Filed 3/15/12

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

ADASSA WALKER et al., Plaintiffs and Appellants, v. TICOR TITLE COMPANY OF CALIFORNIA, Defendant and Appellant.	A126710, A126832, A127086, A128390 (Alameda County Super. Ct. No. RGO7342384)

Plaintiffs sued defendant Ticor Title Company of California (Ticor) and several other defendants on allegations they participated in a conspiracy to fraudulently induce plaintiffs to take out real estate refinancing loans. The fraudulent acts were committed largely by a single defendant, Altaf Shaikh, known to plaintiffs as "Zak Khan" (Khan), acting as agent for a mortgage brokerage firm. With respect to the claims involved in this appeal, those alleged against Ticor, the trial court granted summary adjudication on a claim of aiding and abetting the fraud, and the case proceeded to trial on claims of breach of contract and fiduciary duty. Plaintiffs presented evidence that Ticor, which acted as escrow holder for the loan closings, facilitated Khan's fraud by permitting him to obtain the borrowers' signatures on the loan documents, rather than requiring the signings to occur under Ticor's supervision. With a minor exception, the jury found in Ticor's favor.

Plaintiffs contend the jury's verdicts were not supported by the evidence and the trial court erred in granting summary adjudication of their claim for aiding and abetting the fraud. In a cross-appeal, Ticor contends the trial court erred in considering plaintiffs'

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II.A., II.B., and II.D.

financial circumstances when setting its contractual attorney fees award and in allocating liability for the award among the plaintiffs, rather than making them jointly and severally liable. Ticor also claims the court should have granted reimbursement of its expert witness fees under Code of Civil Procedure section 998 (section 998). We find no error in the disposition of plaintiffs' claims, but we conclude the trial court erred in reducing Ticor's attorney fees on the basis of plaintiffs' limited financial resources and in refusing to award expert witness fees. We vacate these orders and remand for further proceedings.[1]

I. BACKGROUND

Plaintiffs, originally 19 individuals, filed suit against Ticor and 12 other defendants in August 2007, alleging defendants conspired to fraudulently induce them to refinance real estate loans. According to the second amended complaint, which joined two additional plaintiffs, the central figure in the fraud was Khan. While acting on behalf of a mortgage brokerage firm, he and an assistant misrepresented some facts and failed to disclose others to cause plaintiffs to enter into loans originated by defendant World Savings Bank, FSB (World Savings). Against Ticor, plaintiffs pleaded claims for breach of contract, breach of fiduciary duty, aiding and abetting the fraud of Khan and the other defendants, and "Breach of Duty." Prior to trial, the court granted summary adjudication of the aiding and abetting and breach of duty causes of action.

A. *The Evidence at Trial*

The case proceeded to trial only against Khan, Khan's assistant, and Ticor, the latter on the remaining theories of breach of contract and fiduciary duty. The evidence demonstrated plaintiffs were induced to enter into adjustable rate mortgages originated, with one exception, by World Savings. Khan, the person who induced plaintiffs to take out these loans, was an employee of two mortgage brokerage firms, defendants Golden Gate Mortgage and Secure Financial, Inc. He located prospective refinancing customers

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[1] The appellate record contains eight different notices of appeal and cross-appeal filed by plaintiffs and Ticor. All of the appeals have been consolidated in this matter by stipulation.

through the activities of a telemarketing company he owned, defendant Bay Area Telemarketing, Inc. Khan used a number of unethical tactics to persuade plaintiffs to refinance, including misrepresenting the terms of the loans and failing to disclose various loan features, including payments the brokerage firm would receive. He also induced some of the plaintiffs to make payments to his telemarketing company, although he was not entitled to them, and in two cases forged the signatures of borrowers.

Each of the loans was closed under essentially identical escrow instructions. Plaintiffs' claims of breach of contract and fiduciary duty against Ticor, the escrow holder, were based on three provisions of the "LENDER'S CLOSING INSTRUCTIONS" and one provision of the "BORROWER'S ESCROW INSTRUCTIONS." Most of the attention focused on the lender's instruction prohibiting Ticor from "MAIL[ING] out or otherwise releas[ing] documents" from its offices "without [World Savings's] prior approval." Plaintiffs contended a Ticor employee, Jo Saenz, regularly violated this instruction by permitting Khan to take the unsigned loan documents from Ticor's offices, obtain the borrowers' signatures on the documents himself, and return the signed documents to Ticor, thereby avoiding a signing ceremony overseen by a Ticor employee.

Ticor did not counter the evidence of Saenz's release of loan documents to Khan, but it claimed the escrow instructions were not violated because World Savings had either authorized the practice, as permitted by the escrow instruction, or waived enforcement of this provision. Ticor's evidence demonstrated that a "loan representative" for World Savings, Thilo Dreuth, worked closely with Khan, overseeing the loans he developed. Khan and Dreuth regularly discussed Khan's activities in the course of obtaining the loans. During these conversations, Khan sometimes told Dreuth that he needed the loan documents to be drawn before a certain date "[b]ecause a customer, for example, is going out of town, [and] I need to go to their home and get it signed." Based on these conversations, Khan concluded, "Thilo Dreuth knew I was picking up the document[s] from the title company" for signature and "didn't mind." Dreuth had a motive to consent to Khan's removal of the documents to facilitate closing

of the loans. As Dreuth confirmed, "the more loans that closed the more money [I] made." According to an expert witness presented by Ticor, the practice of allowing mortgage brokers to take documents out of escrow to be signed was "[q]uite common" in 2003 and 2004, when these loans were obtained, due to the heavy volume of refinancing activity.

Plaintiffs were awarded total compensatory and punitive damages of $530,596 against Khan, but the jury found against them on their claims against Ticor, with one exception.[2]

B. *Posttrial Motions*

Plaintiffs filed a motion for judgment notwithstanding the verdict (JNOV) or, alternatively, a new trial, arguing the evidence "compelled" a finding Ticor had breached the escrow instructions. The trial court denied the motion.

Ticor thereafter filed a motion seeking over $2 million in attorney fees pursuant to a clause of the loan documents.[3] In opposing the motion, plaintiffs conceded Ticor was entitled to a fee award, but they contended the amount of its request was unreasonable. Detailing several examples of unnecessary conduct by Ticor's counsel, plaintiffs argued "the amount [of attorney fees] claimed must be reduced to $884,036.62." It was not until oral argument and subsequent supplemental briefing that plaintiffs raised the issues considered here, urging the court to reduce the fee award in recognition of plaintiffs' limited ability to pay and to apportion any award among them, rather than impose joint and several liability.

In setting its award of fees, the trial court observed Ticor's requested amount was "astonishing in [its] audacity" and "unreasonable by any measure in terms of time claimed to be devoted and the redundancy of effort." Reflecting plaintiffs' argument on

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[2] The jury found a breach of contract by Ticor as to plaintiffs Daniel and Josephine Garcia, but it concluded the breach had not caused the Garcias any monetary harm.

[3] The attorney fees provision, which calls for the payment of reasonable attorney fees to the "Escrow Holder" in the event it prevails in a lawsuit, is included in the "GENERAL PROVISIONS" of the borrower's escrow instructions.

supplemental briefing, the court also noted an award of the full amount "would be individually and collectively ruinous to the plaintiffs" and held it had the authority to reduce the award on this ground. Without explaining how these factors entered into its decision, the court set the amount of attorney fees at $884,036.62, the amount conceded by plaintiffs to be reasonable before taking into consideration their ability to pay. The court allocated liability for the fees among the plaintiffs pro rata according to their relative recoveries against Khan.

Ticor also filed a memorandum of costs seeking, inter alia, expert witness fees pursuant to section 998. In moving to tax certain costs, plaintiffs argued expert witness fees should not be available because Ticor's section 998 settlement offers, cumulatively $100,000, were unreasonable.[4] According to plaintiffs, the offers, served seven months before trial and prior to a ruling on Ticor's summary judgment motion, failed to account for their large attorney fees claim. Alternatively, plaintiffs contended fees should be denied for two Ticor experts who did not testify. One of these experts, a forensic accountant named Barbara Luna, was not offered at trial after an element of her testimony was ruled inadmissible.

The trial court denied Ticor's request for expert witness fees, agreeing the settlement offers were not made in good faith. The court explained, "The stakes in the case, notwithstanding the outcome of such, that I don't think that the 998 offer can be construed as reasonable, adequate or a good faith effort to have the case settle, particularly at the juncture which the offer was made and the stakes which were evident at that time." It also disallowed expert witness fees for Luna because her testimony had been excluded.

II. DISCUSSION

Plaintiffs contend they were entitled either to JNOV or a new trial on their breach of contract and fiduciary duty claims. They also argue the trial court erred in granting

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[4] The settlement offers were made individually to each plaintiff and ranged from $1,000 to $25,500. Plaintiffs did not argue that any individual offer was unreasonable, instead attacking them as a whole.

summary adjudication of their claim for aiding and abetting the fraud, and they dispute the amount of the attorney fees award. In a cross-appeal, Ticor contends the trial court erred in considering plaintiffs' financial circumstances and in allocating the attorney fees award among plaintiffs. In addition, Ticor argues the court should have granted expert witness fees under section 998.

A. *Plaintiffs' Claims at Trial*

Plaintiffs' breach of contract and fiduciary duty claims were premised on the contention Ticor violated various provisions of the escrow instructions governing the closure of the refinancing loans. There is no question the instructions created enforceable duties. (*Amen v. Merced County Title Co.* (1962) 58 Cal.2d 528, 532.)

We review the denial of JNOV and a new trial for substantial evidence to support the jury's verdict, applying the same standard as the trial court. "On appeal, we review the motion de novo. '[W]e determine whether substantial evidence supported the verdict, viewing the evidence in the light most favorable to the party who obtained the verdict. [Citation.] We resolve all conflicts in the evidence and draw all reasonable inferences in favor of the verdict, and do not weigh the evidence or judge the credibility of witnesses.' " (*Linear Technology Corp. v. Tokyo Electron Ltd.* (2011) 200 Cal.App.4th 1527, 1532.)

1. *Saenz's Release of Closing Documents*

Plaintiffs focus primarily on their claim Saenz breached the escrow instructions by releasing the loan documents to Khan. While acknowledging the releases occurred, Ticor contends they did not constitute an actionable breach of the escrow instructions because (1) World Savings gave prior approval for the practice or waived this provision of the instructions; (2) plaintiffs suffered no damages as a result of the release of documents; (3) its duty under the lender's closing instructions ran only to World Savings, not to plaintiffs; and (4) plaintiffs failed to perform under the instructions because they agreed to sign the documents outside Ticor's offices.

We first consider Ticor's defense of consent or waiver. Because the escrow instructions prohibited Ticor from releasing the documents "without [World Savings's]

prior approval," consent by World Savings to the release of documents to Khan would preclude a finding the escrow instructions were violated. There is substantial evidence to support a finding of prior approval. As discussed above, Khan testified the World Savings employee who oversaw his activities, Dreuth, was well aware the loan documents were being released to him, understood the reasons for the releases, and did not object to them.[5] Particularly given the evidence that Dreuth had a personal financial motive to support Khan's efforts to close the loans successfully, the jury could have found Dreuth's consistent failure to object in these circumstances to constitute an affirmative approval of Khan's conduct.

Even if Dreuth's failure to object did not rise to the level of consent, plaintiffs' claim would fail if there was substantial evidence to support a finding his conduct constituted a waiver of the escrow requirement. A waiver is found when a party to a contract engages in " ' "conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that it has been relinquished." ' " (*Sanchez v. County of San Bernardino* (2009) 176 Cal.App.4th 516, 529.) The intent to waive a contractual right "must be clearly expressed." (*Moss v. Minor Properties, Inc.* (1968) 262 Cal.App.2d 847, 857.) That said, there is no particular form waiver must take. Conduct alone can constitute a waiver even of a provision in a written contract. (*Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th 1031, 1040, fn. 10.)

The jury reasonably could have concluded Dreuth's conduct was inconsistent with an intent to enforce World Savings's right to require Ticor to maintain the loan documents in its offices. Dreuth was Khan's contact at World Savings for the purposes of closing these loans. Khan repeatedly told Dreuth he was taking the documents to borrowers' homes to obtain their signatures, explaining his reasons for doing so. If Dreuth, on behalf of World Savings, had intended to enforce the company's right under

[5] In his testimony, Dreuth denied knowing documents had been released to Khan, but when applying a substantial evidence review we accept as true the evidence supporting the jury's verdict. (*Linear Technology Corp. v. Tokyo Electron Ltd., supra,* 200 Cal.App.4th 1527, 1532.)

the instructions, he could, and presumably would have told Khan not to remove the documents or taken some other action to stop him. There is no evidence of any such conduct. Instead, Dreuth silently tolerated Khan's conduct. Particularly in light of the evidence it was common at the time for documents to be executed outside title company offices as a means of coping with the high level of refinancing activity, suggesting Dreuth's conduct was not out of the ordinary, there was substantial evidence to support a jury finding of waiver.

In arguing against consent or waiver, plaintiffs first contend the only evidence to support Dreuth's consent or waiver was the testimony of "the criminal 'Zak Khan.' "[6] As plaintiffs recognize, however, the substantial evidence test does not permit us to weigh the credibility of witnesses. (*Linear Technology Corp. v. Tokyo Electron Ltd., supra,* 200 Cal.App.4th at p. 1532.) Regardless of his criminal history, Khan's testimony was sufficient to support the jury's verdict.

Plaintiffs also argue Dreuth's consent or waiver cannot be inferred solely from his failure to respond to Khan. Even silence, however, can be found to constitute a waiver when it occurs in circumstances otherwise supporting a finding of waiver. (*McAulay v. Jones* (1952) 110 Cal.App.2d 302, 308.) For the reasons discussed above, we find the surrounding circumstances adequate to provide substantial evidence of consent or waiver here.

Plaintiffs contend there was no evidence Dreuth or anyone else at World Savings communicated to Ticor its approval of Ticor's release of the closing documents to Khan. The escrow instructions, however, did not require the approval to be communicated to Ticor. Further, a finding of waiver, rather than explicit approval, would presumably eliminate any need for communication of approval to Ticor.

Plaintiffs finally argue there is no evidence Dreuth had authority to approve of the removal of closing documents from the title company offices or waive compliance with

[6] Khan pleaded no contest to a charge of grand theft growing out of his mortgage brokering activities. He paid restitution of $250,000 in connection with the plea, of which $33,753 was paid to plaintiffs prior to trial.

the instructions prohibiting removal of the documents. Ticor was not required, however, to present evidence of the authority actually granted to Dreuth by World Savings. In these circumstances, Dreuth's authority was measured not only by his actual authority, but also by his ostensible authority. (Civ. Code, § 2315; *Bear Creek Master Assn. v. Edwards* (2005) 130 Cal.App.4th 1470, 1487.) " 'Ostensible authority . . . is the authority of the agent which the principal causes or allows a third person to believe that the agent possesses.' " (*J.L. v. Children's Institute, Inc.* (2009) 177 Cal.App.4th 388, 403.) As a matter of law, an agent has the authority "[t]o do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency." (Civ. Code, § 2319; *Hogan v. Country Villa Health Services* (2007) 148 Cal.App.4th 259, 266.) World Savings placed Dreuth in charge of overseeing Khan's brokering of its loans. This necessarily included the authority, ostensible if not actual, to determine how the loan documents would be executed.

2. *The Remaining Escrow Instructions*

Plaintiffs next contend Ticor violated an escrow instruction requiring "an independent third party, called a 'closing agent' " to "coordinate the settlement" of the loans. This instruction anticipated Ticor would act as the closing agent and prohibited a mortgage broker or other interested party from acting as the closing agent. Plaintiffs argue Ticor violated this instruction when it permitted Khan to obtain the borrowers' signatures.

There was evidence from which the jury could have concluded the escrow instruction was concerned with more than the signing of documents. The escrow administrator for Ticor's parent company explained the closing of a mortgage loan consists of all activities involved with the receipt and disbursement of the loan funds, including the preparation of the settlement statement and escrow instructions, the recording of the documents, and the ordering of the final policies of title insurance. As the administrator testified, "The closing isn't the signing ceremony, the closing is all of the activities that the escrow officer performs." On the basis of this testimony, the jury could have concluded the activities Khan undertook—obtaining signatures, providing

notices, and distributing copies—were only a part of the larger process of settlement governed by the escrow instruction. The language of the escrow instruction requires the closing agent only to "coordinate" settlement of the loan, not to conduct every aspect itself. There is no dispute Ticor handled the remaining aspects of settlement and supervised the entire process. Accordingly, there was substantial evidence to support the jury's conclusion Ticor satisfied this instruction.

Plaintiffs also contend Ticor violated an escrow instruction requiring it to give a copy of the "Notice of Right to Cancel" to each borrower. The contention is based on testimony of various plaintiffs that Khan did not provide them a copy of the notice. Ticor, in opposition, relies on Khan's testimony he did provide the required copies to the plaintiffs. Khan's testimony provides substantial evidence to support the jury's finding this instruction was not violated. Plaintiffs argue the instructions required Ticor itself to perform this function, but nothing in the language of the instructions precluded Ticor from delegating this task, nor could plaintiffs have been damaged by such a delegation.

Finally, plaintiffs claim Ticor violated the borrower's instruction describing Ticor's duties as "the proper handling of such money and the proper safekeeping of such instruments . . . and for the disposition of same in accordance with the written Instructions accepted by Escrow Holder." Read in context, this instruction is a limitation on Ticor's duties, making clear its duties were limited to complying with the remaining escrow instructions.[7] Because we find substantial evidence to support the jury's conclusion that no other escrow instructions were violated, there is no basis for finding a violation of this catch-all provision, which contains no separate contractual covenants.[8]

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[7] The instruction, entitled "CLARIFICATION OF DUTIES," states Ticor "serves ONLY as an Escrow Holder in connection with these instructions and cannot give legal advice to any party hereto. . . . Escrow Holder's duties hereunder shall be limited to the proper handling of such money and the proper safekeeping of such instruments, or other documents received by Escrow Holder, and for the disposition of same in accordance with the written instructions accepted by Escrow Holder."

[8] Plaintiffs also accuse Khan of forging signatures, but they do not separately argue Ticor breached the instruction requiring it to warrant the authenticity of signatures.

Because the jury's finding the escrow instructions were not violated is supported by substantial evidence, it is unnecessary for us to address Ticor's remaining arguments concerning plaintiffs' breach of contract and fiduciary duty claims.

B. ***Summary Adjudication of Plaintiffs' Fraud Claim***

" ' "A trial court properly grants a motion for summary judgment only if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. [Citations.] The moving party bears the burden of showing the court that the plaintiff 'has not established, and cannot reasonably expect to establish,' " the elements of his or her cause of action. [Citation.]' [Citation.] We review the trial court's decision de novo, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party." (*State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1017–1018.)

A cause of action for aiding and abetting the intentional tort of another requires proof the alleged aider and abettor " ' " '(a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act *or* (b) gives substantial assistance to the other in accomplishing a tortious result and the [alleged aider and abettor's] own conduct, separately considered, constitutes a breach of duty to the third person.' " ' " (*Das v. Bank of America, N.A.* (2010) 186 Cal.App.4th 727, 744, quoting *Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1144 (*Casey*), italics added.) In order to be found liable for aiding and abetting a fraud under the first theory, a defendant must consciously decide to participate and act for the purpose of assisting the fraud. (*Casey,* at pp. 1145–1146.) This requires evidence the defendant had sufficient knowledge to form the "specific intent" to aid the fraud. (*Schulz v. Neovi Data Corp.* (2007) 152 Cal.App.4th 86, 95.)

The trial court granted summary adjudication of plaintiffs' aiding and abetting claim solely on the ground there was no triable issue Ticor had actual knowledge of

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In fact, only two plaintiffs contended signatures had been forged on the loan documents. As to those plaintiffs, Khan's testimony that the signature was authentic provided substantial evidence to support a finding no breach of warranty occurred.

Khan's fraud. Although this reasoning erred in overlooking the alternative theory of aiding and abetting that does not require actual knowledge, we conclude the grant of summary adjudication must be affirmed.

We first address the theory of aiding and abetting requiring actual knowledge and substantial assistance. (*Das v. Bank of America, N.A., supra,* 186 Cal.App.4th at p. 744.) To demonstrate a disputed issue of fact with respect to Ticor's knowledge of the fraud, plaintiffs relied on declarations from two plaintiffs and Khan's deposition. The first plaintiff, Youbert Nissan, stated he called Saenz at Ticor on August 13, 2004 to tell her he wanted to rescind a refinancing that had occurred on August 10. When told by Saenz his call was too late because the loan had already closed, Nissan asked how the loan could close "without my wife signing the loan documents." In response, Saenz told him his wife's signatures were notarized. Although Nissan told her he had not dealt with the notary, Saenz refused to call the notary to confirm the validity of the signatures. Instead, she told him "you have to talk to Zak Khan about this issue and not to call her again." In the second plaintiff declaration, Steven Lepley stated he called an unnamed person at Ticor "at least four times" to request copies of the closing documents for his loan, since Khan had not given him copies. Lepley did not claim any other contact with Ticor. In the portions of Khan's deposition cited by plaintiffs, he testified he told Saenz he did not have a mortgage broker's license. He also told her he wanted his company, Bay Area Marketing, to be compensated from loan proceeds for "telemarketing fees." Saenz instructed him to include the fees as a cost item on the "HUD-1 statement" and "have the borrower sign."

We agree with the trial court this evidence is insufficient to create a triable issue of fact regarding Ticor's actual knowledge of Khan's fraud. None of the evidence permits an inference that, when releasing the documents to Khan for signature, Saenz was aware Khan was committing fraud in securing the loans and acted with the intent to assist his

fraud.[9] While Nissan told Saenz his wife had not signed the loan documents, he did not claim Khan had obtained the signatures by deception. Lepley's calls to Ticor did nothing more than alert Saenz that Khan had failed to leave copies of the documents, which is not a fraudulent act on its face. Khan's own testimony did not suggest he was committing fraud. Plaintiffs argue Saenz's suggestion that Khan place the charges on a HUD statement was a "way to hide these charges" because "the HUD-1 statement was not given to the borrower until after the loans had closed." The evidence they cite in support, however, does not permit the inference that disclosure on a HUD statement would necessarily conceal the charges from the borrower. Further, plaintiffs' argument is inconsistent with Saenz's instruction to Khan to have the borrowers "sign," suggesting she anticipated they would be required to acknowledge the charges, and Khan testified the fees were, in fact, disclosed prior to closing. Because proof of actual knowledge is an essential element of the first theory of aiding and abetting, the trial court did not err in granting summary adjudication on this aspect of the claim.

Assuming the trial court erred in granting summary adjudication, under the second theory, which does not require a showing of knowledge, any such error is moot. The second theory requires a demonstration the defendant's own conduct, " ' "separately considered" ' " from the conduct of the alleged fraudster, constituted a breach of duty to the plaintiff. (*Casey, supra,* 127 Cal.App.4th at p. 1144.) The only breaches of duty by Ticor claimed by plaintiffs, outside the aiding and abetting of Khan's fraud, were the violations of the escrow instructions. As discussed above, the jury concluded, on the basis of substantial evidence, no violation of the escrow instructions occurred. As a result, even if the trial court erred in granting summary adjudication of the claim of fraud on this theory, the error was harmless. (*Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830,

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[9] This evidence arguably may have given Saenz reason to suspect fraud, but that is insufficient under the standard required for aiding and abetting. (*Casey, supra,* 127 Cal.App.4th at pp. 1145–1146; *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 823–824, fn. 10.)

836 [erroneous denial of summary judgment motion harmless, since issues can be resolved at trial].)

C. *The Award of Attorney Fees to Ticor*

Both parties take issue with the trial court's consideration of the financial impact on the plaintiffs in setting the amount of Ticor's contractual attorney fees award. Ticor contends the trial court abused its discretion in considering financial impact at all; plaintiffs contend the court abused its discretion by not giving it sufficient weight. In addition, Ticor contends the trial court erred in allocating liability for attorney fees among the plaintiffs, rather than imposing joint and several liability among them.

1. *The Financial Impact of the Award*

An award of contractual attorney fees is reviewed for abuse of discretion. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 (*PLCM Group*).) While a trial court has "broad authority" in determining the amount of reasonable legal fees (*ibid.*), it is an abuse of discretion to apply the "wrong legal standard." (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.)

In holding it could consider the financial impact of the attorney fees award in determining reasonable fees, the trial court relied on *Garcia v. Santana* (2009) 174 Cal.App.4th 464 (*Garcia*). The *Garcia* court reviewed a trial court decision to deny an award of statutory attorney fees against the unsuccessful plaintiff, a resident of a low-income housing complex, because of the plaintiff's financial condition. (*Id.* at p. 468.) While the *Garcia* majority reversed the trial court's wholesale denial of fees, it allowed the trial court on remand to take into consideration the financial impact the award would have on the plaintiff in determining the amount of the award. The court's analysis began with the premise the state's residents have the " 'right of access to the courts,' " relying largely on cases addressing in forma pauperis plaintiffs. (*Id.* at pp. 471–472.) From these decisions, the court concluded, "litigation costs are not intended to be used as a tool to deny access to the courts, nor to deter persons from asserting their rights at the cost of their ability to provide for the necessities of life." (*Id.* at p. 472.) Characterizing the award of fees as a sanction, the court authorized the consideration of the financial

circumstances of the losing party to ensure the fees do not " 'impose an unreasonable financial burden upon the sanctioned party.' " (*Id.* at pp. 476–477.)

In an opinion dissenting from the majority's rationale, Justice Frank Y. Jackson concluded a reasonable attorney fee should not take into account the losing party's financial condition. (*Garcia, supra,* 174 Cal.App.4th at p. 479 (conc. & dis. opn. of Jackson, J.).) The dissent began with the language of the statute, Civil Code section 1354, which directs that the trial court "shall" award reasonable attorney fees to a prevailing party. Because past decisions had consistently defined reasonable fees without regard to the financial impact on the losing party, the dissent reasoned the statute required the award of fees without taking this factor into account. (*Garcia*, at p. 480.) It pointed out that the premise of in forma pauperis assistance, the judicial system's waiver of its *own* filing fees for an indigent plaintiff, is a different matter from the court's denial of attorney fees otherwise payable to a private party (*id.* at p. 481) and disputed the majority's conclusion that a postjudgment award of attorney fees could deny a plaintiff access to the courts or serve as a punishment. (*Id.* at p. 482.)

For one obvious reason, *Garcia* is distinguishable. *Garcia* concerned an award of attorney fees pursuant to a statute, rather than a contract. If Ticor's entitlement to attorney fees were judged solely by the standards applicable to an award of damages under a contract, we would have little difficulty rejecting the consideration of such equitable matters as its financial impact. Contract damages are the classic legal remedy, consistently distinguished from equitable remedies. (E.g., *Kaufman v. Goldman* (2011) 195 Cal.App.4th 734, 743.) An award of damages is judged solely by the losses suffered by the plaintiff as a result of the breach. (See generally *Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 967–969.) To our knowledge, it has never been suggested that a party to a contract can be excused from

performance, or the party's performance altered, solely as a result of that party's financial condition.[10] In any event, plaintiffs cite no such case.

The unconventional nature of contractual attorney fees, however, makes such a straightforward resolution difficult. As discussed below, contractual attorney fees awards are judged not as damages but by the rules applicable to statutory attorney fees, including the consideration of equitable factors. While recognizing this general principle, we conclude it is inappropriate to consider the losing party's financial status as an equitable factor in assessing contractual attorney fees.

While attorney fees awarded under a contract were, at one time, considered to be an element of contract damages (e.g., *Genis v. Krasne* (1956) 47 Cal.2d 241, 246), that view changed with the enactment of Civil Code section 1717. While intended to ensure the mutuality of any contractual attorney fees provision (*PLCM Group, supra,* 22 Cal.4th at p. 1090), the statute also constituted statutory authority for the award of contractual fees. Once contractual attorney fees could be deemed awarded pursuant to section 1717, courts found them analogous to statutory attorney fees and declared them an element of costs of suit, rather than damages. (See *Beneficial Standard Properties, Inc. v. Scharps* (1977) 67 Cal.App.3d 227, 232; *T.E.D. Bearing Co. v. Walter E. Heller & Co.* (1974) 38 Cal.App.3d 59, 64.) The Legislature endorsed this view in 1981 by amending section 1717 to add language expressly characterizing contractual attorney fees as a cost of suit.[11] (Stats. 1981, ch. 888, § 1, p. 3399.) In doing so, the Legislature intended "to establish uniform treatment of fee recoveries in actions on contracts containing attorney fee provisions and to eliminate distinctions based on whether recovery was authorized by statute or by contract." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 616.) Following the

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[10] The doctrine of impossibility is not an exception. That defense excuses performance, not because a party has become financially unable to perform, but because performance itself has become "impractica[l] due to excessive and unreasonable expense." (*City of Vernon v. City of Los Angeles* (1955) 45 Cal.2d 710, 717.)

[11] The amendment added the language, "Reasonable attorney's fees shall be fixed by the court, . . . and shall be an element of the costs of suit." (Stats. 1981, ch. 888, § 1, p. 3399.) The sentence is retained in subdivision (a) of Civil Code section 1717.

amendment of section 1717, " 'attorney's fees were to be seen as allowed by statute, rather than by contract.' " (*PLCM Group, supra,* 22 Cal.4th at p. 1091.)

Accordingly, while the availability of an award of contractual attorney fees is created by the contract (Code Civ. Proc., § 1033.5, subd. (a)(10)(A)), the specific language of the contract does not necessarily govern the award. In setting contractual attorney fees, " '[e]quitable considerations [under Civil Code section 1717] must prevail over . . . the technical rules of contractual construction.' " (*PLCM Group, supra,* 22 Cal.4th at p. 1095, quoting *International Industries, Inc. v. Olen* (1978) 21 Cal.3d 218, 224.) Parties to a contract cannot, for example, enforce a definition of "prevailing party" different from that provided in Civil Code section 1717. (*Santisas v. Goodin, supra,* 17 Cal.4th at p. 617.) In its most recent statement of the factors to be considered in setting an award of contractual attorney fees, the Supreme Court noted: "Although the terms of the contract may be considered, they 'do not compel any particular award.' " (*PLCM Group*, at p. 1096.)

While we recognize that an award of contractual attorney fees may be subject to equitable considerations, we nonetheless conclude a losing party's financial condition should not be considered in the setting the amount of such an award. As the dissent in *Garcia* makes clear, the issue is not without controversy even in connection with statutory attorney fees. It is by no means clear that statutory attorney fees should be characterized as denying an indigent party access to the courts or as a punishment, the rationale used by the *Garcia* majority. (See *Garcia, supra,* 174 Cal.App.4th at p. 482 (conc. & dis. opn., Jackson J.).) Further, the *Garcia* majority's ruling has the effect of "penaliz[ing] a defendant who prevails in litigation into which he has been involuntarily thrust by preventing him from recovering what the Legislature has determined to be a just award." (*Id.* at pp. 482–483.)

In any event, *Garcia*'s reasoning does not justify its application to contractual attorney fees because, unlike statutory fees, contractual fees are voluntarily incurred. The possibility of an award of contractual attorney fees exists because the parties chose to enter into an agreement containing an appropriate provision. The award is a business risk

assigned as a matter of mutual agreement by the parties. As a result, contractual attorney fees cannot fairly be characterized as a punishment. Nor can the possibility of an award of contractual attorney fees constitute an improper denial of access to the courts, since the risk of such an award has been undertaken in return for the benefits of the contract.[12]

We recognize this holding is, on its face, inconsistent with language stating that Civil Code section 1717 was intended to "eliminate distinctions based on whether recovery was authorized by statute or by contract." (E.g., *Santisas v. Goodin, supra,* 17 Cal.4th at p. 616.) On examination, however, this language is addressed solely to uniformity in the various factors to be considered in determining the value of the legal work to be compensated. The intent of this determination is "to fix the fee at the fair market value for the legal services provided" through "an objective determination of the value of the attorney's services." (*PLCM Group, supra,* 22 Cal.4th at p. 1095.) Courts are therefore instructed to consider such factors as " 'the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case.' " (*Id.* at p. 1096.) It is in this regard that section 1717 was intended to impose uniformity, thereby ensuring the calculation of reasonable attorney fees would be the same whether imposed under contract or statute.

Our conclusion does not threaten this uniformity. In finding *Garcia*'s rationale inapplicable to contractual attorney fees, we have not introduced a difference in the calculation of the "objective determination of the value of the attorney's services" between statutory and contractual attorney fees. (*PLCM Group, supra,* 22 Cal.4th at p. 1095.) A reduction in an award of attorney fees otherwise determined to be reasonable on the basis of the losing party's financial condition is not a change in the determination of the fair market value of the legal services rendered. Rather, it is an equitable reduction in the losing party's liability for an otherwise reasonable fee. We find nothing in Civil

[12] The same is not necessarily the case with respect to a plaintiff in a lawsuit featuring the possibility of statutory attorney fees, since the plaintiff has no choice but to risk an award of attorney fees in order to enforce his or her statutory rights.

Code section 1717 or the cases construing it that suggests contractual and statutory awards must be consistent in permitting such reductions. Accordingly, we conclude the trial court abused its discretion in considering the financial condition of the plaintiffs when setting Ticor's award of contractual attorney fees, and we remand for reconsideration of the award of attorney fees under the proper legal standard.

2. *The Allocation of Liability Among Plaintiffs*

Rather than enter a single award of attorney fees for which plaintiffs were jointly and severally liable, the trial court allocated a portion of the total award to each plaintiff, assigning fees on the basis of plaintiffs' relative recoveries against Khan. Ticor contends the trial court lacked discretion to allocate liability for the fees in this manner, arguing the "usual rule in California" is that multiple losing parties are jointly and severally liable for a contractual attorney fees award. (E.g., *Mepco Services, Inc. v. Saddleback Valley Unified School Dist.* (2010) 189 Cal.App.4th 1027, 1045 & fn. 25; *Glass v. Najafi* (2000) 78 Cal.App.4th 45, 47.)

Regardless of the "usual rule," it is well established, "trial courts have discretion not only in setting the amount of an award of attorney fees, but in allocating the award among various defendants based on their relative culpability." (*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 97–98; *Sokolow v. County of San Mateo* (1989) 213 Cal.App.3d 231, 250.) It can even constitute an abuse of discretion *not* to allocate fees when defendants are of very different relative culpability. (*No Oil, Inc. v. Occidental Petroleum Corp.* (1975) 50 Cal.App.3d 8, 28–29.)

By the same reasoning, equitable considerations can justify a trial court's apportionment of an award of attorney fees among multiple plaintiffs in appropriate circumstances. In *Golf West of Kentucky, Inc. v. Life Investors, Inc.* (1986) 178 Cal.App.3d 313, superseded by statute on other grounds as stated in *Cooper v. Westbrook Torrey Hills* (2000) 81 Cal.4th 1294, 1299–1300, the court allocated an appellate cost judgment between two plaintiffs who had sued the defendant under individual franchise agreements and consolidated their cases for trial. (*Golf West*, at pp. 317–318.) The court rejected the argument the plaintiffs should be found jointly and

severally liable for costs, noting there would have been no question of joint and several liability had they not chosen to join their cases. Similarly here, although plaintiffs elected to bring suit together, they were not joint obligors on a single contract. Each plaintiff (or plaintiff couple) had a separate agreement with Ticor and could have filed suit separately. Their individual decisions not to do so resulted in efficiencies for all parties and the court, of course, but in particular for Ticor, which was required to defend only one lawsuit rather than a dozen. We find this an adequate justification for the trial court's exercise of discretion in allocating attorney fees among the plaintiffs, rather than imposing joint and several liability.

The primary case on which Ticor relies, *Acosta v. SI Corp.* (2005) 129 Cal.App.4th 1370, is inapposite. The *Acosta* court was not asked to, and did not address the discretion of a trial court in allocating costs liability. In fact, the defendant in *Acosta* conceded the court had the discretion to impose an allocation of costs under Code of Civil Procedure section 1032. (*Acosta,* at p. 1374.) Rather, the court addressed only the plaintiffs' contention the defendant's memorandum of costs was defective because it *failed* to apportion costs of suit among them. (*Id.* at p. 1373.) In concluding the defendant's memorandum of costs was not defective for this reason (*id.* at pp. 1378, 1379), the court had no occasion to consider the plaintiffs' actual liability for the costs.[13]

D. *Expert Witness Fees*

1. *Denial of Fees Under Section 998*

If a party declines to accept a good faith settlement offer made pursuant to section 998 and fails to obtain a judgment more favorable than the offer, the party may be

[13] Ticor also appears to argue the trial court abused its discretion in the manner in which it allocated fees, pointing out that allocation pro rata according to their damages had the affect of allocating some of the largest awards to what appeared to be the least financially capable plaintiffs. We find nothing unreasonable about the court's decision. By allocating fees in the manner it chose, the trial court allocated the greatest attorney fees to the plaintiffs who were entitled to the largest recoveries against Khan and therefore stood to gain the most from the litigation.

held liable for the offeror's postoffer litigation costs, including expert witness fees. (Code Civ. Proc., § 998, subd. (c); *Linthicum v. Butterfield* (2009) 175 Cal.App.4th 259, 270.) "Good faith . . . requires that the settlement offer be 'realistically reasonable under the circumstances of the particular case.' " (*Adams v. Ford Motor Co.* (2011) 199 Cal.App.4th 1475, 1483 (*Adams*).) The defendant's success at trial is prima facie evidence of the reasonableness of a section 998 offer, and the plaintiff bears the burden of demonstrating a lack of good faith. (*Essex Ins. Co. v. Heck* (2010) 186 Cal.App.4th 1513, 1528.) "[A] reasonable section 998 settlement offer is one that 'represents a reasonable prediction of the amount of money, if any, [the offeror] would have to pay [the offeree] following a trial, discounted by an appropriate factor for receipt of money by [the offeree] before trial.' [Citation.] The reasonableness of a defendant's section 998 settlement offer is evaluated in light of 'what the offeree knows or does not know at the time the offer is made,' along with what the offeror knew or should have known about facts bearing on the offer's reasonableness. [Citation.] In other words, for a section 998 offer to be reasonable, the defendant must reasonably believe that the plaintiff might accept his offer, and the plaintiff must have access to the facts that influenced the defendant's determination that the offer was reasonable." (*Adams,* at p. 1485.) We review the trial court's finding Ticor's section 998 offers were not made in good faith for abuse of discretion. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 134.)

Plaintiffs have made no genuine attempt to defend the trial court's decision on appeal. In their reply brief, plaintiffs properly dispute Ticor's contention that a de novo standard of review should be applied, but with respect to the issue of good faith they argue merely: "[T]he Court, which was in the best position to know, having presided over the entire case, decided the offer at the time it was made was not reasonable. There is no basis for reversing this decision." Asserting in a conclusory manner that the trial court was correct does not constitute legal argument, particularly when the trial court's own explanation of its reasoning was equally conclusory. As a result, plaintiffs have not articulated a single factor demonstrating Ticor's lack of good faith.

We find no objective basis for the trial court's conclusion that Ticor's section 998 offers were not made in good faith. The offers were made after substantial discovery, only seven months before trial. By that time, all parties were aware of the likely state of the evidence, and plaintiffs were in a position to intelligently evaluate the offer. (See *Najera v. Huerta* (2011) 191 Cal.App.4th 872, 878.) While Ticor's individual settlement offers were small in amount, they were not disproportionate to plaintiffs' claimed compensatory damages. The cumulative settlement offer of $100,000 constituted nearly half of the compensatory damages of $215,686 sought by plaintiffs at trial. Further, as the results of the trial illustrate, the evidentiary basis for plaintiffs' claims against Ticor was far from conclusive, justifying Ticor's offer of less than the full amount of claimed damages. Finally, the offers contained a waiver of fees and costs, a further valuable provision. (*Adams, supra,* 199 Cal.App.4th at p. 1485.) Plaintiffs' sole argument to the trial court, that the settlement offers failed to account for plaintiffs' accumulated attorney fees, did not demonstrate a lack of good faith because the threat of attorney fees liability was mutual. Finding no basis for doubting the good faith of Ticor's offers, we find the trial court's denial of costs under section 998 to have been an abuse of discretion.

2. *Denial of Fees for Dr. Barbara Luna*

Following discovery of Khan's fraud, many of the plaintiffs demanded that World Savings rescind their loans under the federal Truth in Lending Act (15 U.S.C. § 1601 et seq.). World Savings complied with the demands. As part of such a rescission, the lender is required, in effect, to refund to the borrower all interest paid on the rescinded loan. (15 U.S.C. § 1635(b).) As a result, the borrower obtains the equivalent of an interest-free loan for the period of time between the loan's origination and the rescission.

Ticor intended to offer Luna to testify that the damages of the rescinding plaintiffs should be reduced by the amount of this refunded interest. Prior to trial, plaintiffs challenged this aspect of her testimony by motion in limine, arguing the refunded interest was not a proper offset. The trial court granted the motion in limine and precluded this testimony.

In denying recovery of Luna's fees under section 998, the trial court ruled her retention was not reasonable and necessary because her testimony on interest offsets was found not admissible. The court noted, "It's . . . a very common argument . . . that a witness was not called to testify and, therefore, the parties should not be able to recover those costs. There could be all kinds of reasons for [an] affirmative voluntary decision not to call a witness, which doesn't necessarily answer the question whether the cost is recoverable. I just want to make clear I'm excluding that scenario from the analysis of Dr. Luna. [¶] . . . But the premise for which she was being called does not survive, [which is], in this Court's mind, the test of recovery [of] costs."

"A 'verified memorandum of costs is prima facie evidence of [the] propriety' of the items listed on it, and the burden is on the party challenging these costs to demonstrate that they were not reasonable or necessary. [Citation.] . . . [¶] Whether an item listed on the memorandum was reasonably necessary is a question of fact to be decided by the trial court. [Citation.] . . . [T]he trial court, having heard the entire case, is in the best position to evaluate the importance of expert witnesses at trial, and therefore is in the best position to evaluate the reasonableness of the expert witness fees listed in the memorandum of costs." (*Adams, supra,* 199 Cal.App.4th at pp. 1486–1487.) "We review the trial court's award of expert witness fees as a section 998 discretionary item of costs using an abuse of discretion standard." (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262.)

While we recognize the broad scope of the trial court's discretion, we conclude the trial court applied too strict a standard in relying on its own ruling on the admissibility of Luna's testimony to deny reimbursement. Costs are available under section 998 if the party seeking the costs acted reasonably in incurring them. A trial court's authority over the admissibility of evidence is discretionary, and its exercise of discretion is influenced by a host of factors. (E.g., *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1449.) Some of these, such as materiality, relevance, and duplication, can be anticipated at the time the witness is retained, while others may depend upon subsequent pretrial developments and even developments during the course of trial. Further, as this situation illustrates, even

those factors that can be anticipated may be uncertain as a result of ambiguities in the governing law. If a trial court exercises its discretion to exclude expert testimony on the basis of matters that could not be evaluated with confidence at the time the expert's testimony was developed, the prevailing party's decision to retain the expert does not necessarily become unreasonable and unnecessary. Stated another way, the party cannot be *required* to guess correctly regarding the court's exercise of discretion in order to recover its legitimate expenses. Rather, the reasonableness of the decision to develop expert testimony must be judged by the circumstances prevailing at the time the expert's testimony is developed. The party's decision to develop the testimony is reasonable if, at that time, there are reasonably persuasive arguments for the admissibility of the witness's testimony and the countervailing arguments are not clearly more persuasive.

We have no hesitation in finding a fair argument for the admissibility of Luna's interest offset testimony. There is no question Luna's testimony was material and nonduplicative. The dispute was over its relevance. Ticor argued plaintiffs were entitled to receive as damages no more than full compensation for the losses they suffered as a result of its alleged breaches of contract and fiduciary duty. (See Civ. Code, § 3358 ["no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof"].) When plaintiffs were permitted to rescind the improper loans, they received a refund of the interest they paid, thereby receiving a financial benefit. Ticor argued this benefit should be used to offset their other claimed damages from the breach, since it reduced their losses as a result of the fraud. By analogy, the benefits a party obtains through mitigating its damages from a breach may be offset against the damages payable as a result of the breach. (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 468.) Plaintiffs, it could be argued, were mitigating their damages by seeking rescission under the Truth in Lending Act. Although this argument for relevance is certainly reasonable, it is uncertain. We have not been cited to any existing authority clearly supporting or refuting it.

Plaintiffs, in turn, had reasonable arguments against the treatment of the interest as an offset. First, the interest payments were not received by plaintiffs in compensation for Ticor's breach. Instead, they were payments made in connection with a presumed independent violation of a federal statutory duty by World Savings. It is not clear they were a proper offset under Civil Code section 3358. Second, as plaintiffs point out, section 3358 states that it applies "except as expressly provided by statute." It is possible to construe sections 1635(g) and 1640(a) of title 15 of the United States Code as permitting the interest to be received in addition to a rescinding party's actual damages.[14]

We need not decide whether, given these arguments, the trial court abused its discretion in excluding Luna's testimony on the offset. As discussed above, that is not the standard by which Ticor's retention of Luna should be judged. Because the arguments in favor of admission of her testimony were solid and the arguments against its admission were not clearly more persuasive, it was reasonable for Ticor to develop and offer the testimony. For this reason, the trial court abused its discretion in refusing compensation under section 998 solely on the basis of its decision to exclude Luna's testimony.

In reaching this conclusion and remanding to the trial court for reconsideration of the reimbursement of Ticor's expert witness fees, we do not mean to confine the trial court's exercise of discretion with respect to other issues bearing on the reimbursement for Luna's fees, such as the reasonableness of their amount. Further, because we conclude the trial court applied an improper standard in denying fees altogether, we do not reach Ticor's argument that a portion of Luna's fees should have been reimbursed

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[14] The parties also make arguments under the collateral source rule and the "benefit" doctrine. Because, as the parties concede, these doctrines apply only to recoveries on tort claims (*Turpin v. Sortini* (1982) 31 Cal.3d 220, 236 [" 'benefit' doctrine"]; *Bramalea California, Inc. v. Reliance Interiors, Inc.* (2004) 119 Cal.App.4th 468, 472), they are irrelevant to the reasonableness of Ticor's decision to develop Luna's testimony in connection with plaintiffs' contract claim. We therefore need not address these doctrines.

because she was prepared to offer admissible testimony on topics other than the interest offset, although she was apparently never called to provide such testimony.

III. DISPOSITION

The trial court's ruling on the award of contractual attorney fees and its denial of expert witness fees to Ticor are vacated, and the matter is remanded to the trial court for further proceedings consistent with this decision. The judgment is otherwise affirmed. Ticor is entitled to recover its costs on plaintiffs' appeals. The parties will bear their own costs with respect to Ticor's appeals.

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Margulies, J.

We concur:

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Marchiano, P.J.

____
Banke, J.

Trial Court: Alameda County Superior Court

Trial Judge: Hon. Robert B. Freedman

Counsel:

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