Case No. 22-56003

United States Court of Appeals for the Ninth Circuit

LAURA LYNN HAMMETT, individually,
Plaintiff and Appellant,

v.

MARY E. SHERMAN, et al.
Defendants and Appellees.

Appeal from the United States District Court
for the Southern District of California
Case No. 3:19-cv-00605-LL-AHG
The Honorable District Judge Linda Lopez

APPELLEES ALAN M. GOLDBERG; ELLIS R. STERN; and STERN & GOLDBERG'S ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT REQUIRED BY FRAP 26.1

Defendants-Appellees, Alan M. Goldberg, Ellis R. Stern and Stern and Goldberg are individuals and a partnership and therefore no corporate disclosures are required.

DATED: June 5, 2023

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By: */s/ Corinne C. Bertsche*
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INTRODUCTION

This action stems from a family dispute over Plaintiff Laura Lynn Hammett's share of distributions from Silver Strand Plaza, LLC ("Silver Strand), a family business which owned an apartment complex as its principle asset. In addition to filing this action against Silver Strand, its manager, Mary E. Sherman, and other family members, Plaintiff also filed claims against her litigation adversary's counsel, namely Defendants Ellis Stern and Alan N. Goldberg, and Stern & Goldberg (collectively "S&G Defendants") which were clearly barred by California's anti-SLAPP statute, Code of Civil Procedure section 425.16. As a result, the S&G Defendants promptly filed an anti-SLAPP motion.

However, in response to the anti-SLAPP motion, Plaintiff voluntarily dismissed each of her causes of action alleged against S&G Defendants admitting that her derivative claim purportedly on behalf of Silver Strand alleged against them was improper. In her dismissal, Plaintiff also indicated she intended to pursue a different claim against them after obtaining leave of court pursuant to Civil Code section 1714.10.

Under controlling law relied upon by the district court in granting S&G Defendants' motion for attorney's fees, Plaintiff's dismissal of the alleged claims against S&G Defendants did not excuse her obligation to pay S&G Defendant's attorneys fees incurred to defeat the claims through the anti-SLAPP motion process. The district court properly found that the S&G Defendants are prevailing parties and entitled to recover from Plaintiff their reasonable attorney's fees and costs in the amount of $23,093.00 in pursuing their anti-SLAPP motion.

Plaintiff's arguments on appeal that the district court's rulings were erroneous, including on the basis the court was purportedly biased against her, are without any merit and should be soundly rejected.

JURISDICTIONAL STATEMENT

Pursuant to Ninth Circuit Rule 28-2.2, Appellees submit the following statement of jurisdiction:

The district court had original diversity jurisdiction pursuant to 28 U.S.C. § 1332 since plaintiff and defendants reside in different states.

Appellant appeals from the district court's judgment, entered September 30, 2022, as well as several interim orders which merged

with the final judgment. (7-SER[1]-1450-53.) The district court entered final judgment on all claims for relief in the underlying action on September 30, 2022. (1-SER-4.) This Court has jurisdiction over final orders and non-final orders that merge with the final judgment or order. *Gonzalez v. U.S. Immigration & Customs Enf't,* 975 F.3d 788, 802 (9th Cir. 2020). Since the judgment is final under Federal Rule of Civil Procedure 41(b), this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

The notice of appeal was filed on October 25, 2022, and is timely pursuant to 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a). (7-SER-1450-53.)

ISSUES PRESENTED

1. Did the district court properly grant appellees' motion for attorney's fees finding they were prevailing parties pursuant to California Code of Civil Procedure section 425.16(c) following Plaintiff's dismissal of her claims against appellees while their special motion to strike (anti-SLAPP motion) was pending?

[1] Appellees jointly file the Appellees' Supplemental Excerpts of the Record ("SER")

2. Did the district court properly deny Plaintiff's motion to vacate and for reconsideration of the attorneys fee order?

3. Did the district court properly exercise its discretion in its award of attorney's fees to appellees?

4. Did the district court properly exercise its discretion in denying Plaintiff's request to disqualify the Honorable Janis Sammartino and vacate orders based on purported bias by the court?

5. Did the district court properly exercise its discretion in denying Plaintiff's requests for limited scope counsel?

Appellees assert the answer to these questions is "yes."

STATEMENT OF THE CASE

A. Plaintiff sues Sherman, Silver Strand Plaza, LLC, their attorneys, and other defendants.

Plaintiff initially filed this action on April 2, 2019, against Mary E. Sherman, individually, as manager of Silver Strand Plaza, LLC, and as co-trustee of the J&M and Grandchildren Trusts ("Sherman"), Silver Strand Plaza, LLC ("Silver Strand"), Linda Kramer ("Kramer"), and Diane Dennis ("Dennis"), alleging claims for breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, defamation per se, civil

conspiracy, and conversion, seeking exemplary damages, an accounting, and specific performance of indemnification. (7-SER-1406.)

Silver Strand is a family owned limited liability company whose principal asset is a multi-tenant shopping center located in Imperial Beach, California. (7-SER-1326.) Defendant Sherman is the manager of Silver Strand. (*Id.*) Plaintiff's claims in this action arise from her ownership of a 14.1571% interest in Silver Strand. (*Id.*) Other family members own the remainder of interests in Silver Strand. (7-SER-1326-27.)

On May 29, 2019 Plaintiff filed a First Amended Complaint ("FAC"), adding as her sixth cause of action a derivative claim of legal malpractice against Sherman and Silver Strand's prior counsel, Ellis Roy Stern, Esq., Alan N. Goldberg, Esq., Stern & Goldberg, A California Partnership (herein collectively referred to as "S&G Defendants"), and Patrick C. McGarrigle, Esq., and McGarrigle, Kenney & Zampiello, a professional law corporation (herein collectively referred to as "MKZ Defendants") as defendants based on their prior representation of

Sherman and Silver Strand.[2] (7-SER-1392.) Plaintiff also added the Attorney Defendants to her fifth cause of action for conversion, and requested that the MKZ Defendants be disqualified as counsel for Silver Strand. (7-SER-1387, 1400.) Plaintiff further added as defendants Jeffrey Sherman as co-trustee of the J&M Trust ("J. Sherman"), and Kramer and Hunsaker as co-trustees of the L&E Trust in her FAC.[3] (7-SER-1326.)

Plaintiff's FAC asserts various allegations against her family members, primarily based on the allegations that Sherman violated the Amended and Restated Operating Agreement of Silver Strand by allowing unreasonable management fees, allowing unexplained "Asset Account Adjustments," taking improper bonuses, buying a computer with company funds, and converting money from Plaintiff which was later returned. (7-SER-1329-30.) Plaintiff's complaint further alleges she was defamed and intimidated from pursuing her legal rights, and

[2] The S&G Defendants and the MKZ Defendants are also collectively referred to herein as the "Attorney Defendants."

[3] All defendants other than the S&G and MKZ Defendants are referred to herein collectively as the "non-attorney Defendants" or the "Silver Strand Defendants"

details years of family disputes, rife with allegations of mental cruelty, child pornography, drug use and hospitalization for depressing and stressful situations, and alleged threats of murder for hire. (7-SER-1330-31, 1341-42, 1362-63.)

As to the S&G Defendants, Plaintiff's claims derive from litigation-related or privileged activity arising from S&G Defendants' prior representation of Sherman and Silver Strand. Despite that the S&G Defendants never represented Plaintiff and never possessed any assets belonging to plaintiff or Silver Strand, Plaintiff named the S&G Defendants in the following causes of action asserted in the FAC: (1) the Fifth Cause of Action for Conversion; and (2) the Sixth Cause of Action for Legal Malpractice. (7-SER-1324.) Plaintiff's Fifth Cause of Action entitled "Conversion" pleads that a civil conspiracy existed between S&G Defendants and their client, and that any payment of fees was accordingly a conversion.[4] (7-SER-1387-91.)

[4] Plaintiff alleges that Stern was paid for his services by Silver Strand funds, which she claims are the equivalent to distributions she should have also received. (7-SER-1388.) To the contrary, Silver Strand's Operating Agreement permits Sherman, as the manager of Silver Strand, to retain attorneys on behalf of Silver Strand and herself and to use the company's assets to pay the attorney's fees for those attorneys. (5-SER-1062-64, 1067-68.)

In the Sixth Derivative Cause of Action for Legal Malpractice, Plaintiff alleges that S&G Defendants failed to use the "skill, prudence, and diligence" that "members of their profession commonly possess and exercise" in their representation of Silver Strand. (7-SER-1392.) Plaintiff does not allege that S&G Defendants ever represented her. Rather, Plaintiff alleges S&G Defendants represented Defendant Sherman and Silver Strand and claims that Silver Strand suffered an unspecified amount of financial losses due to the actions of the Attorney Defendants. (7-SER-1335, 1388, 1392-94.)

Plaintiff alleges that Ellis Stern ("Stern") and Alan Goldberg ("Goldberg"), acting on behalf of S&G were retained as co-counsel to Defendants Silver Strand and Sherman as manager of Silver Strand from December 2013 through May 2018. (7-SER-1327.) Plaintiff makes various allegations regarding S&P Defendants' communications with her, including that (1) defendants accused Plaintiff of using inappropriate language in communications with counsel; (2) communicated that they were legal counsel to Silver Strand and Kramer; (3) communicated to Plaintiff that her threats to her mother, Sandra Kramer, amounted to elder abuse; (4) refused to tell Plaintiff

what various accounting documents represented in response to her demands; (5) communicated with Plaintiff regarding her claims and threatened legal action against the company; (6) sent an email demanding a release for their client; and (7) communicated a settlement offer to Plaintiff for her share of the company, and explained the amount offered.[5] (7-SER-1333, 1335-40, 1346-47, 1353, 1379, 1381, 1388-90.)

On May 7, 2018, Plaintiff, through attorney Michael Early, filed a complaint against Sherman and Silver Strand in United States District Court for the Central District of California, entitled *Lynn v. Sherman, et al.*, Case No. 2:18-cv-03757-FMO-JPR. (5-SER-1036.) Plaintiff's claims were primarily based on allegations that Sherman was withholding certain distributions that Plaintiff claimed she was entitled to receive as a member of Silver Strand. Plaintiff makes numerous

[5] Given the level of animosity and threats of litigation between plaintiff and the remaining family members, Stern attempted to negotiate a settlement of plaintiff's interests in Silver Strand. (7-SER-1381, 1388, 1384.) However, plaintiff rejected what she viewed as an offer price of "1/6 of its actual value." (7-SER-1377, 1388.) Plaintiff alleges that "even if there were no damages from the low-ball offer, it shows the defendants tried to get away with that, like the difference between murder and attempted murder, but civil." (*Id.*)

references to Stern and his representation of Sherman, and his various communications to Plaintiff on behalf of Sherman in her complaint in *Lynn v. Sherman*. (5-SER-1036-42.) Sherman and Silver Strand were represented by the MKZ Defendants in *Lynn v. Sherman*. On May 8, 2018, Plaintiff voluntarily dismissed that action. (5-SER-1048.)

B. Plaintiff brings motions for leave to retain representation on a limited scope basis, which are denied.

After filing the action and amending her complaint, on July 19, 2019, Plaintiff filed a motion for leave to retain representation on "limited scope," on the basis that she will likely not have enough funds to retain counsel for all purposes to complete the case. (7-SER-1321-23.)

On July 31, 2019, the district court denied Plaintiff's motion, explaining that neither the Federal Rules of Civil Procedure nor the district court local rules provide a mechanism for a limited scope representation, and that any attorney appearing on behalf of Plaintiff must enter a full appearance. (1-SER-146-47.) The court further indicated that to the extent the court "retains any discretion to entertain a motion to permit both Ms. Hammett and her attorney to appear simultaneously for imprecisely defined purposes, *see* S.D. Cal.

CivLR 83.3(f)(4), the Court declines to exercises that discretion here." (*Id.*)

Plaintiff subsequently filed a second motion for leave to retain representation for special appearance on August 11, 2020. (2-SER-369-70.) Plaintiff's second motion was limited to retaining an attorney for the "purpose of collection of fees and costs for process of service and attorney fees and costs for the collection of said fees and costs" under local rule 83.3(f)(4) due to Sherman's refusal to waive service of summons and pay costs. (*Id.*) The court denied Plaintiff's second motion on August 13, 2020, finding that local rule 83.3(f)(4) did not apply to the "special appearance" contemplated by Plaintiff in her motion. (1-SER-76-77.)

C. The Attorney Defendants bring special motions to strike ("anti-SLAPP" motions) pursuant to California Code of Civil Procedure section 425.16.

The S&G Defendants filed a special motion to strike ("anti-SLAPP motion") pursuant to California Code of Civil Procedure section 425.16, and a motion to dismiss in the alternative on July 30, 2019. (5-SER-

91.)[6] S&G Defendants argued that Plaintiff's claims fell within California's anti-SLAPP statute under California Code of Civil Procedure section 425.16 since the claims arose from litigation related and protected activity engaged in by the S&G Defendants as Plaintiff's opposing counsel representing her litigation adversaries. (*Id.;* District Court Docket, "Dkt." 21-1.)

The S&G Defendants further argued that Plaintiff is unable to establish a probability of prevailing on either claim for legal malpractice or conversion based on several defenses. Defendants argued Plaintiff's claim for legal malpractice is without merit because (1) Plaintiff was never a client of S&G Defendants and is unable to establish an attorney-client relationship; (2) it was brought as a derivative claim and is barred as a matter of law; and (3) is time barred pursuant to the one-year statute of limitation in California Code of Civil Procedure section 340.6. (5-SER-991-95; Dkt. 21-1.)

The S&G Defendants also argued that Plaintiff failed to state a claim for conversion against them since (1) her cause of action is a

[6] The MKZ Defendants similarly filed a Special Motion to Strike ("anti-SLAPP" motion) pursuant to California Code of Civil Procedure section 425.16 on July 30, 2019. (5-SER-1078.)

disguised claim for civil conspiracy between an attorney and client, which is precluded under California Civil Code section 1714.10(a); (2) Plaintiff never had title or possession of any Silver Strand assets and has no standing to pursue a claim on behalf of the company; (3) it is a generalized claim for money which is not actionable as conversion; and (4) S&G's actions complained of are subject to and barred by the litigation privilege pursuant to California Civil Code section 47(b). (5-SER-991-95; Dkt. 21-1.)

D. Plaintiff voluntarily dismisses her claims against the Attorney Defendants while their anti-SLAPP motions are pending, resulting in the district court denying the motions as moot.

In response to the Attorney Defendants' anti-SLAPP motions, on August 20, 2019, while their motions were pending, Plaintiff voluntarily dismissed her claims against the Attorney Defendants, claiming in her dismissal that she "errantly titled the Sixth Cause of Action, omitting 'on behalf of Silver Strand Plaza, LLC as Plaintiff and nominal defendant'" and admitting that she is not a licensed attorney and cannot represent a limited liability company. (5-SER-953-54.) In her dismissal, Plaintiff also expressed an intent to refile these and other new claims against the Attorney Defendants by stating "[b]ecause the

two anti-SLAPP motions filed by the Attorney Defendants require early discovery, the Plaintiff chooses to withdraw the less significant claim of conversion now and revive it after she files a motion pursuant to CCP 1714.10 to include a claim of Aiding and Abetting a Breach of Fiduciary Duty." (*Id.*)

Subsequently, given that Plaintiff had voluntarily dismissed her claims against the Attorney Defendants, the district court entered an order denying both anti-SLAPP motions as moot on August 21, 2019 and took the motions off calendar. (1-SER-144-45.)

E. The Attorney Defendants file motions for attorneys' fees pursuant to California Code of Civil Procedure section 425.16(c).

On September 3, 2019, and September 5, 2019, the Attorney Defendants filed their respective motions for attorneys' fees pursuant to Code of Civil Procedure section 425.16(c). (4-SER-888, 916.)

The S&G Defendants argued they were entitled to mandatory attorney's fees as prevailing parties in their anti-SLAPP motion pursuant to Code of Civil Procedure section 425.16(c), in light of Plaintiff's voluntary dismissal and arguments raised in their anti-SLAPP motion. (4-SER-888-903.) In support, S&G Defendants

presented defense counsel's declaration as to the work performed and reasonableness of the attorney's fees requested. (4-SER-904-15.)

On September 25, 2019, Plaintiff filed a combined opposition to the Attorney Defendants' motions for attorneys' fees, and on October 9 and 10, 2019, filed objections to the declarations of Patrick McGarrigle, Ellis Stern, and Alan Goldberg. (4-SER-678, 658, 649.) Plaintiff argued she dismissed her claims against the Attorney Defendants since she could not legally pursue claims on behalf of Silver Strand. (4-SER-706-07; Dkt. 78-1.) She further argued that the anti-SLAPP motions were filed for an improper purpose "to force me to show my hand," and that her claims do not deal with free speech or right to petition. (4-SER-684-85, 687.) Plaintiff also argued facts related to her claims of improper distributions against Sherman in her opposition. (4-SER-691-94; Dkt. 78-1.) Lastly, Plaintiff argued that the attorney fee rate of $475 or $490 per hour "seems excessive." (4-SER-703.)

The Attorney Defendants each filed their respective replies to the motions for attorneys' fees on October 10, 2019.[7] (3-SER-624, 636.)

[7] On October 10, 2019, the MKZ Defendants also filed an objection and request to strike objections to evidence filed by plaintiff. (3-SER-947.)

S&G Defendants argued Plaintiff's dismissal of the alleged claims did not excuse her obligation to pay legal fees incurred to defeat the claims through the anti-SLAPP process, and pursuant to *Gottesman v. Santana,* 263 F. Supp. 3d 1034 (S.D. Cal. 2017), the court retains the authority to determine defendants' entitlement to attorney's fees, despite Plaintiff's voluntary dismissal. (3-SER-626.) Defendants argued that they made a threshold showing that Plaintiff's allegations fall within the purview of Code of Civil Procedure section 425.16, and that Plaintiff's claims lacked merit. Defendants further argued that since Plaintiff did not realize the objective in the litigation by her dismissal, she failed to rebut the presumption that defendants were the prevailing parties to the anti-SLAPP motion. (3-SER-627-28.)

F. The district court grants the Attorney Defendants' motions for attorney's fees, as well as the remaining defendants' motions to dismiss the FAC.

On March 23, 2020, the district court enter its order granting the Attorney Defendants' motions for attorneys' fees, and awarded the MKZ Defendants $15,792.00, and the S&G Defendants $23,010.50 in attorneys' fees. (1-SER-87, 140.) The district court found that under controlling law, Plaintiff's dismissal did not excuse her obligation to pay

the Attorney Defendants' legal fees incurred to defeat the claims through the anti-SLAPP motion process, and that the Attorney Defendants were the prevailing parties on their anti-SLAPP motions, entitling them to attorneys' fees pursuant to Code of Civil Procedure section 425.16(c). (1-SER-131-38.) The court also denied Plaintiff's objections to Defendants' declarations as untimely filed in accordance with the court's briefing schedule. (1-SER-131.)

In the same order, the district court also granted defendants Dennis, Kramer, Hunsaker, Silver Strand, and Sherman and J. Sherman's respective motions to dismiss, and granted Plaintiff leave to file a second amended complaint within 45 days. (1-SER-140.) The court also denied Plaintiff's motions for sanctions and default against Kramer, as well as Sherman's motion for undertaking. (*Id.*) In denying Plaintiff's motion for default, the court found Kramer had timely filed a motion to dismiss Plaintiff's claims and that the Clerk did not err in refusing to enter default against Kramer. (1-SER-139.)

G. The district court grants plaintiff additional time to file her second amended complaint in response to plaintiff's ex parte motion to stay proceedings three months due to effects from the coronavirus pandemic.

On April 15, 2020, Plaintiff filed an ex parte motion to stay all proceedings, except a possible Federal Rules of Appellate Procedure motion for permission to appeal an interlocutory judgment, for three months due to medical and economic effects she claimed to have experienced due to the coronavirus pandemic. (3-SER-619.) Given the relief requested, the district court construed her request as one for a continuance of her deadline to file an amended complaint and granted her request for further time. The court ordered that Plaintiff shall file her Second Amended Complaint on or before August 7, 2020. (1-SER-78-80.)

H. Plaintiff files an interlocutory appeal of the court's order granting attorneys' fees, which is dismissed by this Court.

On March 26, 2020, the Attorney Defendants submitted requests for judgment to the Court to separately enter judgment on their behalf pursuant to Federal Rule of Civil Procedure 54(b), which were opposed by Plaintiff on the basis that the order was not a final appealable order.

(1-SER-81-83; Dkt. 112, 114, 116.) The Attorney Defendants therefore withdrew their requests for Judgment and asked the court to confirm Plaintiff was obligated to pay the award of attorneys' fees absent a separate judgment. (1-SER-81-83.) On April 15, 2020, the district court thus denied the requests for judgment as moot and confirmed that Plaintiff was still obligated to pay the attorneys' fees ordered. (*Id.*)

Contrary to Plaintiff's position taken in opposition to the Attorney Defendants' request to enter a separate judgment, on April 22, 2020, Plaintiff nevertheless appealed the district court's order granting the motions for attorneys' fees. (7-SER-1471; Ninth Circuit Dkt. 8.) After reviewing the order appealed from, on May 1, 2020, this Court ordered Plaintiff to show cause why the appeal should not be dismissed for lack of jurisdiction. (Ninth Circuit Dkt. 8.) After review of the parties' responses to the order to show cause, on July 23, 2022, this Court issued its order dismissing Plaintiff's appeal on the ground that the order appealed from was a non-appealable order and this Court lacked jurisdiction. (*Id.*)

I. Plaintiff files Second and Third Amended Complaints which do not name the Attorney Defendants as parties.

On August 7, 2020, Plaintiff filed a Second Amended Complaint ("SAC"). (3-SER-374.) The SAC removed both the S&G Defendants and the MKZ Defendants as parties. (*Id.*)

All non-attorney Defendants filed motions to dismiss Plaintiff's SAC, which were granted. (1-SER-35-59.) However, the court also granted Plaintiff leave to amend given that she was proceeding pro se and allowed her thirty days to file an amended complaint. (1-SER-59.)

Plaintiff filed a Third Amended Complaint ("TAC") on November 3, 2021 against all the non-attorney Defendants. (2-SER-173.) Again, Plaintiff did not name the Attorney Defendants as parties to the TAC. (*Id.*)

J. Plaintiff files a motion to disqualify the Honorable Janis L. Sammartino.

On August 22, 2020, Plaintiff filed a motion for disqualification of Judge Sammartino based on (1) the court's denial of her motions for limited scope representation; (2) "admonishment to the Plaintiff that chilled her First Amendment right to petition for presenting a grievance about a court staff member" for backdating a docket entry instead of

entering default against Kramer[8]; (3) "decisions on this case that are contrary to reasons given for decisions…made on other cases;" (4) making a "convoluted order" that the case was "closed" and "terminated" before leave to amend had expired, which she claims caused her to file her appeal.[9] (2-SER-336-38, 354.)

In her declaration, Plaintiff explained that she was unaware that she could not pursue a derivative claim without counsel, and that Judge Sammartino never admonished her that a derivative suit is on behalf of an entity that must be represented by counsel. (2-SER-355-56.) She further complains that Judge Sammartino made "several *sua sponte* arguments against her, such as when denying her motion for an

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[8] In denying Plaintiff's motion for default against Kramer in her individual capacity for allegedly failing to timely move to dismiss based solely on how the motion was entered in the docket through CM/ECF when filed, the court cautioned Plaintiff in its March 23, 2020 order "against impugning the Clerk or other staff of this Court or District based on gratuitous speculation regarding relationships of favoritism toward litigants or their counsel. See, e.g., ECF No. 85 at 2, 4. Such accusations should not be made lightly and, absent evidence supporting such claims, the Court will not countenance them." (1-SER-139.)

[9] The court's March 23, 2020 order indicated "Plaintiff MAY FILE an amended complaint within forty-five (45) days of the electronic docketing of this Order. *Should Plaintiff fail timely to file an amended complaint, this action shall remain closed without further Order of the Court.*" (1-SER-140, emphasis in original.)

extension of time to amend the complaint because Plaintiff neglected to provide notice to opposing counsel first. (2-SER-356.) Plaintiff further declared that Judge Sammartino misapplied caselaw in granting the attorneys fee motions, and did not mention the first prog of the two-step test for anti-SLAPP motions in the order granting attorneys fees. (2-SER-360, 363.)

Plaintiff's motion was scheduled to be heard on October 1, 2020, which was opposed by multiple defendants. (2-SER-336; 1-SER-75; 7-SER-1473-74.) The district court set a briefing schedule which allowed opposition by September 1, 2020, and indicated no replies would be permitted. (1-SER-75.) However, pursuant to Plaintiff's objection to the order denying the opportunity to reply to a response to the motion to disqualify, the court entered a subsequent order permitting Plaintiff to file a reply brief on or before September 8, 2020. (1-SER-73-74.)

Thereafter, on September 25, 2020, this action, among numerous others, were transferred to the Honorable Todd W. Robinson. (1-SER-71.) In light of the transfer of the action, Judge Robinson denied the motion as moot on September 28, 2020. (1-SER-70.)

The district court also thereafter denied plaintiff's motion for reconsideration of the Order Denying as Moot Plaintiff's Motion for Disqualification of the Honorable Janis L. Sammartino. (1-SER-66-67.) In denying Plaintiff's motion for reconsideration, the court found Plaintiff's arguments did not meet the criteria for reconsideration as the motion was not based on any newly discovered evidence or intervening change in controlling law. (*Id.*)

K. Plaintiff files a motion to vacate and reconsider the district court's order granting attorney's fees, which is denied.

On October 1, 2020, Plaintiff filed a "Motion to Vacate Void Orders Granting Attorneys' Fees (ECF No. 111); In the Alternative, Motion for Reconsideration." (2-SER-311-314.) Plaintiff argued that the attorney fee order should be vacated since her claim against the Attorney Defendants for legal malpractice was brought as a derivative action advocated by a person not authorized to practice law and was therefore void. (*Id.*) Plaintiff further requests reconsideration of the attorney fee award arguing it was made in error since the motions to strike were denied as moot, defendants were not prevailing parties, Judge Sammartino failed to examine the "first prong" of the anti-SLAPP

motion and her "discretionary" decision "was tainted" by bias against Plaintiff. (*Id.*) Plaintiff's declaration in support sets forth substantially similar "facts" and arguments raised in opposition to defendants' motions for attorneys' fees. (2-SER-315-322.)

The Attorney Defendants filed a joint opposition to Plaintiff's motion to vacate and reconsider the attorney fee awards.[10] (2-SER-248-81.) Defendants argued that Plaintiff's purported "initial error" in filing the complaint against the Attorney Defendants in pro per did not render the district court's order awarding fees "void," nor was there any basis for reconsideration. (*Id.*)

Plaintiff filed her reply on November 9, 2020 rearguing that the court erred in granting defendants' motion for attorney's fees, and further reasserting her objection to the "untimely opposition," despite the court's order granting leave to file the opposition. (2-SER-237-47.)

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[10] Given that defense counsel relied on the local rules in calendaring their opposition and did not become aware of Judge Robinson's Standing Order modifying the local rule briefing schedule until after plaintiff filed a "non-opposition," defendants requested leave to file their opposition to plaintiff's motion and to continue the hearing date, which was granted by the court. (1-SER-63-65; 2-SER-272-81.) The court also noted in its order that it would have extended the same courtesy to plaintiff given the confusion arising from the transfer of the action. (1-SER-64.)

On September 30, 2022, the district court entered its order denying Plaintiff's motion to vacate and for reconsideration of the order awarding attorney's fees. (1-SER-25-34.) The court held Plaintiff failed to assert any newly available evidence or intervening change in the law, nor a clear error that would merit the reconsideration of the court's prior interlocutory order. (*Id.*) In denying laintiff's motion, the court found that Plaintiff's voluntary dismissal was not void and the court was within its discretion to determine whether defendants were the prevailing party for purposes of awarding attorney's fees in connection with their special motions to strike pursuant to Code of Civil Procedure section 425.16(c). (*Id.*) The court noted that Plaintiff admits that her voluntary dismissal of the claims against the Attorney Defendants was due to her own error in improperly asserting a derivative action as a pro se litigant, and that there is no merit in Plaintiff's argument that either the court or defendants should have aided her in the prosecution of that claim. (1-SER-31.)

L. The district court dismisses plaintiff's TAC and enters judgment.

Following motions to dismiss filed by each remaining non-attorney Defendant, the district court granted Dennis, Silver Strand, Kramer

and Hunsaker's motions, and dismissed Plaintiff's Third Amended Complaint with prejudice on September 30, 2022. (1-SER-5-21.)

The court entered judgment on the same date, September 30, 2022. (1-SER-4.)

Plaintiff filed a notice of appeal on October 25, 2022, appealing from the September 30, 2022 judgment, and multiple interim orders. (7-SER-1450-53.)

SUMMARY OF ARGUMENT

The district court's order awarding S&G Defendants attorney's fees as prevailing parties on their special motion to strike (anti-SLAPP) motion pursuant to Code of Civil Procedure section 425.16 was proper and should be affirmed on appeal.

Plaintiff's further argument that the Honorable Janis Sammartino should have been disqualified and orders in this case reversed based on purported bias against Plaintiff is clearly without any merit. Plaintiff's motion for disqualification was legally insufficient to support disqualifying Judge Sammartino or vacate any orders in this action. Plaintiff failed to submit any facts or evidence which would support the district court had any personal bias against her.

Instead, the rulings by the court in granting attorney's fees, denying Plaintiff's motion to vacate and reconsider the order granting fees, denying disqualification of Judge Sammartino, and denying Plaintiff's motion for limited scope counsel, were all proper and the judgment should be affirmed.[11]

STANDARD OF REVIEW

Appellate court review of a district court's order granting attorneys' fees is reviewed under an abuse of discretion standard. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102 (2003); *Tutor-Saliba Corp. v. City of Hailey,* 452 F.3d 1055, 1065 (9th Cir. 2006) ("[t]he determination of attorney fees is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion")

Similarly, a district court's denial of recusal or disqualification is also reviewed for an abuse of discretion. *Yagman v. Republic Ins.,* 987 F.2d 622, 628 (9th Cir. 1988); *United States v. McTiernan,* 695 F.3d 882, 891 (9th Cir. 2012). "Discretion is abused when the judicial action is

[11] The non-attorney Defendants (the Silver Strand Defendants), address plaintiff's remaining arguments regarding motions pertaining to these defendants in their appellees' answering brief, which S&G Defendants join and incorporate by reference herein for judicial economy.

'arbitrary, fanciful or unreasonable' or 'where no reasonable man [or woman] would take the view adopted by the trial court.'" *U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc.,* 281 F.3d 929, 934 (9th Cir. 2002).

Additionally, an appellate court "may affirm a district court's judgment on any ground supported by the record, whether or not the decision of the district court relied on the same grounds or reasoning [the appellate court] adopt[s]." *Atel Fin. Corp. v. Quaker Coal Co.,* 321 F.3d 924, 926 (9th Cir. 2003).

ARGUMENT

I. The District Court Properly Granted S&G Defendants' Motion for Attorney's Fees.

A. S&G Defendants are entitled to attorneys fees and costs following Plaintiff's voluntary dismissal of her SLAPP Suit as prevailing parties under the Anti-SLAPP statute.

California Code of Civil Procedure section 425.16(c) states in pertinent part: "In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorneys' fees and costs." The California Supreme Court has expressly held that "under Code of Civil Procedure §425.16, subdivision (c), any SLAPP defendant who brings a successful motion to strike is

entitled to mandatory attorney fees." *Ketchum v. Moses*, 24 Cal. 4th 1122, 1131 (2001).

The right of a prevailing defendant to recover reasonable attorneys' fees under section 425.16 is intended to adequately compensate for the expense of responding to a baseless lawsuit. *Robertson v. Rodriguez,* 36 Cal. App. 4th 362 (1995); *Mann v Quality Old Time Serv., Inc.,* 139 Cal. App. 4th (2007) [the provision was "enacted to impose litigation costs on those who assert meritless claims burdening the exercise of the defendant's constitutional… petition rights."] Thus, the fee award should include compensation for all the hours reasonably spent, including those fees incurred in enforcing Defendant's mandatory right to fees. *Robertson,* 36 Cal. App. 4th at 1133, 1141 (citing *Serrano v. Unruh,* 32 Cal. 3d 621, 624, 639 (1982).

1. Plaintiff failed to rebut the presumption that S&G Defendants are prevailing parties under the California anti-SLAPP statute pursuant to her voluntary dismissal.

Contrary to Plaintiff's argument, her voluntary dismissal of claims asserted against the Attorney Defendants did not eliminate the court's ability to award defendants attorneys' fees under the anti-SLAPP

statute. *Gottesman v. Santana*, 263 F.Supp.3d 1034, 1039-1040 (S.D. Cal. 2017); *Coltrain v. Shewalter,* 66 Cal. App. 4th 94, 106-07 (1998); also see *Vess,* 317 F.3d at 1109.

Because Plaintiff voluntarily dismissed the S&G Defendants while their anti-SLAPP motion was pending, S&G Defendants are the presumptive prevailing party. *Gottesman,* 263 F.Supp.3d at 1039-40; *Coltrain,* 66 Cal.App.4th at 107. "'[A] plaintiff's voluntary dismissal raises a presumption that the defendant is the prevailing party that the plaintiff can rebut by explaining its reason for dismissal." *Gottesman,* 263 F.Supp.3d at 1043. In order to rebut the presumption, plaintiff must submit admissible evidence establishing the dismissal was a result of realizing her objectives in the litigation. *Id.* Citing *Coltrain,* the court in *Gottesman* noted that the "'critical issue is which party realized its objective in the litigation.'" *Id.*

In *Vess*, the court awarded defendants their attorneys' fees required under Code of Civil Procedure section 425.16(c). "A trial court has jurisdiction to award attorneys' fees to a prevailing defendant whose SLAPP motion was not heard solely because the matter was dismissed before defendants obtained a ruling on the SLAPP motion."

Vess, 317 F.3d at 1110-1111, citing *Pfeiffer Venice Props. v. Bernard*, 101 Cal. App. 4th 211, 123 (2002).

Here, Plaintiff failed to meet her burden of rebutting the presumption that defendants prevailed in the anti-SLAPP motion, as Plaintiff failed to show that she realized the objective in the litigation by dismissing her claims. Instead, Plaintiff admits that she dismissed her claims since they were legally untenable. In her Notice of Voluntary Dismissal, Plaintiff indicates that she dismissed her Sixth ("Malpractice") cause of action "because the Pro Se Plaintiff errantly titled the Sixth Cause of Action, omitting 'on behalf of Silver Strand Plaza, LLC as Plaintiff and nominal defendant." (5-SER-953-54.) As to the Fifth ("Conversion") cause of action, Plaintiff stated in her dismissal that she "chooses to withdraw the less significant claim of conversion now and revive it after she files a motion pursuant to CCP 1714.10 to include a claim of Aiding and Abetting of Fiduciary Duty." (*Id.*)

Plaintiff's explanation on appeal that she was unaware at the time she filed her complaint that she was precluded from filing a derivative action on behalf of Silver Strand in pro se, and planned to add causes of action for the Attorney Defendants' "litigation-based activity" after she

obtained leave of court pursuant to section 1714.10, in no way supports that she achieved the objectives of her litigation. (Appellant's Opening Brief "AOB," at 31-32.) Plaintiff cites to no legal authority supporting her position. Instead, Plaintiff's dismissal and reasoning supports the opposite — Plaintiff clearly dismissed the claims since she knew they were legally untenable. Plaintiff's further assertion that she may re-file claims after approval by the court actually supports that the dismissal was not a result of achieving her litigation goals.

Since Plaintiff failed to rebut the presumption created by her dismissal, the district court properly found that the S&G Defendants are prevailing defendants entitled to their reasonable attorneys' fees and costs. (1-SER-132-40.)

2. Plaintiff fails to establish she would have successfully opposed S&G Defendants anti-SLAPP motion.

Contrary to Plaintiff's argument on appeal, Plaintiff's voluntary dismissal and failure to rebut the presumption supports the district court's finding that S&G Defendants are prevailing parties entitled to their attorneys fees. Pursuant to *Gottesman* and *Coltrain*, the district court was not required to further analyze the parties burdens on the

anti-SLAPP motion itself. Defendants were prevailing parties based on Plaintiff's dismissal itself. *Gottesman,* 263 F.Supp.3d 1034; *Coltrain,* 66 Cal. App. 4th 94.

Regardless, a review of the anti-SLAPP motion and motion for attorney's fees further supports that the S&G Defendants are prevailing parties to the anti-SLAPP motion. Plaintiff failed to establish she would have successfully opposed the anti-SLAPP motion.

California's anti-SLAPP statute set forth in Code of Civil Procedure section 425.16, subdivision (b)(1) establishes "a two-step process for determining" whether an action should be stricken as a SLAPP. *Navellier v. Sletten,* 29 Cal. 4th 82, 88 (2002).

First, the court determines whether defendant has made a threshold showing that the challenged cause of action arises from an act in furtherance of the right of petition or free speech in connection with a public issue. *Id.* A defendant meets the burden of showing that a Plaintiffs action arises from a protected activity by showing that the acts underlying the Plaintiff's claims fall within one of the four categories described in section 425.16, subdivision (e).

Second, the court must then determine whether Plaintiff satisfied his or her burden of demonstrating a probability of prevailing on the claim. *Navellier,* 29 Cal. 4th at 88.

a. S&G Defendants made a threshold showing that the challenged causes of action arise from protected activity and fall under the anti-SLAPP statute.

S&G Defendants met their burden of showing that the anti-SLAPP statute applies to Plaintiff's claims because the communicative conduct at issue — as established by the pleadings and declarations— are litigation related communications by attorneys to achieve the object of the proceedings and had some connection or logical relation to the proceeding. Cal. Code Civ. Proc. § 425.16(e).

Plaintiff argues that claims for legal malpractice and conversion do not arise from protected conduct. However, contrary to Plaintiff's arguments, the label of her claims does not control in determining whether they fall under section 425.16. See, e.g. *Kracht v. Perrin, Gartland & Doyle,* 219 Cal. App. 3d 1019, 1022 (1990); *Hylton v. Frank E. Rogoziernski, Inc.,* 177 Cal. App. 4th 1264, 1271 (2009). In *Hylton*, the court further explained that

> Our Supreme Court has recognized the anti-SLAPP statute should be broadly construed (citation) and that a plaintiff cannot avoid operation of the anti-SLAPP statute by attempting, through artifices of pleading, to characterize an action as a garden variety tort or contract claim when in fact the claim is predicated on protected speech or petitioning activity. (Citation) Accordingly, we disregard the labeling of the claim (citation) and instead 'examine the *principal thrust or gravamen* of a plaintiff's cause of action to determine whether the anti-SLAPP statute applies.'

Hylton, 177 Cal. App. 4th at 1271, italics in original, internal citations omitted.

Here, Plaintiff claims there is a civil conspiracy between Silver Strand and its counsel to commit abuse of process and/or defraud Plaintiff by offering a settlement to purchase her shares for what she feels is less than her calculated value. Specifically, Plaintiff alleges that "when the attorney defendants began to zealously represent the interests of the individual members, including Mary Sherman as an individual and the SFT, they opened themselves up to inclusion in the conspiracy." (7-SER-1381.) The following operative allegations of the FAC as to S&G Defendants clearly arise from protected speech or petitioning activity, as they consist entirely of statements made by counsel to an adverse party regarding threatened litigation and settlement:

- Stern "often accused Plaintiff of using inappropriate language in communications with counsel or other members of SSP." (7-SER-1333.)
- Stern disclosed in a letter that he was legal counsel to Sandra Kramer and Mary Sherman in her capacity as manager of Silver Strand, LLC. (7-SER-1335.)
- Stern wrote a letter to Plaintiff December 13, 2013 which stated: "However, you should be aware that, in my opinion, your continual email barrage of threats and diatribes against Sandra, your mother, rise to the level of elder abuse." (7-SER-1335-36.)
- Stern allowed plaintiff to view various accounting documents from Silver Strand when it was demanded under the Operating Agreement, but "refused to tell Plaintiff what they represented." (7-SER-1338.)
- After a telephonic conference with the LLC members to discuss allowing Plaintiff to sell her portion of the LLC to the other members, Stern allegedly offered a "skewed minute order of the meeting. (7-SER-1339.)
- Stern sent an email to plaintiff regarding the minutes, the companies financial information, and her threatened litigation. (7-SER-1339-40.)
- Stern sent various emails to plaintiff and her attorney Michael Early regarding the valuation of Silver Strand and documents explaining same. (7-SER-1346-47.)
- Stern sent an email on February 9, 2017 demanding a release for his client. (7-SER-1353.)
- "Defendant Stern did not contact Plaintiff even once before concluding that she was causing all the animosity." (7-SER-1379.)

- Defendant Stern wrote an email explaining the amount offered for Plaintiffs share of the LLC "as the LLC manager and I see it." (7-SER-1381.)
- Stern communicated an offer for plaintiff share of the LLC which was "1/6 the actual value." (7-SER-1388.)
- Stern wrote plaintiff an email about her proposed litigation, calling her naming of counsel "outrageous and frivolous." (7-SER-1389-90.)

"'Under the plain language of section 425.16, subdivision (e)(1) and (2), as well as the case law interpreting those provisions, all communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding or other petitioning context are per se protected as petitioning activity by the anti-SLAPP statute.'" *Finton Construction v. Bidna Keys APLC*, 238 Cal. App. 4th 200, 210 (2015), citing *Cabral v. Martins,* 177 Cal. App. 4th 471, 479–480 (2009). In fact, courts have adopted "a fairly expansive view of what constitutes litigation-related activities within the scope of section 425.16." *Kashian v. Harriman,* 98 Cal. App. 4th 892, 908 (2002). Cases construing the anti-SLAPP statute hold that "a statement is 'in connection with' litigation under section 425.16, subdivision (e)(2) if it relates to the substantive issues in the litigation and is directed to

persons having some interest in the litigation." *Neville v. Chudacoff,* 160 Cal. App. 4th 1255, 1266 (2008).

Both section 425.16 and Civ. Code § 47(b) protect litigants' right of access to the courts without being fear of being harassed subsequently by derivative tort actions. *Healy v. Tuscany Hills Landscape and Recreation Corp.*, 137 Cal. App. 4th 1, 5 (2006). Courts look to Civil Code section 47(b) litigation privilege "as an aid" in determining whether a given communication falls within the ambit of section 425.16. *Flatley v. Mauro*, 39 Cal. 4th 299, 323 (2006).

The litigation privilege applies "to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." *Silberg v. Anderson*, 50 Cal. 3d 205, 212 (1990). The privilege is "absolute in nature, applying 'to all publications, irrespective of their maliciousness.'" *Action Apartment Assn., Inc. v. City of Santa Monica*, 41 Cal. 4th 1232, 1241 (2007). "Any doubt about whether the privilege applies is resolved in favor of applying it." *Crossroads Investors, L.P. v.*

Federal Nat'l Mortgage Ass'n, 13 Cal. App. 5th 757, 786 (2017); *Finton Construction,* 238 Cal. App. 4th at 212.

"Many cases have explained that [Civil Code] section 47…(b) encompasses not only testimony in court and statements made in pleadings, but also statements made prior to the filing of a lawsuit, whether in preparation for anticipated litigation or to investigate the feasibility of filing a lawsuit." *Bergstein v. Strook & Strook & Lavan, LLP*, 236 Cal. App. 4th 793, 814 (2015); *Briggs v. Eden Council for Hope & Opportunity,* 19 Cal. 4th 1106, 1115 (1999) [pre-litigation statements protected under Cal. Civ. Code § 47(b) are "equally entitled to the benefits of section 425.16"].

Accordingly, the various statements made by S&G Defendants to an adverse party are absolutely privileged under 47(b) and fall within the purview of section 425.16, including the alleged "low ball" offer made by Stern. *Seltzer v. Barnes*, 182 Cal. App. 4th 953, 964-967 (2010) [settlement negotiations and agreements are made "in connection with" litigation for purposes of § 425.16]; *Suarez v. Trigg Laboratories, Ltd.*, 3 Cal. App. 5th 118, 123-124 (2016) [anti-SLAPP protection applies even

against allegations of nondisclosure or misleading statements made during settlement process].

Lastly, Plaintiff's conversion claim relating to S&G Defendants' receipt of payment for services rendered is also protected activity within the meaning of section 425.16. *Sheley v. Harrop,* 9 Cal. App. 5th 1147, 1166-67 (2017) [litigation funding decisions also constitute protected petitioning activity]; also see *Optional Capital, Inc. v. Akin Gump Strauss Hauer & Feld,* 18 Cal. App. 5th 95, 118-119 (2017 [alleged conspiracy to "convert" funds subject to the anti-SLAPP statute].

S&G Defendants therefore met their threshold burden of showing the anti-SLAPP statute applies to Plaintiff's claims against them.

b. Plaintiff failed to establish a probability of prevailing on her claims against S&G Defendants.

Once a defendant establishes the anti-SLAPP law applies to the claims alleged, the burden shifts to the plaintiff to present "sufficient evidence to establish a prima facie case, i.e. showing by competent and admissible evidence, of facts which, if proven at trial, would support a judgment in his favor...." *Du Chattne v. International Brotherhood of Electrical Workers*, 110 Cal. App. 4th 107, 112 (2003). A plaintiff cannot

rely solely on his complaint, but rather, he must provide competent, admissible evidence. *Hailstone v. Martinez*, 169 Cal. App. 4th 728, 736 (2008).

Here, Plaintiff clearly failed to meet her burden since she failed to present any evidence supporting a probability of prevailing on either claim in response to the anti-SLAPP motion. Instead, Plaintiff simply dismissed her claims against the Attorney Defendants. (5-SER-953-54.)

Moreover, as discussed in both the anti-SLAPP motion and motion for attorney's fees, numerous legal defenses apply to both Plaintiff's purported causes of action for "Legal Malpractice" and "Conversion."

Defendants argued and presented evidence establishing that Plaintiff's claim for legal malpractice is without merit because (1) Plaintiff was never a client of S&G Defendants and is unable to establish an attorney-client relationship and requisite duty owed;[12] (2)

[12] The elements of a claim for legal malpractice are: Duty, breach, proximate causal connection to the resulting injury, and actual loss of damage. *Budd v. Nixon,* 6 Cal. 3d 195, 200 (1971); "[A]n attorney will normally be held liable for malpractice only to the client with whom the attorney stands in privity of contract, and not to third parties." *Borissoff v. Taylor & Faust,* 33 Cal. 4th 523, 529 (2004). Here, plaintiff admits in her FAC that S&G Defendants represented Silver Strand and Mary

as alleged directly in the FAC, the claim was brought as a derivative claim by Plaintiff in pro per and is barred as a matter of law pursuant to *McDermott v. Superior Court,* 83 Cal. App. 4th 378 (2000); and (3) the claim is time barred pursuant to the one-year statute of limitation in California Code of Civil Procedure section 340.6.[13] (5-SER-991-995; Dkt. 21-1.)

The S&G Defendants also argued that Plaintiff failed to state a claim for conversion against them since (1) her cause of action is a disguised claim for civil conspiracy between an attorney and client, which is precluded under California Civil Code section 1714.10(a) since

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Sherman. (7-SER-1331-32; 1335-36.) Defendants also submitted evidence plaintiff was never a client. (5-SER-996-99; 1028-30.)

[13] Pursuant to Code of Civil Procedure section 340.6, claims against an attorney arising from professional services must be brought within one year after discovering the alleged wrongful act or omission. Cal. Code Civ. Proc. § 340.6, subd. (a). Plaintiff's claims against S&G Defendants relate to their representation of Silver Strand at the time of Sherman's alleged misappropriation and mismanagement of funds and negotiations over settling plaintiff's share of Silver Strand. (7-SER-1331, 1393-94.) Plaintiff alleges she received S&G's "low ball' offer to buy out her shares in June 2015, and also became aware of the accounting discrepancies in January 2018. (7-SER-1337-38, 1377, 1342.) Plaintiff's FAC adding the S&G Defendants as parties on May 29, 2019 is clearly time-barred.

Plaintiff failed to obtain a pre-filing order as required;[14] (2) Plaintiff never had title or possession of any Silver Strand assets and thus has no standing to pursue a claim on behalf of the company;[15] (3) it is a generalized claim for money which is not actionable as conversion;[16] and (4) S&G's actions complained of are subject to and barred by the

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[14] Civil Code section 1714.10(a) states in pertinent part: "No cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading ….after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action…" Cal. Civ. Code § 1714.10(a); *Cortese v. Sherwood,* 26 Cal. App. 5th 445, 454–457 (2018) [court held plaintiff's third-party breach of trust claim was a claim for civil conspiracy barred by Civil Code section 1714.10].

[15] "Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion." *Moore v. Regents of the Univ. of Cal.,* 51 Cal. 3d 120, 136 (1990), internal citations omitted. Plaintiff has a membership interest in the LLC, not an ownership interest in its personal property and assets.

[16] "Money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved…A 'generalized claim for money [is] not actionable as conversion.'" 5, Witkin, *California Procedure,* Pleading, § 702, p. 118 (5th Ed. 2008). Plaintiff failed to specify the alleged sum of money she claims S&G Defendants converted and instead alleges that "[t]he dollar figure is not super important." (7-SER-1390.)

litigation privilege pursuant to California Civil Code section 47(b). (5-SER-991-1077.)

On appeal, Plaintiff does not refer to any evidence supporting a probability of prevailing on her claims, and in fact does not even argue she would have satisfied this burden on the anti-SLAPP motion. Indeed, as to the malpractice claim, Plaintiff admits she dismissed the derivative claim since she improperly filed it in pro se. Plaintiff also failed to challenge S&G Defendants' defenses to the conversion claim other than to argue that she may re-file in the future after seeking an order pursuant to California Civil Code section 1714.10(a) (AOB at 31, 44-47).

Plaintiff thus failed to demonstrate a probability of prevailing on either claim. Instead, Plaintiff's dismissal was simply an admission that she cannot prevail on the legal claims as stated in the FAC.

B. The attorney's fees awarded by the district court were well within the court's discretion.

The court has broad discretion in determining the reasonable amount of attorney's fees and costs to award a defendant prevailing on an anti-SLAPP motion. *Metabolife Intl. v. Wornick,* 213 F.Supp.2d 1220, 1222 (S.D. Cal. 2002); *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman,*

47 Cal. App. 4th 777, 785 (1996). The S&G Defendants supported their motion for attorney's fees with detailed and factually supported documentation of the hours sought in connection with their Special Motion to Strike, as well as the lodestar fee rates claimed. (4-SER-904-915.)

On appeal, Plaintiff simply argues that the attorney's fees awarded are "unconstitutionally oppressive," citing *Wakefield v. ViSalus Inc.*, 51 F.4th 1109 (9th Cir. 2022). Plaintiff argues the fee award is oppressive since she is in pro per, could not afford an attorney "for all purposes," and lost money when the market crashed during the pandemic while this case was proceeding. (AOB at 32.)

However, *Wakefield* does not support Plaintiff's argument. Plaintiff's attempt to compare the fee award in *Wakefield* with the fees requested in this action is unpersuasive, as *Wakefield* is distinguishable and does not apply. Unlike here, *Wakefield* involved a jury award of over 925 million dollars in statutory penalties in a class action brought by consumers for unsolicited telemarketing phone calls. This Court remanded the action to the district court to determine whether the award was so severe and disproportionate to the statute's compensation

and deterrence goals such as to violate defendant's due process rights, and to determine an appropriate reduction.

Unlike the present action, *Wakefield* did not involve application of the anti-SLAPP statute pursuant to Code of Civil Procedure section 425.16, nor did it involve a claim for attorney's fees for work performed by counsel at all. *Wakefield* is therefore not comparable to the present motion, neither in the amount claimed nor the legal basis of the action.

Instead, in the district court's determination of the amount of attorney's fees to award, there is a strong presumption that the lodestar figure represents a reasonable fee, and any upward or downward adjustments are proper only in rare and exceptional cases. *Van Gerwen v Guar. Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000) (a lodestar is calculated by "multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate").

Plaintiff submitted no evidence supporting either the rate requested or hours charged are unreasonable. Instead, by failing to

oppose the hours and rates claimed, or the resultant lodestar, plaintiff effectively conceded these issues.[17]

Thus, this Court should affirm the district court's order awarding S&G Defendants' attorneys fees and costs.

II. The District Court Properly Denied Plaintiff's Motion to Vacate and Reconsider the District Court's Order Awarding Attorneys Fees.

Plaintiff's attempt to overturn orders made by Judge Sammartino in her motion to vacate or reconsideration of the order awarding attorneys' fees was properly rejected by the district court.

Plaintiff argued in her motion, and again on appeal, that because she brought her claim for malpractice against the Attorney Defendants as a derivative action without being authorized to practice law, Defendants' motions for attorneys fees should have been denied since her FAC was "void ab initio." (AOB at 31, 45.) Plaintiff again

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[17] Plaintiff's medical issues, prior attempts to obtain counsel on a limited scope basis to represent her in this action, or her finances are completely irrelevant to Defendants' motion for attorneys' fees and should not be considered by this Court in reviewing the district court's rulings on the attorney fee motion. The time incurred by defense counsel requested in defendants' motion for attorney's fees is a direct result of plaintiff's continued litigation against S&G defendants.

alternatively argued that the court's decision was erroneous since Plaintiff voluntarily dismissed her claims against the Attorney Defendants prior to the hearing on their respective special motions to strike brought pursuant to California Code of Civil Procedure section 425.16 (anti-SLAPP motions).

Plaintiff moved for reconsideration under the court's inherent power to reconsider its interlocutory orders pursuant to Federal Rule of Civil Procedure 54(b), among other rules which did not apply.[18] (2-SER-311-14; Dkt. 177-2.) Reconsideration is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). Reconsideration is only appropriate in limited circumstances, including where "the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change

[18] Rule 54(b) states in pertinent part that "any order . . . which adjudicates . . . the rights and liabilities of fewer than all the parties . . . is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Fed. R. Civ. Proc. 54(b).

in controlling law." *Sch. Dist. No. 1J, Multnomah Cty. v. AC&S, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).[19]

"In the absence of new evidence or a change in the law, a party may not use a motion for reconsideration to raise arguments or present new evidence for the first time when it could reasonably have been raised earlier in the litigation." *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 649 F.Supp.2d 1063, 1069-1070, 2009 U.S. Dist. Lexis 75932, *15-16, citing *Caroll v. Nakatani,* 342 F.3d 934, 945 (9th Cir. 2003). "Motions to reconsider are also 'not vehicles permitting the unsuccessful party to "rehash" arguments previously presented.' [citations] Ultimately, a party seeking reconsideration must show 'more than a disagreement with the Court's decision, and recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden.'" *Cachil Dehe Band of Wintun Indians,* 649 F.Supp.2d at 1070.

[19] Pursuant to S.D. Cal. Civ. L.R. 7.1.i.2, plaintiff was required "to present to the judge . . . an affidavit . . . setting forth . . . what new or different facts and circumstances are claimed to exist [that] did not exist, or where not shown, upon such prior application")

Since Plaintiff failed to demonstrate any basis for reconsidering or vacating the district court's prior order granting the Attorney Defendants' motions for attorneys' fees pursuant to Code of Civil Procedure section 425.16(c), her motion was properly denied. (1-SER-25-34.) The district court properly rejected Plaintiff's attempt to re-litigate this issue simply because this matter has been transferred to a different judge.

A. Plaintiff's purported error in filing the FAC against the Attorney Defendants in pro se does not render the district court's order awarding defendants' attorneys' fees void, nor does it constitute a basis for reconsideration.

Plaintiff seeks to avoid the consequences of prosecuting baseless claims against the Attorney Defendants by claiming that she dismissed the claims once she realized she could not pursue a "derivative suit" on behalf of an entity in pro se, which she argues renders the order and all proceedings on the derivative claim "void." (AOB at 45; Dkt. 177-2 at 2.) Plaintiff argues that the order granting attorneys' fees should be vacated or reconsidered since she made an "initial error but corrected her error immediately upon discovery." (Dkt. 177-2 at 3.)

Plaintiff fails to cite any legal authority in support of her position that an order or judgment for costs or fees against a Plaintiff who erroneously prosecuted an action in pro se is void. Plaintiff decided to act in pro se on her own behalf in filing and prosecuting these claims. Plaintiff's ignorance of the law is not a basis to void the district court's order awarding the Attorney Defendants' attorneys' fees in having to defend themselves due to Plaintiff's admitted error. Fed. R. Civ. Proc. 11. Federal Rule of Civil Procedure 11 requires that a pro se plaintiff conduct a reasonable inquiry to ensure that their legal contentions are warranted by existing law, by non-frivolous arguments to extend, modify, or reverse existing law, or non-frivolous arguments to establish new law. Fed. R. Civ.P. 11. "Pro se litigants must follow the same rules of procedure that govern other litigants." *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987) (overruled on other grounds.)

Plaintiff's argument blaming the *district court* for failing "to deem the impermissible pleading void ab initio" and dismiss "the derivative cause or the entire pleading on her own" is entirely without merit. (AOB at 45.) Plaintiff cites no authority supporting her argument that the court had any obligation to relieve Plaintiff of the consequences of filing

an untenable complaint. Nor can she. See *Noll v. Carlson,* 809 F. 2d 1336, 1448 (9th Cir. 1986) ("[C]ourts should not have to serve as advocates for pro se litigants."); *Cf. Indep. Towers of Wash. v. Washington,* 350 F.3d 925, 929 (9th Cir. 2003) ("Our adversarial system relies on the advocates to inform the discussion and raise the issues to the court.")

Here, Plaintiff, as "an individual," pursued two claims, one she labeled as "Derivative claim of legal malpractice," and the other for "conversion" against the Attorney Defendants. (7-SER-1324.) Not only did Plaintiff admittedly pursue an untenable derivative claim, Plaintiff fails to acknowledge that Defendants' anti-SLAPP motions were brought to strike both claims, only one of which was purportedly brought as a "derivative" claim. The fact that Plaintiff was unauthorized to practice law has no bearing on her claim for conversion.

Regardless, even if Plaintiff's labeling the malpractice claim as "derivative" rendered her claim invalid, she nevertheless pursued this invalid claim against the Attorney Defendants causing them to incur substantial fees to defend themselves. California Code of Civil Procedure section 425.16(c) provides a mandatory award of attorneys'

fees to defendants who prevail on anti-SLAPP motions. Plaintiff was unable to avoid the consequences of her actions simply by dismissing her claims while the anti-SLAPP motions were pending. Instead, pursuant to controlling case law properly relied upon by the district court, Plaintiff's voluntary dismissal provided a basis for the district court's finding that the Attorney Defendants were prevailing parties on their respective anti-SLAPP motions, entitling them to reasonable attorneys' fees.

The court properly found that Plaintiff's claimed ignorance of the law in filing her legal malpractice claim as a derivative action was not a proper basis for reconsideration of the court's order granting attorney's fees. "[N]either ignorance nor carelessness on the part of the litigant or his attorney provide grounds for relief under Rule 60(b)(1)." *Allmerica Fin. Life Ins. & Annuity Co. v. Llewellyn*, 139 F.3d 664, 666 (9th Cir. 1997). As recognized by this Court, "Rule 60(b)(1) is not intended to remedy the effects of a litigation decision that a party later comes to regret through subsequently-gained knowledge that corrects the erroneous legal advice of counsel." *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1101 (9th Cir. 2006). Reconsideration pursuant to Rule

60(b) is an extraordinary remedy designed to address mistakes attributable to special circumstances, not merely to correct erroneous applications of law. *Engleson v. Burlington N.R.R. Co.,* 972 F.2d 1038, 1044 (9th Cir. 1992) (counsel's ignorance of applicable statutes at issue in the matter does not constitute excusable neglect to justify relief under rule 60(b)). This same rationale applies to a claim for relief under Rule 54(b).

B. Plaintiff Failed to Cite any New or Different Facts or Circumstances to Justify Reconsideration of the District Court's March 23, 2020 Order.

The district court also properly found that Plaintiff's motion to vacate or reconsider the order granting attorneys' fees also failed to cite any new or different facts or circumstances to justify reconsideration. (1-SER-25-34.) "A motion for reconsideration cannot be granted merely because Plaintiff is unhappy with the judgment, frustrated by the Court's application of the facts to binding precedent, or because he disagrees with the ultimate decision." See 11 Charles Alan Wright & Arthur R. Miller Federal Practice & Procedure § 2810.1 (3d ed.)

Plaintiff failed to identify any newly discovery evidence which could form the basis for her opposition to the attorney fee motion.

Instead, Plaintiff's affidavit filed in support of her motion to vacate or reconsider simply reargues the issues previously presented for the most part. (2-SER-315-22.) The only matters Plaintiff identified which were either not raised, or could not have been raised previously, all involve filings or entries on the docket which occurred after the court's order granting the motions for attorneys' fees. For example, Plaintiff complained that because she was confused by the docket reflecting that this case was "closed" or "terminated" following the March 23, 2020 order, she filed an appeal which was denied since it was interlocutory. (2-SER-320.) Plaintiff further complained that Judge Sammartino was biased since she did not grant Plaintiff's request for an extension of time to file her amended complaint due to the Coronavirus Pandemic on the basis that Plaintiff "neglected to" provide notice to opposing counsel first. (2-SER-264.) However, none of these facts have any bearing on the court's order granting the motions for attorneys' fees, and were instead filings by the parties after the attorney fee motion was decided.

Lastly, Plaintiff's arguments were also not based on "an intervening change in controlling law" that would allow reconsideration of the court's order. Indeed, the case law cited by Plaintiff in her motion

to vacate or reconsideration was decided prior to the filing of the Attorney Defendants' motions for attorneys' fees.

C. Reconsideration is Not Justified Based on Any Claimed Error in Law, Judicial Bias, or "Manifest Injustice"

Plaintiff further argues that Judge Sammartino erroneously granted the Attorney Defendants' motions for attorneys' fees, claiming that she was biased against her, and the court did not address Plaintiff's arguments made in opposition to the motions. (Dkt. 177-2 at 9-11.)

However, plaintiff failed to establish any bias or deep-seated and unequivocal antagonism against her that would render a fair judgment impossible. See generally, *Liteky v. United States,* 510 U.S. 540, 555 (1994) (*Liteky*)[20]; *United States v. Grinnell Corp*., 384 U.S. 563, 583 (1966). Instead, Plaintiff's disagreement with the court's rulings is not a valid basis to re-litigate its prior orders, nor does it constitute judicial bias. "[J]udicial rulings, routine trial administration efforts, and

[20] A district court's conduct in the course of a judicial proceeding indicates bias only if: (1) its opinion derives from an extrajudicial source or (2) the court displays "deep-seated and unequivocal antagonism that would render fair judgment impossible." *Liteky* at 556.

ordinary admonishments (whether or not legally supportable)" alone are inadequate to indicate judicial bias. *Liteky*, at 555–56.

Plaintiff claims that despite her arguments in opposition to the motions, the court did not analyze whether Defendants met the threshold issue that Plaintiff's action fell under the anti-SLAPP statute pursuant to Code of Civil Procedure section 425.16. However, as discussed above, it was not necessary for the court to analyze the merits of the anti-SLAPP motions in ruling on the attorneys' fee motions. Pursuant to controlling and valid case authority upon which this Court properly relied, Plaintiff's voluntary dismissal raised a presumption that Defendants were the prevailing parties on their respective anti-SLAPP motions. In ruling on the motions, the district court properly found that Plaintiff failed to rebut the presumption that the Attorney Defendants were the prevailing parties on their respective anti-SLAPP motions. (1-SER-134.)

Contrary to Plaintiff's argument, the court did consider and analyze the nature of Plaintiff's voluntary dismissal and agreed with the Attorney Defendants' arguments, finding that

> Ms. Hammett's assertion that she may refile the defective claims actually supports the conclusion that her dismissal did not come as a result of her achieving her litigation goals." (1-SER-133.) "The Court agrees with the MKZ Defendants. Given Plaintiff's apparent intention to refile her claims against them, it cannot be said that Plaintiff's voluntary dismissal was the result of her realizing her objectives in the litigation. See, e.g., *Primacy Eng'g, Inc. v. ITE, Inc*., No. 318CV01781GPCMDD, 2019 WL 2059668, at *7-8 (S.D. Cal. May 9, 2019) ('An intent to refile the litigation in other jurisdictions belies a claim that [the voluntarily dismissing plaintiff] was able to substantially achieve its litigation objectives in this suit…')

(1-SER-134.)

The district court further noted the S&G Defendant's argument that Plaintiff dismissed claims she knew were legally untenable, while threatening further frivolous litigation, and found "as with the MKZ Defendants,…the Court concludes that Plaintiff has failed to rebut the presumption…" (1-SER-134.)

As discussed above, the court's order granting attorney's fees was based on valid and well-accepted case law. Based on the controlling legal authority followed by the district court, it cannot be said that the order was a result of clear error or manifest injustice. Plaintiff's unrelenting actions, first in filing her meritless claims, in pursuing continued attacks on Judge Sammartino and the district court's order

granting the attorneys' fee motions, and on appeal, continue to cause the S&G Defendants to incur substantial attorneys' fees.[21]

III. The District Court's Rulings Did Not Exhibit Bias Against Plaintiff as a Pro Se Litigant.

On appeal, Plaintiff argues that all orders rendered against her in this action are "tainted" due to purported bias against Plaintiff as a pro se litigant. Specifically, Plaintiff argues the district court erred in denying her motion to disqualify Judge Sammartino as moot, and instead should have granted the motion on its merits. Plaintiff further argues subsequent judges' decisions in this action are also erroneous and exhibit bias against her. However, Plaintiff's disagreement with the district court's rulings was not a basis to disqualify Judge Sammartino or vacate any orders made in this action. Plaintiff's attempt to shop for a different judge and obtain different rulings was properly rejected by the district court and should likewise be rejected on appeal.

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[21] On September 30, 2022, the court granted S&G Defendants' motion for leave to file a combined motion for attorney's fees incurred on plaintiff's appeal of the interlocutory order granting fees as well as further fees incurred in the district court action on the motion to vacate. (1-SER-22-24.) S&G Defendants filed their combined motion for additional attorney's fees on October 14, 2022, which has not yet been ruled on and remains pending in the district court. (7 SER–1485.)

A. The district court properly denied Plaintiff's Motion to Disqualify Judge Sammartino.

1. Plaintiff's motion for disqualification was properly denied as moot in light of transfer of the action to the Honorable Todd Robinson.

Plaintiff moved to disqualify Judge Sammartino based on Plaintiff's claims of purported bias based on rulings made by Judge Sammartino, specifically the order granting attorneys fees to the Attorney Defendants and denying her motions for limited scope representation. Judge Sammartino granted Plaintiff's request to submit a reply to any response filed by defendants, however, while the motion was pending, this action was transferred to the Honorable Todd Robinson, along with multiple other cases in due course on September 25, 2022. (1-SER-71-72.) Plaintiff's motion seeking to recuse Judge Sammartino from the case was thus rendered moot given that a new judge had taken her place. Judge Robinson therefore properly denied the motion as moot on September 30, 2022. (1-SER-70.)

Nevertheless, even though Plaintiff's motion was denied as moot, Plaintiff challenged Judge Sammartino's ruling on the fee motions in

her subsequent motion to vacate and reconsider. As discussed above, the district court properly denied Plaintiff's motion.

2. Plaintiff failed to establish any basis to disqualify Judge Sammartino.

"'Since a federal judge is presumed to be impartial, the party seeking disqualification bears a substantial burden to show that the judge is biased.'" *Mendia v. Garcia*, 2017 U.S. Dist. LEXIS 64238, at *10 (N.D. Cal. April 27, 2017). The standard for disqualification is "'[w]hether a reasonable person with knowledge of all facts would conclude that the judge's impartiality might reasonably be questioned.'" *United States v. Hernandez*, 109 F.3d 1450, 1453 (9th Cir. 1997). "Disqualification must rest upon a factual basis" and "should not be based on tenuous speculation; if it were, litigants would have veto power over the assignment of judges." *Laxalt v. McClatchy*, 602 F.Supp. 214, 218 (D. Nev. 1985); *Adams v. Albertson*, 2012 U.S. Dist. LEXIS 50904 *6 (N.D. Cal. Apr. 11, 2012) ('Recusal must be based upon facts and not on conjecture, speculation or statement of opinion"). Plaintiff clearly failed to meet her heavy burden.

In order to establish that a judge has a personal bias or prejudice against a party pursuant to 28 USC § 144, the party challenging the

judge must show with evidence that "(1) the facts must be material and stated with particularity; (2) the facts must be such that if true they would convince a reasonable man that a bias exists; and (3) the facts must show the bias is personal, as opposed to judicial, in nature." *Henderson v. Department of Public Safety & Corrections*, 901 F.2d 1288, 1296 (5th Cir. 1990). Moreover, such "bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp*., 384 U.S. 563, 583 (1966).

In support of her motion for disqualification, Plaintiff asserted the following "facts" in support of her claim that Judge Sammartino is biased against her: 1) Judge Sammartino failed to advise Plaintiff as to the definition of a derivative action or that that she cannot proceed with a derivative action in pro per; 2) denied her motions for "limited scope representation"; 3) failed to "comment" on Plaintiff's reasons for her voluntary dismissal as to the attorney defendants; 4) initially denied Plaintiff's motion for an extension of time to file her second amended complaint on the basis Plaintiff failed to provide notice to opposing

counsel; 5) denied Plaintiff's request to enter default as to Linda Kramer; 6) cautioned Plaintiff in its order regarding accusations against the Clerk or staff based on gratuitous speculation (1-SER-139); 7) misapplied the law in granting defendants' motions for attorney's fees; 8) ruled against Plaintiff on her motion to compel entry of default before she filed her reply; 9) confused Plaintiff by providing her 45 days leave to amend, and indicating that if Plaintiff fails to file an amended pleading, the action is closed without further order (1-SER-140); and 10) the clerk entered the word "terminated" on the docket. (2-SER-354-66.)

Plaintiff offered no facts or evidence that Judge Sammartino's alleged bias stems from an extrajudicial source. Instead, Plaintiff states that she never heard of Judge Sammartino before this case was assigned to her, and that it "is plausible Judge Sammartino had heard of me and should have recused herself and didn't" and it "is also plausible that Judge Sammartino has a prejudice against pro se litigants." (2-SER-366.)

In *Reiffin v. Microsoft Corp.*, 158 F.Supp.2d 1016 (N.D. Cal. March 30, 2001) in denying plaintiff's motion to disqualify the judge, the court

found that the parties' declaration failed to sufficiently state facts and reasons for his belief that a bias or prejudice exists since the facts described the court's analysis of the key legal issues in the case, which "demonstrate a judicial, rather than personal, inclination to rule against Reiffin on certain issues." *Reiffin, supra*, 158 F. Supp.2d at 1021-1022.

Here, similar to *Reiffin*, Plaintiff's "facts" in support of her motion for disqualification likewise are based on the court's reasoned legal rulings on motions in this case, not on any personal inclination to rule against Plaintiff. None of the "facts" and "evidence" complained of by plaintiff support evidence of personal bias against her. Contrary to plaintiff's motion and arguments on appeal, the court is not required to provide legal advice to Plaintiff regarding her desire to proceed with a derivative claims, or "comment" on Plaintiff's voluntary dismissal. The fact that the court has found in favor of defendants on various motions, or in ordering that if Plaintiff fails to file her amended complaint, the action is closed without further court order, also does not constitute evidence supporting bias by Judge Sammartino. See *Green v. Dorrell,* 969 F.2d 915, 919 (10th Cir. 1992) ["adverse rulings against a litigant

cannot in themselves form the appropriate grounds for disqualification."]; *Reiffin,* 158 F. Supp.2d at 1022, citing *Henderson*, 901 F.2d at 1296 ["An evaluation of the strength or weakness of a party's case, however, does not qualify as the type of personal bias contemplated by section 144."]

Lastly, no person would perceive bias based on the court's cautioning Plaintiff not to speculate regarding relationships of favoritism toward litigants or counsel without evidentiary support. "In order for bias against an attorney to require disqualification of the trial judge, it must be of a continuing and personal nature and not simply bias against the attorney or in favor of another attorney because of his conduct." *Henderson*, 901 F.2d at 1296.

3. Plaintiff also fails to establish any other judge was biased against her in this action.

Plaintiff further claims on appeal that all orders in this action were "tainted" and should be reversed based on the Southern District Court's perceived bias against her and pro se litigants in general. However, not only does Plaintiff fail to cite to any evidence establishing that either subsequent judge, i.e., Honorable Todd W. Robinson or

Honorable Linda Lopez, exhibited any personal bias against her based on the criteria cited above, Plaintiff did not file any motion for recusal as to either judge or submit any evidence below supporting bias.

Instead, Plaintiff's argument of bias against other judges in this action are made based solely on Plaintiff's opinion that their rulings against her are erroneous. As discussed above, Plaintiff's disagreement with the district court's rulings does not render the court biased against her and is certainly not a basis to reverse orders made in this action. See *Reiffin,* 158 F. Supp.2d at 1021-1022.

B. The district court properly exercised its discretion in denying plaintiff's motions to retain counsel on a limited scope basis.

Plaintiff argues on appeal that the court exhibited bias against her as a pro se litigant in denying her request to retain counsel on a limited scope basis. Plaintiff further argues that had the court granted her leave to retain an attorney to advocate on the distinct issue of the derivative suit, she would not have dismissed. (AOB at 32.)

However, not only does Plaintiff fail to provide any support for her argument that the court erroneously denied her motions for limited scope representation, Plaintiff's argument ignores that she filed the

complaint and FAC *individually* as a pro se litigant. She did not move for leave to retain counsel on a limited basis until *after* filing her pleadings, and shortly before the anti-SLAPP motions were filed.

Moreover, Plaintiff's motions presented to the court did not seek to retain counsel to appear to advocate the distinct derivative claims since she could not do so pro se. Instead, because of the anticipated expense of the litigation, Plaintiff sought to retain counsel for the limited purposes of "bring[ing] motions that allow for attorney fees before final judgment or sanctions," attending hearings "if permission for telephonic appearances are ever denied," "coach[ing] on practical application of law," "assist[ing] if we go to trial," and "explanation of particularly complex issues like Derivative causes of action." (1-SER-146-47.) She further explained that while she wants to hire representation familiar with the Rules of Federal Procedure and practical application of the law, she will likely not have enough funds to retain counsel for all purposes to complete the case with expert costs. (7-SER-1321-23.)

Plaintiff's second motion was filed after the attorney fee order was entered and was even further limited. In her second motion, filed on August 11, 2020, she sought leave to retain representation for a "special

appearance" for "purpose of collection of fees and costs for process of service and attorney fees and costs for the collection of said fees and costs" under local rule 83.3(f)(4) due to Sherman's refusal to waive service of summons and pay costs. (2-SER-369-70.) It had nothing to do with retaining counsel to prosecute a derivative claim.

Regardless, the district court properly denied both motions on the basis that neither the Federal Rules of Civil Procedure nor the district court local rules provide a mechanism for a limited scope representation, and that under the rules, an attorney appearing on behalf of Plaintiff must enter a full appearance. (1-SER-146-47, 76-77.) The Civil Local Rules require that "[w]henever a party has appeared by an attorney, the party may not afterwards appear or act in the part's own behalf in the action, or take any step in that action, unless an order of substitution has first…been made by the court." S.D. Cal. CivLR 83.3(f)(1). The court indicated that to the extent the court "retains any discretion to entertain a motion to permit both Ms. Hammett and her attorney to appear simultaneously for imprecisely defined purposes, *see* S.D. Cal. CivLR 83.3(f)(4), the Court declines to exercises that discretion here." (*Id.*)

Plaintiff's second motion to retain an attorney for "special appearances" was likewise properly denied. (1-SER-76-77.) The court found that although local rule 83.3(f)(4) addresses "special appearances" by an attorney, it was inapplicable to Plaintiff's request. The court properly explained that "[t]echnically, 'special appearance' means an appearance for the limited purpose of challenging an assertion of personal jurisdiction over a party." *Streit v. Covington & Crowe,* 82 Cal. App. 4th 441, 444 n.2 (2000). The term also has a less formal but common usage to denote an appearance at a hearing by an attorney in the place of the attorney of record. *Id.* Since Plaintiff's motion sought neither, it was properly denied.

Plaintiff was not prohibited from consulting with retained counsel to advise her of her rights and claims. However, the court was well within its discretion of requiring Plaintiff to comply with the local rules that if she elected to retain counsel to enter an appearance in the action, that counsel enter a full appearance as the attorney or record.

CONCLUSION

For the foregoing reasons, defendants and appellees Alan M. Goldberg, Ellis R. Stern and Stern & Goldberg respectfully request this Court affirm the district court's award of attorney's fees in their favor and affirm the judgment in this action.

DATED: June 5, 2023

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: */s/ Corinne C. Bertsche*
Corinne C. Bertsche
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STATEMENT OF RELATED CASES
FOR CASE NUMBER 22-56003

Pursuant to Circuit Rule 28-2.6, Defendants-Appellees discloses the following related cases:

None.

DATED: June 5, 2023

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CERTIFICATE OF COMPLIANCE
FOR CASE NUMBER 22-56003

Pursuant to Federal Rules of Appellate Procedure Rules 28(a)(10), 32(a)(7)(B) and 32(g) and Ninth Circuit Rule 32-1(a), I certify that the Appellees' Answering Brief is proportionally spaced, has a typeface of 14-point or more and contains 13,429 words.

DATED: June 5, 2023

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: */s/ Corinne C. Bertsche*
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ALAN M. GOLDBERG; ELLIS R. STERN; and STERN & GOLDBERG

CERTIFICATE OF SERVICE
FOR CASE NUMBER 22-56003

I hereby certify that on June 5, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

APPELLEES ALAN M. GOLDBERG; ELLIS R. STERN; and STERN & GOLDBERG DAVID S. DEMIAN'S ANSWERING BRIEF

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Raquel Legaspi
Raquel Legaspi

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