plaintiff] does not fly for the next 3-4 months[,]" Dr. Chipman's December 21, 2022 letter

does not establish that Plaintiff could not have attended his deposition remotely on December 9, 2022, as ordered by the court. (Memarzadeh Decl., Ex. 604.)

The court therefore finds that Plaintiff has not submitted evidence establishing that a medical condition prevented him from appearing for his deposition remotely on December 9, 2022.

Second, the court finds that Plaintiff has not shown that he could not attend his deposition because of any technological issues. In opposition, Plaintiff asserts that he could not attend his deposition "due to technological limitations[,]" but does not (1) sufficiently describe what limitations prevented him from appearing for deposition, or (2) present evidence establishing that any such limitations prevented his appearance.

Third, the court finds that Plaintiff's conduct establishes that he willfully disobeyed the court's order. (*Los Defensores, Inc., supra,* 223 Cal.App.4th at p. 390 [the trial court may consider the conduct of the party to determine if actions were willful].) Specifically, the court finds it significant that (1) Plaintiff refused to appear for depositions noticed by Defendants numerous times before the court issued the October 26, 2022 order; (2) Plaintiff did not, at any time between the court's October 26, 2022 order and the December 9, 2022 deposition date ordered by the court, move the court for a protective order or otherwise request that the court change the date for his deposition; and (3) Plaintiff did not provide—and still has not provided—Defendants with alternative dates

for his deposition, instead stating only that he "may" be available at an unspecified time. (Glaser Decl., ¶¶ 5, 7, 9-10, 13; Glaser Decl., Exs. B [Amended Notice of Deposition dated April 1, 2022], C [Certificate of Non-Appearance], E, [Second Amended Notice of Deposition dated July 19, 2022], F [Third Amended Notice of Deposition dated August 29, 2022], H [Affidavit of Failure of Witness to Appear for Deposition and Proceedings]; Memarzadeh Decl., ¶ 29 ["I *may* be available for a Plaintiffs deposition to be conducted telephonically when symptoms moderate"] [emphasis added].)

Finally, the court finds that Defendants have been unduly prejudiced by Plaintiff's failure to comply with the court's order. Trial is set for February 8, 2023. To date, Defendants have not been able (1) to take Plaintiff's deposition, or (2) to obtain the documents requested in the deposition notice which are directly relevant to Plaintiff's claims. (See, e.g., Glaser Decl., Ex. F, Third Amended Notice of Deposition, pp. 5-7 [requesting the production of documents evidencing or supporting the contentions that Defendants engaged in unethical billing practices, overbilled Plaintiff, billed Plaintiff for services not performed, and the production of the handwritten notes and agreements referenced in the complaint].) Plaintiff's conduct has deprived Defendants of the ability to prepare for trial and to defend themselves against Plaintiff's claims.

The court finds, based on the facts and evidence described above, that a less severe sanction would not produce compliance with the discovery rules or provide

Defendants with an adequate remedy, and therefore finds that terminating sanctions in this instance are warranted. As set forth above, Plaintiff (1) refused to appear for numerous depositions noticed by Defendants; (2) did not appear for deposition on December 9, 2022, in violation of the court's order; (3) did not seek relief from the court to change the date of his deposition; and (4) has not offered any alternative dates on which he is available for deposition. Because of Plaintiff's history of abuse of the discovery process, the court finds that ordering Plaintiff to appear for deposition again, or imposing other, less severe sanctions, is unlikely to result in Plaintiff's appearance and production of documents at the deposition. The court therefore finds that it is appropriate, and exercises its discretion, to impose terminating sanctions against Plaintiff pursuant to Code of Civil Procedure section 2023.030, subdivision (d).

The court denies Defendants' motion to impose monetary sanctions against Plaintiff, because the court finds that issuing an order granting Defendants' motion for terminating sanctions is an adequate remedy for Defendants' misuse of the discovery process.

The court denies all other relief requested in Defendants' motion as moot.

ORDER

The court grants in part defendants Lottie Cohen and The Law Office of Lottie Cohen's application to compel compliance with October 26, 2022 order and imposing

monetary sanctions or, in the alternative, terminating sanctions and/or issue sanctions as follows.

The court grants defendants Lottie Cohen and The Law Office of Lottie Cohen's request that the court impose terminating sanctions against plaintiff Maher Memarzadeh.

The court orders that this action is dismissed. (Code Civ. Proc., § 2023.030, subd. (d)(3).)

The court orders that (1) the trial set in this action for February 8, 2023, and (2) the Final Status Conference set for February 2, 2023, are vacated.

The court directs the clerk to give notice of this ruling.

> 4/5/23: Defendants Lottie Cohen and the Law Office of Lottie Cohen shall recover their costs in the amount of $9,467.95 against Plaintiff Maher Memarzadeh.

IT IS SO ORDERED.

DATED: January 17, 2023

/s/_____
Robert B. Broadbelt III
Judge of the Superior Court

APPENDIX D — EXCERPT FROM THE PETITION FOR REVIEW IN THE SUPREME COURT OF CALIFORNIA, FILED NOVEMBER 4, 2024

S287722

CASE NO. _____

IN THE SUPREME COURT OF CALIFORNIA

MAHER MEMARZADEH,

Petitioner, Plaintiff, and Appellant,

vs.

LOTTIE COHEN *et al.*,

Respondents and Defendants.

Filed November 4, 2024

PETITION FOR REVIEW

After a Decision of the Court of Appeal,
Second Appellate District, Division One,
Case Nos. B327967, B329476

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sanction because the sanction eliminates a party's fundamental right to a trial, thus implicating due process rights." (*Lopez, supra*, 246 Cal.App.4th at p. 604.)

B. Terminating Sanctions Should Not Be Used To Discriminate Against an Individual with a Disability

This Court should grant review to make clear that a trial court abuses its discretion when it imposes terminating sanctions against an individual who is unable to comply with his discovery obligations due to a disability. An individual who is unable to comply with a court's discovery order due to a medical condition cannot be considered to have acted "willfully," which the Court should confirm is a requirement for the imposition of terminating sanctions. Moreover, it is impermissible under federal and California law to deprive an individual of his right to trial on account of his disability. This Court should make clear that such a discriminatory use of the drastic sanction of dismissal is an abuse of discretion.

Here, Dr. Memarzadeh made clear he failed to appear at his initially noticed deposition due to a medical condition. (Op. at 4.) He thereafter explained in his opposition to Ms. Cohen's ex parte application to compel that he suffered from an ear disorder that prevented him from traveling to his deposition and attached supporting medical documentation. (Op. at 5.) After the judge ordered him to appear at a deposition and before the scheduled date of

the deposition, Dr. Memarzadeh declared that he could not attend the deposition because his ear disorder prevented him from flying and he also had an MRI scheduled for that day. (Op. at 6-7.) When Ms. Cohen's counsel filed an ex parte application to compel, Dr. Memarzadeh reiterated in his opposition that he was unable to attend the deposition for medical reasons and supplied several more doctors' notes advising him not to fly. (Op. at 7-8.) Dr. Memarzadeh subsequently submitted several statements and declarations from doctors indicating his symptoms were more persistent and severe and prevented him from appearing either in person or by videoconference. (4AA 1668, 1719, 1760-64.)

This Court should make clear that ordering terminating sanctions under these circumstances is an abuse of discretion. The Courts of Appeal have been uniform in holding that terminating sanctions for failure to comply with a court order are allowed only where the failure was "willful." (See, e.g., *Aghaian v. Minassian* (2021) 64 Cal.App.5th 603, 618-619; *Lee v. Lee* (2009) 175 Cal.App.4th 1553, 1559; *Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1102; *Biles v. Exxon Mobil Corp.* (2004) 124 Cal.App.4th 1315, 1327; *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 495; *Vallbona, supra*, 43 Cal. App.4th at p. 1545.) This Court should confirm this solid wall of authority.

The case law in this area does not define "willful," and this Court should bring needed clarity on this issue. This Court has "observed that the meaning of the term

'willfully' varies depending on the statutory context. (*People v. Garcia* (2001) 25 Cal.4th 744, 753.) In criminal statutes, the term "implies that the person knows what he is doing, intends to do what he is doing, and is a free agent." (*Ex parte Trombley* (1948) 31 Cal.2d 801, 807.) In the context of discovery sanctions, "willfully" should include at least an intentional refusal to comply with discovery obligations, not an inability to comply due to a medical disability.

It is especially important for the Court to clarify that a failure to comply based on a disability cannot form the basis for a terminating sanction because it implicates serious concerns of disability discrimination. Both federal and California law prohibit discrimination based on disability. (See, e.g., 42 U.S.C. § 12132 [under Americans with Disabilities Act, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity"]; Civ. Code § 54, et seq. [California Disabled Persons Act].) As reflected in the medical documentation, Dr. Memarzadeh suffered from a disability. (See 42 U.S.C. § 12102 [defining disability as "a physical or mental impairment that substantially limits one or more major life activities"].)

The judiciary in particular is charged with "ensur[ing] that persons with disabilities have equal and full access to the judicial system." (Cal. R. Court 1.100.) And judges are expressly directed to "refrain from engaging in conduct . . . that exhibits bias, including but not limited

to bias based on . . . physical or mental disability . . . whether that bias is directed toward counsel, court staff, witnesses, parties, jurors, or any other person." (Cal. R. Court Standard 10.20; see also Canon of Judicial Ethics 3(B)(5) [directing that judges "shall not" engage in conduct that "would reasonably be perceived as bias, prejudice, or harassment" based upon, among other things, disability].)

If an individual is not able to comply with his or her discovery obligations due to a disability, then imposition of a terminating sanction is inappropriate. Such a sanction would deprive the disabled person of access to the courts and his or her right to a trial. This Court should grant review to resolve this important issue and direct that trial courts may not exercise their discretion to order terminating sanctions in a way that discriminates against those with a disability.

APPENDIX E — EXHIBITS RE MEDICAL CONDITION

ENLOE MEDIA CENTER
ENLOE MEDICAL CENTER (MAIN CAMPUS)
EMERGENCY DEPARTMENT
1531 ESPLANADE
CHICO CA 95926-3310
530-332-7300

September 16, 2022

Patient: **Maher Memarzadeh**
Date of Birth: **1/2/1973**
Date of Visit: **9/16/2022**

To Whom It May Concern:

Maher Memarzac eh was seen and treated in our emergency department on 9/16/2022. He may return to work on 9/26/2022.

If you have any questions or concerns, please don't hesitate to call.

CC:
No Recipients

Appendix E

Dignity Health
Mercy Medical Center Redding
2175 Rosaline Ave
Redding, CA 96001
(530) 225-6000

Excuse from Work, School, or Physical Activity

Maher Memarzadeh should not fly for 2 weeks or until cleared by ENT

Health Care Provider Name (printed): Karolina DeAugustinis

Health Care Provider (signature): /s/ K DeAugustinis

Date: 09/22/22

This information is not intended to replace advice given to you by your health care provider. Make sure you discuss any questions you have with your health care provider.

Document Released: 06/13/2002 Document Revised: 01/08/2016 Document Reviewed: 07/20/2015 ExitCare® Patient Information

Appendix E

Mercy Medical Center—Redding
2175 Rosaline Ave
Redding, CA 96001
(630) 225-6000

Name: MEMARZADEH, MAHER **DOB:** 01/02/1973
Current Date: 09/22/2022 05:53:14
MRN: 1001165270(R) **FIN:** 32011499699(H)
Patient Address: 536 15TH ST SANTA MONICA CA 90402
Patient Phone: (310) 310-5584

Mercy Medical Center—Redding would like to thank you for allowing us to assist you with your healthcare needs. These instructions are intended to provide general information and guidelines to follow at home to properly care for your particular medical problem.

Follow-Up Instructions:
MEMARZADEH, MAHER, has been given these follow-up instructions:

Follow Up With:	**Where:**	**When:**
Follow up with primary care provider		

Comments:
You were seen in the emergency department for evaluation of your ear pain and your episode of passing out this week. You were offered further work-up in the emergency department and declined. It is recommended that you follow-up at a clinic to complete an EKG and lab work for your episode of passing out.

Appendix E

You have been given follow-up information for ENT. Please schedule an appointment. Return to the emergency department immediately if you have another episode of passing out, develop chest pain or trouble breathing or any new symptoms you find concerning.

Follow Up With:	**Where:**	**When:**
Joseph Campanelli	DHMG—North State; 2510 Airpark Dr; Ste 301 Redding, CA 96001 5302423500 Business (1)	

Comments:

Patient Education Materials:
MEMARZADEH, MAHER has been given the following patient education materials:

VERIFIED STATEMENT
STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I, Maher Memarzadeh, Ph.D., declare:

1) I am the Plaintiff in the herein referred to action, *Maher Memarzadeh vs Lottie Cohen, the Law Office of Lottie Cohen.*

2) On 09/22/2022, the Emergency Room physician at Dignity Hospital, Dr Karolina Paziana Deaugustinis (A140550), recommended I visit an ENT.

3) Dr Karolina Paziana Deaugustinis (A140550) recommended I follow up with a specific ENT, Dr Joseph L Campanelli (G79290), DHMG—North State; 2510 Airpark Dr.; Suite 301; Redding, CA (Shasta County).

4) Dr Campanelli's office did not immediately schedule an appointment.

5) I made an appointment for 10/03/2022 with Dr Darron M. Ransbarger (A105223) at the Chico Otolaryngology Group; 135 Mission Ranch Blvd; Chico, CA 95926 (Butte County) because of persisting bacterial infection concerns relevant to an ear infection in my right ear.

6) On 10/03/2022, in his examination room, Dr Ransbarger (A105223) specified to me that there was a significant possibility of cardiac arrest or heart attack. He also stated that I would need to have imaging on my thoracic cavity. He also advised that only my primary care physician, Dr Jeffrey P. Salberg (G46132), could prescribe certain medications that I would need and to involve him for treatment.

7) Dr Jeffrey Salberg is my primary care physician. My health insurer recognizes him as my primary care provider. I visited him at his offices on 10/29/2021 for my yearly checkup and routine physical examination.

8) On 10/04/2022, I contacted Dr Salberg with my concern regarding my responsibilities as a Plaintiff in the instant court case. Dr Salberg responded to me on 10/11/2022.

9) On 10/11/2022, when Dr Salberg responded, he advised me to go to the Emergency Room and seek a cardiology referral for immediate care since Dr Ransbarger had concerns of cardiac arrest (heart attack). However, I was unable to locate a driver to chauffeur me to the Emergency Room.

10) Based upon my 09/16/2022 admission to the Emergency Room at Enloe Medical Center Hospital and subsequently my 09/22/2022 admission to the Emergency Room at Dignity Health Mercy Medical Center Redding for the same bacterial infection concerns relevant to an ear infection in my right ear, I am extremely concerned not to travel until the immediate danger to my life and irreparable harm to my health are assuaged.

11) On 10/12/2022, I was able to see the available ENT from Dr Joseph Campanelli's office, Dr Mitchell E Blum (G25010). Dr Blum updated my medical condition, provided the first steps of an appropriate treatment, and now awaits the introduction of the appropriate general practitioner who will provide his own evaluation of my current condition and new prescriptions. (See **Exhibit 204**)

12) I am seeking *ex parte* relief based on personal knowledge of irreparable harm and immediate danger to my life and health.

13) Such personal knowledge is substantiated by: (a) Dr Deaugustinis' recommendation that I "not fly for two weeks or until cleared by ENT," (b) Dr Deaugustinis' recommendation that I complete an EKG (Electrocardiography) and lab work for my episode of syncope, (c) the re-occurring syncopal episodes, (d) Dr Deaugustinis' recommendation that I "return to the emergency room immediately" if I experienced another episode of syncope, "developed chest pain, trouble breathing, or any new symptoms," (e) Dr Blum's updated 10/12/2022 recommendation: "Mr Memarzadeh is unable to fly because of an inner ear disorder. He is going through medical testing and treatment. The minimal period of time before he can travel is 12 weeks from today." (See **Exhibit 204**)

14) Personal knowledge of irreparable harm and immediate danger to my health restrict my travel to southern California.

15) Since my 10/03/2022 visit to Dr Ransbarger for repeated and recurring syncopal episodes, ear pain, stiff neck, hearing loss, ringing, and episodic dizziness, my symptoms have not improved.

16) I am concerned that there exists immediate danger to my health. Based on my personal

knowledge and that of my physicians, my medical condition may worsen and cause irreparable harm to my circulatory system if I engage in any stressful activity such as travel.

17) Only after my EKG/ECG (Electrocardiography) is completed, the laboratory work corroborates no infection, and a vestibular function test confirms no balance disorder, will I and my physicians be able to reflect that, based on personal knowledge, there is no immediate danger to my life and irreparable harm to my health.

18) A vestibular test/rehabilitation and laboratory work will require me to remain inactive for twelve weeks until January 18, 2023 and under the care of physicians and specialist clinicians to better diagnose my illness and determine the causes of my injury.

19) I have included all documents relevant to my physician's visits, hospital visits, prescriptions, diagnoses, recommendations, referrals, etc... bearing dates from April 2022, May 2022, September-October 2022, as exhibits to my court filings for Los Angeles County Court Case Number BC704662. (See Exhibits 102 and 104 from 09/26/2022 filing)

20) My visit to the Emergency Room on 09/22/2022 and my most recent visit to the ENT on 10/12/2022 delivered "affirmative factual showings" and

"competent testimony" from licensed medical doctors with "personal knowledge of irreparable harm, immediate danger" to my health and constitutes "statutory basis for granting relief *ex parte*." (Cal. Rules of Court, rule 3.1202(c)) (See **Exhibit 204**)

21) I certify that the statements in this Declaration are based upon all available medical information relevant to my medical condition.

22) This determination is made based upon my personal knowledge that I possess about my own health and visits to medical doctors and hospital emergency rooms in April 2022, September-October 2022, as well as the personal knowledge of medical doctors' diagnoses of my health and medical condition.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

(This statement is made under oath.)

Executed on October _16_, 2022, at Tennant, California.

By: /s/_____
Dr Maher Memarzadeh
Plaintiff-Litigant, *in persona propria*

Appendix E

Dignity Health
2510 Airpark Dr
St 106
Redding, CA 96001
PH:(530) 242-3500

October 12, 2022

MEMARZADEH, MAHER

Dear MAHER,

Mr. Memarzadeh is unable to fly because of an inner ear disorder. He is going through medical testing and treatment. The minimal period of time before he can travel is 12 weeks from today.

/s/_____
Mitchell E Bllum MD

Appendix E

Barton Primary Care
South Lake Tahoe, Fourth Street

Barton Primary Care 4th Street
1108 4th Street, Ste 4—South Lake Tahoe, CA 96150
Phone: 530-543-5750—Fax: 530-542-5743

December 21, 2022

To Whom It May Concern:

This is confirmation that Maher Memarzadeh attended his scheduled appointment with Stephen B Chipman, M.D. on 12/21/22. For medical reasons it is advisable that Mr. Memarzadeh does not fly for the next 3-4 months while medical issues are diagnosed and treated.

If you have any questions please do not hesitate to call me at the phone number listed below.

Sincerely,

/s/_____
Stephen B Chipman, M.D.
530-543-5750

12/21/22 BP 193/104 (193/104) needs to be addressed asap.
—immediate need for visit in home town.

Appendix E

Dignity Health
Ph: 530-242-3580

Encounter Date
01/25/2023

Patient Information
MEMARZADEH, MAHER
536 15TH ST
SANTA MONICA, CA 90402

To Whom It May Concern,

Mr. Memarzadeh is under my care for a balance disorder. I have told him not to be driving or flying. His symptoms go on to need to convert to working on a computer and he has severe nausea and vomiting by staring at anything for more than 5 to 10 minutes. He is in the process of being evaluated for the symptoms; we do not have a timeframe for return to work at this time.

Thank you,

/s/_____
Mitchell E. Blum, MD

Appendix E

Adventist Health

March 01 2023

MAHER MEMARZADEH
536 15TH ST
SANTA MONICA, CA 904022934

To whom it may concern

This is to certify that this gentleman has been under my care and evaluated in our office for syncopal episode. Episodes of syncope have occurred twice under stressful situations related to his work and 1 presyncopal episode a so with similar stress situation. He is undergoing further evaluation to identify the etiology. It is recommended that to reduce stress, all interactions related to work starting today be carried out through email, for the next 3 months, to reduce his stress and not through zoom meetings which appeared to be inducing more anxiety for the patient and potentially bringing on his symptoms..

Sincerely,

/s/_____
Narinder Bajwa M.D.
481 PLUMAS BLVD, STE 201
YUBA CITY, CA 95991
(530) 634-9988

Appendix E

VERIFIED WRITTEN DECLARATION

I, Dr Narinder Bajwa, MD, declare:

1. I am a medical doctor licensed to practice medicine in the State of California.

2. On March 1, 2023, Maher Memarzadeh was evaluated in our office for syncopal episodes.

3. The episodes of syncope have occurred under stressful situations related to the presence of a camera.

4. Until further evaluation identifies the etiology, it is recommended that any appearance before a camera be suspended.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 21st day of April 2023, at Yuba City, California.

/s/_____
Narinder Bajwa, MD

I, Maher Memarzadeh, Plaintiff, authorize this Physician's Declaration to be delivered to San Francisco Superior Court via, Attorney Andrew Nicholas Dimitriou.

Respectfully,

/s/_____

Appendix E

VERIFIED WRITTEN DECLARATION

I, Dr Narinder Bajwa, MD, declare:

1. I am a medical doctor licensed to practice medicine in the State of California.

2. On March 1, 2023 and again on May 02, 2023, Maher Memarzadeh was evaluated in our office for syncopal episodes after his April 22-23, 2023 emergency room visit.

3. The episodes of syncope have occurred under stressful situations related to the presence of a camera.

4. Until further evaluation identifies the etiology, it is recommended that his oral deposition be deferred.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 2nd day of May 2023, at Yuba City, California.

/s/_____
Dr Narinder Bajwa, MD

I, Maher Memarzadeh, Plaintiff, authorize this Physician's Declaration to be delivered to Superior Court.

Respectfully,

/s/_____

Appendix E

VERIFIED WRITTEN DECLARATION

I, Dr S. BRET CHIPMAN, MD, declare:

1. I am a medical doctor licensed to practice medicine in the State of California.

2. On December 21, 2022 and again on May 09, 2023, Maher Memarzadeh, a patient under my care, was evaluated in my medical office for his continued symptoms of syncope, vertigo, disequilibrium, severe nausea, vomiting, shortness of breath, chest pain radiating to the arms, rapid pulse rate, and pounding heart.

3. Maher Memarzadeh's medical condition causes him additional unusual and extreme stress well beyond what is reasonable during video recordings (i.e. Zoom Meetings) including other concurrent symptoms that occur with the syncopal episodes.

4. If a video deposition of Maher Memarzadeh is taken his symptoms would re-occur.

5. Until his symptoms are further evaluated, he should not fly, drive, sit for an oral deposition, or expose himself to situations and circumstances induced by appearances before a camera.

6. What causes him unusual and extreme stress well beyond what is reasonable triggering the syncopal episodes should he suspended until his symptoms are medically diagnosed and treated.

7. The symptoms may be a result of a more serious medical condition involving cardiac or underlying neurological causes and are potentially harmful and dangerous to his health.

8. Further evaluation and testing is being done by medical specialists.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 9th day of May 2023, at S. Lake Tahoe , California

/s/_____
S. BRET CHIPMAN, MD

I, Maher Memarzadeh, Plaintiff, authorize this Physician's Declaration to be delivered to be delivered to Court.

Respectfully,

/s/_____

APPENDIX F — DECLARATION OF MAHER MEMARZADEH IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, FILED FEBRUARY 2, 2021

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No.BC704662

MAHER MEMARZADEH, AN INDIVIDUAL,

Plaintiff,

v.

LOTTIE COHEN, AN INDIVIDUAL; THE LAW OFFICE OF LOTTIE COHEN, FORM OF BUSINESS ENTITY UNKNOWN; AND DOES 1-50, INCLUSIVE,

Defendants.

Date: May 10, 2021
Time: 10:00 a.m.
Dept.: 53

Complaint Filed: May 1, 2018
Trial Date: February 23, 2022

Filed February 2, 2021

Appendix F

DECLARATION OF MAHER MEMARZADEH IN SUPPORT OF MOTION FOR RECONSIDERATION

[Filed concurrently with Plaintiff Maher Memarzadeh's Notice of Motion and Motion for Reconsideration; Declaration of Maher Memarzadeh; (Proposed) Order]

DECLARATION OF MAHER MEMARZADEH, PHD

I, Maher Memarzadeh, PhD, declare as follows:

1. I am a party to the above-entitled action. This declaration is submitted in support of the concurrently filed Motion for Reconsideration. The following facts are within my personal knowledge and, if called as a witness herein, I, the Plaintiff, can and will competently testify thereto.

2. The Plaintiff, Dr Maher Memarzadeh, is of sound mind and incontrovertible and upstanding character and has been honorably recognized by the University of California as a Doctor in Philosophy for his thorough knowledge of History and has been accorded all the rights and privileges thereto pertaining in 2005.

3. As an historian, Plaintiff Dr Maher Memarzadeh ("Plaintiff') knows that in the instant case *Memarzadeh v. Cohen, et.al.* (BC704662) there are two sets of circumstances: the occurrences of the facts relevant to the underlying case *Memarzadeh v. Diamond et.al.* (SC121758), on the one hand, and the recounting of the occurrences of the facts that are detailed in the

pleadings of the present case, *Memarzadeh v. Cohen et.al.* (BC704662), on the other hand.

4. Thus, where CCP§1008 allows an application for reconsideration of a matter, in order to modify, amend, or revoke the prior order, contingent upon "new or different facts, circumstances, or law," the applicant (Plaintiff) requests that this Honorable Court consider that misinterpretations materialized between the Plaintiff and his counsel when the latter was attempting to translate, traduce, and render the Plaintiff's account of the occurrences and every relevant fact saliently and faithfully to this Honorable Court. Such misinterpretations were not caused by the Plaintiff.

5. Thereupon, those misinterpreted facts and circumstances were then reinterpreted for the Court by the Defendants and its counsel based upon a flawed and biased understanding that characterizes any two conflicting viewpoints, which have caused this Court to be the venue for the resolution of their dispute.

6. Despite the mentioned impediments that normally require parties to make reasonable attempts to understand circumstances through deliberate language, other conditions influenced there to be "new or different facts, circumstances, or law," namely the departure of Greg Lane Young (SBN226293), the attorney who was involved in the day-to-day handling of *Memarzadeh v Cohen et.al.,* who also was the attorney most familiar with the case and litigation file relating to the matter. Attorney Young, the principal from Haney & Young, filed the Second

Amended Complaint (SAC) on 06/25/2019. Subsequent to the filing, the dissolution of Haney & Young occurred; now it is called Haney Law Group. The Plaintiff only learned of Attorney Young having left Haney & Young on 09/25/2019 and that Attorney Young had left the firm sometime the previous summer.

7. The hurriedness of the SAC filing and Young's overseas travels between 06/24/2019 and 07/08/2019: "I will be out of the country until July 8, 2019," pursuant to the filing, were all reasons why all the facts and circumstances did not form part of the pleading and the defects in sufficiency of the pleading were not identified in the course of the pleading's formation.

8. Subsequently, the matter was handled by Steven Harold Haney (SBN121980) who prepared and late-filed an Opposition to Defendant's Demurrer to the SAC on 02/04/2020, at the beginning of the Covid Public Health crisis.

9. Attorney Haney, without Plaintiff's knowledge or consent, and after having filed a Motion to be Relieved as Counsel on 01/16/2020, decided to prepare and late-file the Opposition to Defendant's Demurrer to the SAC.

10. Plaintiff brought such facts to the Court's attention in his Declarations of 02/13/2020 and 04/14/2020 in which he opposed Attorney Haney's withdrawal and requested continuances of hearings.

11. The valid reason for not offering the relevant facts and corresponding circumstances earlier was caused

by the changes in counsel to the detriment of the Plaintiff and owing to no fault of the Plaintiff. As mentioned above, the Opposition to the Demurrer was prepared by the Plaintiff's previous counsel (Haney) to the exclusion of the Plaintiff, after the Plaintiff's previous counsel (Haney) had decided to quit.

12. Accordingly, the Plaintiff should be allowed to offer the Court facts and/or circumstances not previously considered with the assistance of the substituted attorney. Newly substituted counsel would be capable of rendering the salient facts intelligible, free of the uncertainty of the fatal errors that the previous counsel was unwilling or unable to cure the insufficiencies of, through the exercise of reasonable diligence and review of documentation forwarded by the Plaintiff.

13. Despite filing the Motion to be Relieved as Counsel, Attorney Haney continued to take affirmative acts to represent the Plaintiff. For example, Haney filed a Case Management Statement on 02/03/2020 without forwarding copies of filed documents or obtaining the Plaintiff's approval for the contents of the same. Haney's Opposition to Defendant's Demurrer to the SAC included an Exhibit "1" that contained the First Amended Complaint (FAC) with markups that indicated its modifications integrated as part of the SAC. On the whole, the SAC was not a new pleading but contained newly included facts presented within the same outline format that poorly communicated or insufficiently argued Plaintiff's allegations.

14. Based upon the foregoing, it would be injustice not to allow an agreeable and competent attorney who willingly and contractually would act in the Plaintiff's best interests to argue "new, different facts, circumstances, or law," relevant to BC704662 and the underlying SC121758.

15. The Plaintiff retained the current attorney, Michael Peng (SBN260852), in May 2020 for the limited scope and specific purpose to handle the "pleadings stage" matters in *Memarzadeh v Cohen et.al.* Specifically, Attorney Peng was hired to handle: (1) Defendant's pending demurrer to the SAC; (2) preparation and filing of a motion for leave to file a Third Amended Complaint (TAC); (3) Opposition/Replies to Motions while in the pleadings stage.

16. Accordingly, the Plaintiff requests that, based on recounted True and Undisputed Facts in this Declaration and otherwise, where CCP§1008 allows for reconsideration to modify and amend the prior 01/14/2021 Demurrer Ruling, contingent upon "new or different facts, circumstances, or law," this Honorable Court consider both sets of circumstances involved in BC704662 and SC121758.

17. The Plaintiff requests that this Honorable Court not deny the Plaintiff his day in court.

18. It is Undisputed Fact that Defendant Cohen met with the Plaintiff and discussed the matter *Memarzadeh v Diamond et.al.* on July 14, 2016 at her office at 2288 Westwood Boulevard. It is also Undisputed Fact that

Defendant Cohen corresponded it is axiomatic that expert testimony is required in a professional negligence case, except in rare circumstances not applicable in *Memarzadeh v Diamond et.al.*

19. It is Undisputed Fact that between July 14, 2016 ("Inducement Email") and January 9, 2017 (2nd Retainer), the Plaintiff and Defendant Cohen discussed SC121758 in at least ten (10) emails. The fact that the Plaintiff relied on Defendant Cohen's representation that there was a requirement for expert testimony, caused the Plaintiff's Detrimental Course of Action and thus the Plaintiff justifiably relied on the said Defendant Cohen's representation and inducement as the basis to form a contract for Cohen's attorney services. That justifiable reliance is the cause for the resulting damage to the Plaintiff, because Cohen failed and refused to meet substantial evidence requirements at Trial. Defendant Cohen prevented the Plaintiff from discovering why *Memarzadeh v. Diamond et.al.* was not a case that was based upon matters of fact, insisted that it was a case based on matters of law, and failed to disclose facts as to why she decided against, or omitted, Written Discovery and Diamond's Deposition. The Plaintiff did not know of the concealed facts and Defendant Cohen intended to deceive the Plaintiff by concealing the facts because of her Inducement during contract formation ("Inducement Email"). Had the concealed information been timely disclosed, the Plaintiff reasonably would have behaved differently, namely he would have sought other legal counsel. The Plaintiff has been significantly harmed because of Defendant Cohen's concealment and Defendant

Cohen's concealment was a substantial factor in causing the Plaintiff's harm.

20. The Plaintiff's reliance upon Defendant Diamond's and Defendant Cohen's "good faith" and contractual promises caused and continue to cause the Plaintiff's absence from gainful employment, consequent lost wages, and interruption to the Plaintiff's income stream. Attorney involvement should have remedied the interruption to the Plaintiff's income stream, who had been attempting to complete his book manuscript under the auspices of a university appointment. Absence from gainful employment has resulted in lost wages (*Toscano v. Greene Music,* 124 cal. App. 4th 685) that have been interrupted as a direct and proximate result of attorney involvement, the malpractice of whom since 2011 has prolonged the Plaintiff's absence from the Plaintiff's field of specialization. The Plaintiff does not want to be denied his day in court.

21. The fact and circumstances that the Plaintiff met with Cohen at her legal offices on July 14, 2016 and discussed Cohen's retention as counsel of record for *Memarzadeh v Diamond et.al.* was not disclosed, either in the Compliant or the FAC, and although they were mentioned in the SAC and in Haney's Opposition to the Demurrer, it is an Undisputed Fact that neither the event, nor its circumstances, nor the law form part of the 01/14/2021 Demurrer Ruling. No mention of it.

22. Such a fact ("Inducement Email") and its circumstances (i.e., <u>false representation</u> of 07/14/16;

communications with the Plaintiff between 07/14/16 & 01/09/17 proving Defendant Cohen's intention to be retained as counsel of record for SC121758; and Defendant Cohen's concealment from the Plaintiff that Defendant Cohen intended to induce reliance for execution of 01/09/17 Legal Services Contract) form the basis for the Plaintiff's Fraud Causes of Action. Since the fact of the "Inducement Email" is excluded from 01/14/2021 Demurrer Ruling, its omission signifies that the Court did not explicitly consider it as the basis for meeting factual sufficiency for the 3rd and 4th Cause of Action: Misrepresentation and Concealment.

23. It is Undisputed Fact that Defendant Cohen did not perform Written Discovery. Had Defendant Cohen performed Written Discovery, facts that were uncovered at the Trial of SC121758 would have come into plain view beforehand, namely that Defendant Diamond had visited Plaintiff's former Professor Posnansky and during that meeting in 2012, Diamond witnessed that Professor Posnansky characterized Plaintiff to Diamond in the following evidently racist manner: "IRANIAN" [*BIAS BASED ON NATIONAL ORIGIN*] AND "VERY HAIRY" [*BIAS BASED ON RACE/ETHNICITY*] AND "VERY CONSPICUOUS" [*BIAS BASED ON RACE*] AND "A LOT OF HAIR ON HIS NECK AND ARMS," [*BIAS BASED ON RACE/ETHNICITY*] AND "NOT CHARISMATIC," [*UNIVERSITY EMPLOYEE NEEDS TO BE PERSONABLE*] "PARANIOD," [*UNIVERSITY EMPLOYEE NEEDS TO BE EXTROVERTED*], which was recounted in the SAC (¶11d). Despite its mention in passing however, the Plaintiff's attorneys did not

adequately discuss the circumstances that formed part of the facts. They are: had Defendant Cohen performed Written Discovery, Defendant Cohen would have learned of Defendant Diamond's conversations with Professor Posnansky and of Posnansky's admissions. Furthermore, Defendant Cohen would also have learned that Defendant Diamond had factually established that the Plaintiff was described by a UCLA employee, who also was Plaintiff's former Professor, prejudicially and biasedly based on his National Origin, Race, and Ethnicity. Based upon such facts, Defendant Cohen would have known of the requirement to locate a standard of care expert in Employment Discrimination to testify that Diamond had the basis for a Cause of Action in Discrimination based upon National Origin and Racial/Ethnic Bias, and additionally Diamond had direct knowledge of such a bias and thus had "cause" to bring a lawsuit against UCLA/Army Intelligence.

24. But Defendant Cohen would have needed to have performed Written Discovery in order to identify exactly how, when, where, and with whom, namely which particular acts Diamond had engaged or omitted to engage, did Diamond learn the basis for Employment Discrimination from. Without Written Discovery or a Deposition, Defendant Cohen had no basis in fact to know the circumstances of Diamond's meetings with Professor Posnansky and Professor Morony.

25. It is Undisputed Fact that Defendant Diamond also met and discussed the matter the Plaintiff retained him for, known as UCLA/Army Intelligence, with

Bioethicist Anne Simon and Journalist Richard Reeves. For Opposing Counsel (OPC), it is unexplained why the Plaintiff is even concerned about expert testimony from Bioethicist Anne Simon and Journalist Richard Reeves not because of their value, or lack thereof, for the Trial Judge, but because the Trial Judge was being affronted in the SAC. (02/06/2020 Reply, p.05/12)

26. It is Undisputed Fact that Defendant Cohen did not conduct a Deposition in order to further identify Defendant Diamond's acts or omissions with regard to his (Diamond's) Negligence despite there being law, *Krista Masellis v. Law Office of Leslie F. Jensen et al.* (F075772 & F076362; Super. Ct. No. 2012536), in which an expert [attorney Hennenhoefer] testified that, "…. it is below the standard of care not to take depositions ...." In such Deposition, Defendant Diamond would be deposed as to his standard of care in legal services specifically for an Employment Discrimination matter.

27. It is Undisputed Fact that Opposing Counsel in his 02/06/2020 Reply to Haney states: "the notion the trial judge in Plaintiff's case against Mr Diamond was too dumb to know what a strong letter of recommendation is or the difference between a bioethicist or a journalist and someone responsible for hiring at a Department of history is insulting and minimizes the profound weaknesses in the case against Mr Diamond." (p.05/12) However, Opposing Counsel reduces the circumstances in order to obscure the reason a standard of care expert was necessary in the first place: it would not be factual to state that the Trial Judge is a specialist in any field outside that of jurisprudence,

and the mere suggestion that the Trial Judge or Defendant Diamond possess the expertise to be held to the standard of care of a specialist is speculation. (*Wright v. Williams* (1975) 47 Cal.App.3d 802,810 (CACI 600: Standard of Care)). Professors are the ones who ultimately select candidates to be hired for faculty positions at University History Departments.

28. The relevant argument for the requirement for expert testimony relates to persons who are not versed or competent in a particular field of expertise. The simple fact is that a Trial Judge is not a University History Professor and thus a Trial Judge would not know what a University History Professor knows as a matter of professional requirement. The standard for what constitutes a good reference letter and a poor one requires someone with specific knowledge, an expert who serves on a University History Department selection committee, to further inform the subpoenaed witness's (Professor Michael Morony's) impressions of his own reference letter based upon the University Faculty Hiring Process at the Selection Committee level. It is thus a fact that neither Diamond nor a trier of fact have expertise in determining the value of an Academic History Department reference letter for hiring.

29. It is Undisputed Fact that Roger Diamond admitted during the Trial (SC121758), while he was under oath, that when he sought out and met with Professor Michael Morony in 2011-2012 (Plaintiff's former Dissertation Committee Chair), during his (Diamond's) meeting with Professor Morony and subsequently,

Diamond formed a relationship with Plaintiff's former professor in order "to prove plaintiff wrong," and that by "working with Morony" against Plaintiff, he (Diamond) could convince Plaintiff that "he was wrong."

30. It is Undisputed Fact that facts and circumstances relevant to Diamond's abovementioned Breach of Fiduciary Duty did not come into plain view until Diamond was called to the stand by Defendant Cohen in March 2017. Since Diamond admitted to having engaged in "bad faith" only when he was under oath at Trial and provided proof in fact of having breached Fiduciary Duty with Plaintiff by forming a relationship with Plaintiff's former professor, for a specific intention outside of the Scope of the Contract with Plaintiff and in order "to prove plaintiff wrong," Defendant Diamond's engagement in "bad faith" by "working with Morony" against the Plaintiff would have provided further grounds for proving Plaintiff's Cause of Action for Diamond's Breach of Fiduciary Duty.

31. But for Defendant Cohen's Negligence and omission to conduct Written Discovery that would have shed light on Diamond's visits to Plaintiff's former Professors, such facts as to identify exactly how, when, where, and with whom, would have informed Defendant Cohen's conduct as attorney of record in SC121758 and would have been the *modus operandi* to reasonably locate required expert testimony in legal standards.

32. In this instance, the issue is not the requirement of expert testimony to establish Diamond's fiduciary duty breach to Plaintiff, although "[e]xpert testimony is

not required, but is admissible to establish the duty and breach elements of a cause of action for breach of fiduciary duty where the attorney conduct is a matter beyond common knowledge," (*Stanley v. Richmond* (1995) 35 Cal. App.4th at p. 1087). In this instance, but for Defendant Cohen's Negligence to conduct Written Discovery, facts that surfaced during Trial in March 2017, would have been identified earlier, would have then been subject to further scrutiny during a Deposition, and then a decision as to whether expert testimony in legal standards would have established beyond any doubt that Defendant Diamond, indeed, did Breach his Fiduciary Duty with Plaintiff could have been made between Plaintiff and Defendant Cohen.

33. The Undisputed Fact is that Defendant Cohen neither conducted Written Discovery nor a Deposition on Diamond. Plaintiff recalls that Defendant Cohen was exclusively focused on ruling out expert witnesses during the office meetings of February 15, 2017 and February 23, 2017 preceding the Final Status Conference of March 3, 2017. Plaintiff specifically recalls Defendant Cohen's aggressiveness, intimidation, oppression, and coercion.

34. As a direct and proximate result of the substitution of attorneys in May 2020, facts about how the Trial Brief omitted the Fraudulent Misrepresentation Cause of Action of Plaintiff's Original Complaint came to light. Haney & Young had failed to obtain electronically unavailable documents that Plaintiff had requested. Plaintiff did not possess the entire case file until after Attorney Peng was retained. Additionally, the Covid Public Health crisis ensued in March 2020 when the

Presiding Judge first issued restrictions. (Santa Monica Superior Court does not have documents on line.)

35. It is Undisputed Fact that Defendant Cohen, in the Trial Brief, omitted the Misrepresentation Cause of Action of the Original Complaint. Defendant Cohen's omission to include the Misrepresentation Cause of Action as essential to the Plaintiff's allegations, and damages resulting from that omission, has not been considered by the Court. None of the pleadings discuss the Original Complaint and Defendant Cohen's unilateral departures from it as an obstruction to the Plaintiff's right to address Defendant Diamond's malfeasance. Defendant Cohen's omissions (Negligence) as counsel of record to incorporate all Causes of Action from the Original Complaint also constitutes "new or different facts, circumstances, or law," hitherto not included in pleadings by the Plaintiff's counsel or considered by the Court (CCP§1008). The Trial Brief had not been available until Attorney Peng was retained. Thus, the facts and circumstances relevant to the Plaintiff's requirement of Defendant Cohen that the Original Complaint's Causes of Action be amended for factual sufficiency and Defendant Cohen's misrepresentation to the Plaintiff about what the Plaintiff "really desired" was a quick resolution to the case and recovery of the monies he had paid to Diamond, were made in contradiction to the Plaintiff's requests.

36. Defendant Cohen's representations that, as attorney of record, she would amend the Complaint had been certain in January 2017 and into the MSC. But for Defendant Cohen's omissions, the Trial Brief would

also have referenced Diamond not possessing any direct litigation experience in Employment Discrimination based upon his own disclosures in Written Discovery and Deposition, both of which Defendant Cohen failed to perform. But for Defendant Cohen's omissions, Defendant Diamond's Misrepresentation would have formed part of the litigation of SC121758. Hence, the Trial Brief could have accurately represented the damages, injuries, and harm sustained by Plaintiff with the benefit of Written Discovery and Defendant Diamond's Deposition. But for Defendant Cohen's concealment, the Trial Brief would not have been a disjunctive pleading from the Original Compliant.

37. It is Undisputed Fact that Defendant Cohen did not obtain, or attempt to obtain, facts to prove that Diamond did not have the requisite skill that an attorney specialized in Employment Discrimination possesses, which facts were unavailable until Diamond's own admissions in his Closing Brief. The Closing Brief reflected 35 cases that Diamond believed spoke to his expertise in Employment Discrimination. However, *Alcindor v Forsythe,* LASC No. WEC18964 was not an Employment Discrimination case. For the Negligence Cause of Action in SC121758, Defendant Cohen required relevant facts. Thus, Defendant Cohen had to exercise the required care to obtain those facts through Written Discovery. Without requisite facts, the Trial Judge would, and did, consider Defendant Cohen's opinions and conjecture as argumentative and speculative. Defendant Cohen's Negligence (Legal Malpractice) was in not conducting Written Discovery or Deposing Defendant Diamond to determine whether she (Cohen) required a

standard of care witness in Employment Discrimination to prove Diamond's Negligence, Breaches of Fiduciary Duty, and Misrepresentation.

38. It is Undisputed Fact that Defendant Diamond also witnessed Professor Michael Morony admit that he (Morony) had suggested to the Plaintiff alternate employment at the State Department and US Army Intelligence while the Plaintiff was a graduate student at UCLA. Defendant Cohen required expert testimony as to the standard of care of a University History Professor. What the Plaintiff expected both Defendant Diamond and Defendant Cohen to seek answers to, was: if the Plaintiff did not seek such employment outside of academia, then why would Professor Morony suggest alternate employment at spy agencies to the Plaintiff, his graduate student at the time (2002-2005)? The Plaintiff also wanted both Defendant Diamond and Defendant Cohen to establish that the Reference Letters were subjective assessments of the Plaintiff's aptitude while he was a history graduate student and thus would require a standard against which to be judged, based on the content of the Letters as to what they included and what they omitted. What exactly did Professor Morony's Letters of Recommendation, addressed to selection committees for hiring University History Department faculty, intend to communicate to prospective academic employers?

39. It is Undisputed Fact that Defendant Cohen did not bring a motion or even object to Defendant Diamond admitting the entire case file as one document on the third and last day of Trial. Such an act of Negligence

generated counterproductive consequences for Defendant Cohen's strategy to prove that Defendant Diamond did not merit the fees (*Quantum Meruit*) he charged. Defendant Cohen's omission to bring such a motion also proved fatal for the Plaintiff's chances at prevailing in SC121758. But for Defendant Cohen's matter-of-law arguments as sufficient for matter-of-fact legal requirements, the Plaintiff, with expert testimony, would have prevailed against Diamond, even when Diamond could argue that Diamond was entitled to his *Quantum Meruit*.

40. It is Undisputed Fact that Defendant Cohen's omission to hire a court reporter was done so with malice because it involved intentional conduct and concealment on the part of Cohen as counsel of record and would have to be discovered as part of Defendant Cohen's deposition. Plaintiff's interview of a CA State Bar Attorney who defined the obligatory tasks of a counsel of record reveal such a responsibility as incumbent upon the attorney.

41. It is Undisputed Fact that circumstances relevant to background checks and Employment Discrimination were also not discussed in any of the pleadings. But for Defendant Cohen's omission to identify Diamond's conduct vis-a-vis ascertaining the conclusive importance of background checks for Academic Employment in Written Discovery, Diamond's plan, methods, breaches, and skills in the Employment Discrimination matter would have been adequately examined at the Trial of SC121758 in March 2017.[1]

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1. 15 U.S.C. § 1681a(e) quoted from Attorney Russell C. Ford (Strickland, Brockington, Lewis, LLP): "The term 'investigative

42. It is Undisputed Fact that background checks are a routine component of the University Hiring Process. In order for Defendant Cohen to have factually controverted that Diamond changing "his focus away from Plaintiff's goals and toward proving that Plaintiff's stated goals were impossible to prove" were because of the Plaintiff himself (03/29/2017 Plaintiff's Closing Brief at p.7/20), required the benefit of Written Discovery for facts about Diamond's breaches (i.e., fiduciary duty) because the Plaintiff had consistently expressed to Diamond how recruiting was undertaken and how the components of background checks were performed. At Trial, Diamond reduced and simplified the reason the Plaintiff had not attained a University History Department Faculty position in his field of expertise to be a result of "market forces" instead of Diamond's own investigative shortcomings to pinpoint the exact impediments. But for Defendant Cohen's failure to conduct Written Discovery and a Deposition, the Plaintiff would have been able to identify tangible proof in fact of how Defendant Diamond's Negligence, Breaches of Duty, and Misrepresentation were the causes for Diamond not filing a lawsuit based upon the Plaintiff's retention of him in 2011.

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consumer report,' vital to employment background checks for hire, retention, promotion, and discipline decisions, is defined as 'a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information.'" Stetson University Law School's *Background Checks for Students and Employees.* [EMPHASIS ADDED]

43. It is Undisputed Fact that Defendant Diamond observed the divergences between the Plaintiff's Original Complaint and the Trial Brief prepared by Defendant Cohen. In his March 10, 2017 Trial Brief, Defendant Diamond stated:

> "The theory of the complaint seems to be completely at odds with the theory now being espoused by plaintiff's attorney [IN PLAINTIFF'S TRIAL BRIEF]. Specifically the claim now appears to be that the case [ACCORDING TO DEFENDANT COHEN] had no merit and therefore Defendant Diamond should not have charged anything for his time in conducting an extensive investigation."

Defendant Cohen had concealed from the Plaintiff that she would be advancing an argument in the Trial Brief she was preparing that Plaintiff was not credible and that the case had no merit. Defendant Cohen had changed the Plaintiff's arguments without the Plaintiff's consent and without the Plaintiff's knowledge. Defendant Cohen willfully omitted the Plaintiff's allegations in the Original Complaint from the Trial Brief without the Plaintiff's knowledge. But for Defendant Cohen's malfeasance and Negligence not to discuss amending the Original Complaint before the Trial, and Defendant's concealment, the Plaintiff would have obtained a better result at Trial in March 2017.

44. The Trial Brief filed by Defendant Cohen contained very evident omissions that the Original Complaint had included. Defendant Cohen misrepresented

the Plaintiff's theory as to the allegations and facts in the Original Complaint. The Trial Brief should have reasonably displayed continuity of Plaintiff's points from the Original Complaint but did the contrary: it did not accurately express the Original Complaint's Causes of Action that the Plaintiff filed in 2013. The Plaintiff had drafted the allegations of the Original Complaint for the purpose of court relief. Defendant Cohen had concealed from the Plaintiff that, because of her suppression of facts, the Trial Brief would not reasonably be reflective of what another attorney would have performed as the Plaintiff's "counsel of record" for SC121758. Furthermore, Defendant Cohen should have heeded that the case required experts because of its facts and that the case did not relate to matters of law. Defendant Diamond observes in his own Trial Brief: "This appears to be a fact intensive case."

45. But instead, Defendant Cohen concealed from the Plaintiff that there was a requirement for the case to be determined not as a matter of law but based upon facts and the production of expert testimony to prove those facts pursuant to *Wright v. Williams* (1975) 47 cal.app.3d 802,809. The Trial Brief Defendant Cohen prepared proves that Defendant Cohen tried the case as if it were Diamond's actions or advice that were incorrect *based upon* a legal governing principle. As such, Defendant Cohen erred.

46. The Plaintiff's pleadings to date do not treat the new facts from the described circumstances. As CCP§1008 allows for a prior order to be modified or amended, contingent upon "new or different facts, circumstances, or

law," the applicant (Plaintiff) requests that this Honorable Court consider that misinterpretations materialized between the Plaintiff and his counsel (Haney & Young) when the latter was attempting to translate, traduce, and render the Plaintiff's account of the occurrences and every relevant fact saliently and faithfully to this Honorable Court without the benefit of access to source documents from SC121758. Such misinterpretations were not caused by the Plaintiff.

47. As the Statement of Decision of 05/03/2017 observes, the trial court of SC121758 did not agree with Defendant Cohen's theory of argumentation specifically because the issue was that of fact that required factual evidence and, as such, required production of expert testimony; it could not be determined as a matter of law. [*Wright v. Williams* (1975) 47 cal.app.3d 802,809] Thus, Defendant Cohen had concealed her intention for trial from the Plaintiff and, without the Plaintiff's knowledge, Defendant Cohen advanced her concealed arguments at trial. Without the Plaintiff's consent and without due care, Defendant Cohen executed her own theory at the trial of SC121758 in March 2017, which conduct produced a result to the detriment of the Plaintiff.

48. On July 14, 2016, Defendant Cohen had confirmed in writing ("Inducement Email") that she had spoken to Plaintiff at her law office about a prospective attorney malpractice case (SC121758) in which the attorney's "conduct was below the standard of care." In the email, Defendant Cohen recapped her office conversation with the Plaintiff, as follows: "attorney malpractice will require

you to have an expert opinion ... Without such an expert, the case would not be viable, as he is heading to trial." (Defendant Lottie Cohen, 07/14/2016, 2288 Westwood Boulevard, Los Angeles, CA)

Thus, Defendant Cohen misled the Plaintiff on 07/14/16, and continued to solicit the Plaintiff to be retained as counsel of record for *Memarzadeh v. Diamond et.al.* until the Legal Services Contract was actually executed on 01/09/17. The Plaintiff did not know and was not informed that Defendant Cohen would reverse her intention to prosecute the case *Memarzadeh v. Diamond et.al.* based on matters of fact. The Plaintiff would have behaved differently had the omitted information been disclosed to the Plaintiff earlier.

49. Based on the foregoing, I, Plaintiff, respectfully request that the Court grant my Motion for Reconsideration in order that substituted counsel Attorney Michael Peng can substantiate the Fraud Causes of Action (3rd and 4th) and the Negligence Cause of Action (1st) in a Third Amended Complaint with the requisite facts that would prove those Causes of Action for sufficiency based upon the legal standard.

It would be injustice not to allow Plaintiff to prove factual sufficiency now that substitute counsel has been located, solely based upon incomplete and poorly traduced pleadings prepared after previous counsel had decided to withdraw.

The pleadings to date have not considered that Defendant Cohen had failed to conduct Written Discovery

and a Deposition on Defendant Diamond. The Plaintiff's claim stretches to 2013 when he retained Diamond for the Employment Discrimination matter.

50. The Plaintiff hereby requests of this Honorable Court to grant his Motion for Reconsideration based on good cause: Attorney Michael Peng will be able to, based upon CCP§1008 that allows a prior order to be modified or amended, contingent upon "new or different facts, circumstances, or law," supply those facts and circumstances and elaborate the injustice that his client, Dr Maher Memarzadeh has been facing since 2011 when he decided to confront, in the appropriate venue, the reason why he had been denied academic employment at more than 60 University Professorships.

51. Had the Plaintiff known that Defendant Cohen had no intention to use expert testimony in the fact-driven case as she had promised to do so on July 14, 2016 and thereafter, and had the Plaintiff known that Defendant Cohen also had no intention to conduct Written Discovery and Depose Defendant Diamond, Plaintiff would have hired alternate counsel. But for Defendant's Negligence and Fraud, the Plaintiff would not have embarked on that Detrimental Course of Action which led to the Plaintiff not prevailing at the Trial SC121758 in March 2017. Indeed, Defendant Cohen subsequent reversal and engagement in omissions and nondisclosures of when and how to hire experts for testimony began after January 9, 2017.

I declare under penalty of perjury under the laws of the State of California that the facts set forth above are true and correct.

Appendix F

Executed this _31st_ day of January 2021, at ___**Los Angeles**___, California.

Respectfully Submitted,

/s/ Maher Memarzadeh
Maher Memarzadeh. PhD