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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

TIFFANY FENTERS,)	No. CV-F-05-1630 OWW/DLB
)	
)	
Plaintiff,)	MEMORANDUM DECISION GRANTING
)	IN PART AND DENYING IN PART
vs.)	DEFENDANTS YOSEMITE CHEVRON,
)	ABBCO INVESTMENTS, LLC, AND
)	ROBERT ABBATE'S MOTION FOR
)	SUMMARY JUDGMENT (Doc. 137)
YOSEMITE CHEVRON, et al.,)	
)	
Defendants.)	
)	
)	

Before the Court is the motion for summary judgment filed by Defendants Yosemite Chevron, Abbco Investments, LLC, and Robert Abbate (hereafter the "Abbate Defendants").¹

A. ABBATE DEFENDANTS' OBJECTIONS TO BETTANCOURT EXPERT REPORT.

Submitted in opposition to the Abbate Defendants' motion for summary judgment is what is characterized by Mr. Little as "the

¹The motions for summary judgment filed by the County Defendants and the Cassabon Defendants will be resolved by separate memorandum decisions.

1 declaration report" of John Bettancourt. Mr. Bettancourt avers:

2 1. I am a certified public accountant. My
3 current curriculum vitae has been provided
separately.

4 2. I have been retained on behalf of
5 plaintiff Tiffany Fenters in this proceeding.

6 3. My opinions regarding the accounting
7 aspects of this case are set forth in my
8 testimony in the criminal case, People v.
9 Tiffany Fenters, which I incorporate herein
10 by reference. Those opinions remain
11 unchanged. I based those opinions on a
review of the accounting materials provided
and made available by the prosecution in the
underlying criminal case. I reviewed those
materials at length, and I understand that my
related work product has also been produced
by plaintiff's counsel.

12 4. The spreadsheets provided by defendant
13 Robert Abbate is indicative of false,
14 fabricated and misleading work product for
the reasons previously stated in my trial
15 testimony and as reflected in my work
16 product. The accounting work done by
17 defendants Cassabon & Associates and Victor
18 Fung is also indicative of false, fabricated
19 and/or misleading work product for the
reasons largely expressed in my trial
testimony and reflected in my work product.
The defendants' accounting work is not merely
substandard or negligent but instead is
reflective of false, fabricated and/or
misleading work.

20 The Abbate Defendants object to Mr. Bettancourt's
21 declaration on several grounds.

22 Defendants object to consideration of Mr. Bettancourt's
23 declaration because it fails to set forth Mr. Bettancourt's
24 qualifications.

25 Rule 702, Federal Rules of Evidence, provides:

26 If scientific, technical, or other

1 specialized knowledge will assist the trier
2 of fact to understand the evidence or to
3 determine a fact in issue, a witness
4 qualified as an expert by knowledge, skill,
5 experience, training or education, may
6 testify thereto in the form of an opinion or
7 otherwise.

8 "Whether a witness is qualified as an expert can only be
9 determined by comparing the area in which the witness has
10 superior knowledge, skill, experience, or education with the
11 subject matter of the witness's testimony. *Carroll v. Otis*
12 *Elevator Co.*, 896 F.2d 210, 212 (7th Cir.1990).

13 Defendants complain that Mr. Bettancourt's declaration does
14 not set forth his qualifications, other than to aver that he is a
15 certified public accountant.

16 Plaintiff responds that "the totality of the materials
17 submitted to the Court, which include Bettancourt's trial
18 testimony in the underlying criminal case and his deposition,
19 more than amply set forth his qualifications as an experienced
20 forensic accountant and certified fraud examiner, as well as the
21 materials he reviewed in support of his opinion in this case,"
22 citing Bettancourt's trial testimony at p. 516-531 and his
23 deposition testimony at p. 1-23. Plaintiff cites *Miller v.*
24 *Corrections Corp. of America*, 375 F.Supp.2d 889, 896 (D.Alaska
25 2005), in contending that "an expert report may, as do
26 plaintiff's expert's reports, include or make reference to
27 attachments reflecting the expert's opinions."

28 Defendants' objections to Mr. Bettancourt's declaration on
29 the ground that he is unqualified to render the opinion is

1 baseless. Defendants do not point to any specific evidence that
2 Mr. Bettancourt is not qualified to give his expert opinion as to
3 the accounting methods utilized by Defendants.

4 Defendants object that Mr. Bettancourt provides no
5 foundation for his opinion in that he does not set forth any of
6 the data he reviewed or any investigation that he undertook in
7 reaching his conclusions; that it does not set forth his
8 methodology; and that his testimony is speculative and
9 conjectural.

10 However, as Plaintiff notes, Mr. Bettancourt's methodology
11 and foundation is set forth in his trial testimony in the
12 underlying criminal action. While certain of Mr. Bettancourt's
13 conclusions are conjectural and speculative, these are matters
14 going to the weight of his opinion, not its admissibility.

15 B. GOVERNING STANDARDS.

16 Summary judgment is proper when it is shown that there
17 exists "no genuine issue as to any material fact and that the
18 moving party is entitled to judgment as a matter of law."
19 Fed.R.Civ.P. 56. A fact is "material" if it is relevant to an
20 element of a claim or a defense, the existence of which may
21 affect the outcome of the suit. *T.W. Elec. Serv., Inc. v.*
22 *Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th
23 Cir.1987). Materiality is determined by the substantive law
24 governing a claim or a defense. *Id.* The evidence and all
25 inferences drawn from it must be construed in the light most
26 favorable to the nonmoving party. *Id.*

1 The initial burden in a motion for summary judgment is on
2 the moving party. The moving party satisfies this initial burden
3 by identifying the parts of the materials on file it believes
4 demonstrate an "absence of evidence to support the non-moving
5 party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325
6 (1986). The burden then shifts to the nonmoving party to defeat
7 summary judgment. *T.W. Elec.*, 809 F.2d at 630. The nonmoving
8 party "may not rely on the mere allegations in the pleadings in
9 order to preclude summary judgment," but must set forth by
10 affidavit or other appropriate evidence "specific facts showing
11 there is a genuine issue for trial." *Id.* The nonmoving party
12 may not simply state that it will discredit the moving party's
13 evidence at trial; it must produce at least some "significant
14 probative evidence tending to support the complaint." *Id.* The
15 question to be resolved is not whether the "evidence unmistakably
16 favors one side or the other, but whether a fair-minded jury
17 could return a verdict for the plaintiff on the evidence
18 presented." *United States ex rel. Anderson v. N. Telecom, Inc.*,
19 52 F.3d 810, 815 (9th Cir.1995). This requires more than the
20 "mere existence of a scintilla of evidence in support of the
21 plaintiff's position"; there must be "evidence on which the jury
22 could reasonably find for the plaintiff." *Id.* The more
23 implausible the claim or defense asserted by the nonmoving party,
24 the more persuasive its evidence must be to avoid summary
25 judgment." *Id.* As explained in *Nissan Fire & Marine Ins. Co. v.*
26 *Fritz Companies*, 210 F.3d 1099 (9th Cir.2000):

1 The vocabulary used for discussing summary
2 judgments is somewhat abstract. Because
3 either a plaintiff or a defendant can move
4 for summary judgment, we customarily refer to
5 the moving and nonmoving party rather than to
6 plaintiff and defendant. Further, because
7 either plaintiff or defendant can have the
8 ultimate burden of persuasion at trial, we
9 refer to the party with and without the
10 ultimate burden of persuasion at trial rather
11 than to plaintiff and defendant. Finally, we
12 distinguish among the initial burden of
13 production and two kinds of ultimate burdens
14 of persuasion: The initial burden of
15 production refers to the burden of producing
16 evidence, or showing the absence of evidence,
17 on the motion for summary judgment; the
18 ultimate burden of persuasion can refer
19 either to the burden of persuasion on the
20 motion or to the burden of persuasion at
21 trial.

12 A moving party without the ultimate burden of
13 persuasion at trial - usually, but not
14 always, a defendant - has both the initial
15 burden of production and the ultimate burden
16 of persuasion on a motion for summary
17 judgment ... In order to carry its burden of
18 production, the moving party must either
19 produce evidence negating an essential
20 element of the nonmoving party's claim or
21 defense or show that the nonmoving party does
22 not have enough evidence of an essential
23 element to carry its ultimate burden of
24 persuasion at trial ... In order to carry its
25 ultimate burden of persuasion on the motion,
26 the moving party must persuade the court that
there is no genuine issue of material fact
....

21 If a moving party fails to carry its initial
22 burden of production, the nonmoving party has
23 no obligation to produce anything, even if
24 the nonmoving party would have the ultimate
25 burden of persuasion at trial ... In such a
26 case, the nonmoving party may defeat the
motion for summary judgment without producing
anything ... If, however, a moving party
carries its burden of production, the
nonmoving party must produce evidence to
support its claim or defense ... If the

1 nonmoving party fails to produce enough
2 evidence to create a genuine issue of
3 material fact, the moving party wins the
4 motion for summary judgment ... But if the
nonmoving party produces enough evidence to
create a genuine issue of material fact, the
nonmoving party defeats the motion.

5 210 F.3d at 1102-1103.

6 C. ABBATE DEFENDANTS' SEPARATE STATEMENT OF UNDISPUTED
7 FACTS.

8 1. Issue No. 1: Plaintiff Cannot Maintain a Claim
9 for Violation of Section 1983 Because She Cannot Meet the
10 Requisite Elements.

11 DUF 1: Tiffany Fenters ("Fenters" or "Plaintiff")
12 worked for defendant Yosemite Chevron between June 2002 to March
13 2003.

14 *Plaintiff's Response:* UNDISPUTED.

15 DUF 2: Alejandro Aceves ("Aceves") also worked for
16 Yosemite Chevron between April 2002 to March 2003.

17 *Plaintiff's Response:* UNDISPUTED.

18 DUF 3: Defendant Robert Abbate ("Abbate") has managed
19 and operated Yosemite Chevron from 1999 to the present.

20 *Plaintiff's Response:* UNDISPUTED.

21 DUF 4: On March 27, 2003, Fenters quit her employment
22 with Yosemite Chevron and submitted her written resignation on
23 March 28, 2003.

24 *Plaintiff's Response:* UNDISPUTED.

25 DUF 5: On March 31, 2003, Abbate caught Aceves
26 stealing from Yosemite Chevron by falsely voiding actual

1 transactions and then stealing the overage in cash from the
2 register at the end of his shift.

3 *Plaintiff's Response:* UNDISPUTED.

4 DUF 6: On March 31, 2003, Aceves confessed to Abbate
5 that he was stealing by falsely voiding actual transactions and
6 then taking the overage from the register.

7 *Plaintiff's Response:* UNDISPUTED.

8 DUF 7: On March 31, 2003, Aceves also told Abbate
9 that Fenters taught him how to steal through the voiding
10 transaction scheme. Supporting Evidence: Exh. F, Aceves Depo.
11 98:918, 99:9-102:3, 103:3-22, 105:2-12, 106:20-108:21, 110:2-
12 112::23, 129:13-23, 176:5-22, 194:4-196:2; Exh. B, Aceves trial
13 testimony 267:3-12.

14 *Plaintiff's Response:* Disputed. During his trial
15 testimony, Aceves testified that he learned how to do illegal
16 voids himself, in order to obtain extra money. See Trial
17 Transcript, pp. 266-267, 276, 285, 287. Aceves never told Abbate
18 he had seen Fenters do any illegal voids or steal any money from
19 the store. Trial Transcript, pp. 275. In connection with his
20 firing of Aceves, Abbate first brought up Fenters' name, saying
21 that "he knew Tiffany was in it." Trial Transcript, p. 291.
22 Aceves thereafter only implicated Fenters and other employees in
23 an attempt to deflect blame from himself and also because Abbate
24 seemed to focus on her. See Trial Transcript, pp. 272-273, 291-
25 292. Aceves also mentioned Fenters at the subsequent June 4,
26 2003 meeting because she was first suggested by Abbate himself.

1 See Trial Transcript, p 268, 270, 272. Abbate indicated that
2 Aceves could receive a shorter sentence if he helped make the
3 case against Fenters easier. See Trial Transcript, p. 294. The
4 prosecution echoed this offer. Bacciarini Deposition, p. 64.
5 Abbate also told Aceves that if Aceves could get evidence to
6 convict Fenters that he could benefit in his own case. See Trial
7 Transcript, pp. 295. Bacciarini recalls that Aceves may have told
8 him that he was pressured by Abbate to implicate Fenters.
9 Bacciarini Deposition, p. 48-49. There is thus ample evidence
10 that Abbate suggested Fenters as a possible embezzler and that
11 Aceves never implicated her of his own accord. Aceves provided
12 similar and more extensive testimony during his deposition. In
13 addition to confirming that the subject events were fresher in
14 his mind at the time of his criminal testimony, see Aceves
15 Deposition, p. 168, Aceves confirmed that Abbate was the first
16 person to suggest Tiffany Fenters. Aceves Deposition, p.
17 170, 171, 172, 182. Aceves was never pressured for additional
18 information about anyone else who was identified as a possible
19 embezzler, just Tiffany. Aceves Deposition, p. 173, 178. Despite
20 the focus on Fenters, no one ever asked Aceves to provide details
21 regarding any alleged conversations he had with Fenters, identify
22 any dates where the two of them met, provide any phone records,
23 identify any shift records where the two of them worked together,
24 review any videotapes from the cash register area where the
25 illicit instruction allegedly took place, or provide any bank
26 records or other evidence of his obtaining illicit funds. See

1 Aceves Deposition, p. 175-177, 187-188. Aceves testified "that's
2 why it was kind of easy to lie because nobody actually went into
3 detail." Aceves Deposition, p. 175. It seemed that the objective
4 of Abbate and Hutton was to pursue Fenters and have him testify
5 against her. Aceves Deposition, p. 178, 181. This evidence
6 further demonstrates that Abbate and Hutton's entire object was
7 to construct a case against Fenters, even if it meant
8 disregarding the truth.

9 *Court Ruling:* DISPUTED. Although Aceves testified
10 at his deposition that he told Abbate on March 21, 2003 that
11 Plaintiff taught him how to steal through the voiding transaction
12 scheme, Aceves testified differently and inconsistently at
13 Plaintiff's criminal trial.

14 DUF 8: On March 31, 2003, Abbate did not threaten or
15 coerce Aceves into confessing that he stole from Yosemite
16 Chevron.

17 *Plaintiff's Response:* UNDISPUTED, but Plaintiff
18 asserts that Abbate's coercion pertained to having Aceves falsely
19 implicate Plaintiff.

20 DUF 9: On or about May 14, 2003, Abbate made a
21 complaint to the Merced County District Attorney's Office
22 (District Attorney"), including its investigators, that he
23 believed Fenters and Aceves were stealing from Yosemite Chevron
24 through the voiding transaction scheme. Supporting Evidence:
25 Exh. A, Abbate Dec. ¶ 5; Exh. G, Spencer Depo. 47:6-12, 73:1-8;
26 Exh. H, Hutton Investigation Report.

1 *Plaintiff's Response:* Disputed, as the evidence
2 shows that Abbate never had any good faith belief that Fenters
3 was stealing. Abbate misrepresented to Hutton that only one
4 employee worked on the cash register in a given shift, although
5 he knew the opposite was true on a daily basis. Hutton
6 Deposition, p. 20, 74; Abbate Deposition, p. 81, 99. Indeed,
7 employees' log-on codes to the cash register were typically
8 the last four digits of their phone numbers, and the phone
9 numbers of employees were posted in the store. Abbate
10 Deposition, p. 85. Abbate did not expect employees to review
11 their shift reports on a line by line basis to ensure they were
12 responsible for each transaction. Abbate Deposition, p. 90-91.
13 Abbate also never told Bacciarini that more than one employee
14 could have worked on the cash register during a given shift.
15 Bacciarini Deposition, p. 16. Abbate reiterated this
16 misrepresentation at trial, only later acknowledging during trial
17 on cross examination that voids could not necessarily be linked
18 to a particular employee, as opposed to a particular shift. See
19 Preliminary hearing Transcript, p. 8, 17; Trial Transcript, p.
20 242. Hutton would have considered it important to know that
21 actually multiple employees could work on the register in a given
22 shift. Hutton Deposition, p. 21. Hutton would have considered
23 this important because it would have made the task of identifying
24 a particular employee who committed wrongdoing more difficult.
25 Hutton Deposition, p. 22. Abbate conceded on cross-examination
26 at the preliminary hearing that the voids attributable to Fenters

1 were overstated in his spreadsheet. See Preliminary Hearing
2 Transcript, pp. 52-59. Abbate also conceded that certain entries
3 in his spreadsheet appeared to be entered wrongly, and he spent
4 no time reviewing the initial draft spreadsheet he prepared. See
5 Preliminary hearing Transcript, pp. 60-61; Abbate Deposition, p.
6 60, 64. Abbate also attributed certain shifts to Fenters, even
7 though the underlying pay point reports did not contain her
8 genuine signature. See Trial Transcript, pp. 491-492. Abbate
9 also represented to Hutton that he had contact with another
10 anonymous employee, who turned out to be Robert Wilson, around
11 the time of Tiffany's separation from employment who first
12 provided information regarding the alleged embezzlement, but
13 Abbate did not tell Hutton that Wilson had been fired in
14 December 2002 for stealing from Fenters. Hutton Deposition, p.
15 72, 92-94; Trial Transcript, p. 488. Abbate continued his
16 pattern of misrepresentation at the preliminary hearing and trial
17 by again merely referring to Wilson as an "ex-employee." See
18 Preliminary Hearing Transcript, p. 41; Trial Transcript, p. 213.
19 There never was an anonymous employee, and Abbate was aware of
20 Wilson's firing at all pertinent times. See Abbate Deposition, p.
21 44-45, 97. Hutton would have considered this information
22 important to include in his investigation report. Hutton
23 Deposition, p. 90-91. Abbate also initially told Hutton that he
24 has cut Fenters hours beginning in January 2003 because he
25 suspected she was stealing from his business. See Hutton's
26 Investigative Report, Exh. B to Fung. Decl., pp. 2. Abbate did

1 not concede until trial that Fenters' hours had not been cut
2 during this time period. See Trial Transcript, pp. 235-236.
3 Indeed, even after Aceves first admitted stealing in March 2003,
4 Abbate only believed that he was dealing with a petty issue.
5 Abbate Deposition, p. 102. Abbate also did not provide any tax
6 returns or other financial documents reflecting a drop in
7 revenues during the time when the embezzlement was allegedly
8 occurring. Hutton Deposition, p. 22. Abbate also did not provide
9 Hutton with any videotapes from the register area. Hutton
10 Deposition, p. 23. This is further circumstantial evidence of his
11 intent to conceal the truth and unduly influence the criminal
12 proceedings against Fenters.

13 *Court Ruling:* UNDISPUTED; Plaintiff's evidence
14 does not contradict DUF 9 as stated among other things.

15 DUF 10: The District Attorney's Office, including
16 its investigators, were in charge of the investigation in
17 Fenters' case. Exh. I, Bacciarini Depo. 74:6-75:1; Exh. G,
18 Spencer Depo. 36:13-16; Exh. B, Jury Trial Transcript 30:6-18;
19 Exh. J, Souza Depo. 94:7-16, 144:22-145:12; Exh. K, Vernon
20 Fenters Depo. 51:10-13, 66:7-11, 69:7-10.

21 *Plaintiff's Response:* Disputed, as the evidence
22 shows the District Attorney's Office was unduly influenced by
23 Abbate's misrepresentations. The prosecution relied on Abbate's
24 operating in good faith in proceeding to a preliminary hearing
25 and trial. Bacciarini Deposition, p. 87-88. However, Abbate
26 misrepresented to Hutton that only one employee worked on the

1 cash register in a given shift, although he knew the opposite
2 was true on a daily basis. Hutton Deposition, p. 20, 74; Abbate
3 Deposition, p. 81, 99. Indeed, employees' log on codes to the
4 cash register were typically the last four digits of their phone
5 numbers, and the phone numbers of employees were posted in the
6 store. Abbate Deposition, p. 85. Abbate did not expect employees
7 to review their shift reports on a line by line basis to ensure
8 they were responsible for each transaction. Abbate Deposition, p.
9 90-91. Abbate also never told Bacciarini that more than one
10 employee could have worked on the cash register during a given
11 shift. Bacciarini Deposition, p. 16. Abbate reiterated this
12 misrepresentation at trial, only later acknowledging during trial
13 on cross examination that voids could not necessarily be linked
14 to a particular employee, as opposed to a particular shift. See
15 Preliminary hearing Transcript, p. 8, 17; Trial Transcript, p.
16 242. Hutton would have considered it important to know that
17 actually multiple employees could work on the register in a given
18 shift. Hutton Deposition, p. 21. Hutton would have considered
19 this important because it would have made the task of identifying
20 a particular employee who committed wrongdoing more difficult.
21 Hutton Deposition, p. 22. Until the time the Cassabon firm was
22 retained after the preliminary hearing, the District Attorney's
23 Office relied on Abbate to review the financial information
24 pertinent to the case against Fenters. Hutton Deposition, p. 33-
25 34. Abbate's financial analysis was one of the reasons that
26 Hutton submitted the case against Fenters for filing. Hutton

1 Deposition, p. 82. Indeed, the Abbate spreadsheet was the
2 only financial evidence then available in a prospective financial
3 crime case. Hutton Deposition, pp. 82-83. Abbate conceded on
4 cross-examination at the preliminary hearing that the voids
5 attributable to Fenters were overstated in his spreadsheet. See
6 Preliminary Hearing Transcript, pp. 52-59. Abbate also conceded
7 that certain entries in his spreadsheet appeared to be entered
8 wrongly, and he spent no time reviewing the initial draft
9 spreadsheet he prepared. See Preliminary hearing Transcript, pp.
10 60-61; Abbate Deposition, p. 60, 64. Abbate also attributed
11 certain shifts to Fenters, even though the underlying pay point
12 reports did not contain her genuine signature. See Trial
13 Transcript, pp. 491-492. Abbate also represented to Hutton that
14 he had contact with another anonymous employee, who turned out to
15 be Robert Wilson, around the time of Tiffany's separation from
16 employment who first provided information regarding the alleged
17 embezzlement, but Abbate did not tell Hutton that Wilson had been
18 fired in December 2002 for stealing from Fenters. Hutton
19 Deposition, p. 72, 92-94; Trial Transcript, p. 488. Abbate
20 continued his pattern of misrepresentation at the preliminary
21 hearing and trial by again merely referring to Wilson as an
22 "exemployee." See Preliminary Hearing Transcript, p. 41; Trial
23 Transcript, p. 213. There never was an anonymous employee, and
24 Abbate was aware of Wilson's firing at all pertinent times. See
25 Abbate Deposition, p. 44-45, 97. Hutton would have considered
26 this information important to include in his investigation

1 report. Hutton Deposition, p. 90-91. Abbate also initially told
2 Hutton that he has cut Fenters hours beginning in January 2003
3 because he suspected she was stealing from his business. See
4 Hutton's Investigative Report, Exh. B to Fung. Decl., pp. 2.
5 Abbate did not concede until trial that Fenters' hours had not
6 been cut during this time period. See Trial Transcript, pp. 235-
7 236. Indeed, even after Aceves first admitted stealing in March
8 2003, Abbate only believed that he was dealing with a petty
9 issue. Abbate Deposition, p. 102. Abbate also did not provide
10 any tax returns or other financial documents reflecting a drop in
11 revenues during the time when the embezzlement was allegedly
12 occurring. Hutton Deposition, p. 22. Abbate also did not provide
13 Hutton with any videotapes from the register area. Hutton
14 Deposition, p. 23. This is further circumstantial evidence of his
15 intent to conceal the truth and unduly influence the criminal
16 proceedings against Fenters. The record also shows that the
17 District Attorney's Office did no independent investigation that
18 would have permitted it to exercise its discretion in any genuine
19 and autonomous manner. Spencer acknowledged, although it was not
20 done in this case, that his office commonly sought the assistance
21 of a forensic accountant or fraud examiner during the
22 investigation stage of a case. Spencer Deposition, p. 56. Indeed,
23 Hutton conceded at trial that he did nothing to corroborate
24 Aceves' statement and Abbate's spreadsheet, even though he knew
25 Abbate was not an accountant and that confessions are not always
26 the full truth. See Trial Transcript, pp. 377-378, 401-404.

1 Hutton never did an independent analysis of the Abbate
2 spreadsheets. Bacciarini Deposition, p. 22; Abbate Deposition, p.
3 108. Hutton also never tested the store surveillance system
4 himself, even though the system would depict money taken from the
5 register by an employee. Hutton Deposition, p. 24. Hutton never
6 took any steps to obtain any financial information pertaining to
7 Fenters. Hutton Deposition, p. 28-29; Trial Transcript, pp. 443.
8 Hutton did not attempt to speak with Fenters' parents as part of
9 his investigation, even though there was an allegation that
10 Fenters had been "cut off" by them and therefore had a motive to
11 steal. Hutton Deposition, p. 30. (Fenters' father, Virgil
12 Fenters, refuted this allegation at trial. See Trial Transcript,
13 p. 418.) Hutton also never obtained any shift records that
14 corroborated the allegation that Fenters' hours were cut in
15 February 2003 due to her being suspected of stealing. Hutton
16 Deposition, p. 71. Hutton "assumed there was a friendly
17 connection between Fenters and Aceves but made no effort to
18 confirm that through investigation, i.e., phone records, or other
19 Yosemite Chevron employees, Hutton Deposition, p. 31. Hutton also
20 never asked for specifics regarding where Aceves and Fenters were
21 when Fenters allegedly taught him to do illegal voiding. Hutton
22 Deposition, p. 31-32. Hutton never investigated any information
23 suggesting that Abbate was a drug user, although it was provided
24 by the defense during discovery and Hutton acknowledges that
25 such matters can have a bearing on a witness' credibility in a
26 case involving alleged financial loss. Hutton Deposition, p. 83-

1 84; Bacciarini Deposition, p. 88. Hutton never asked Aceves if
2 he had prior cash register experience. Trial Transcript, p. 391.
3 Hutton never investigated how many employees worked or could use
4 the register in a given shift. Trial Transcript, p. 393. The
5 evidence also shows that Abbate was part of the District
6 Attorney's investigative team for purposes of Fenters' criminal
7 case. Hutton acknowledges that Abbate was assisting in the
8 District Attorney's investigation of the Fenters matter between
9 May 14 and June 4, 2003. Hutton Deposition, p. 43. Abbate also
10 acknowledges he assisted in the investigation and had his most
11 extensive contacts with Hutton during the investigative phase of
12 the Fenters criminal case. Abbate Deposition, p. 104, 124.
13 Hutton testified an interview protocol was set up between Abbate
14 and himself with respect to the June 4, 2003 interview of Aceves.
15 Hutton Deposition, p. 42-43. Abbate also set up the June 4, 2003
16 interview with Aceves. Hutton Deposition, p. 44. Abbate actually
17 conducted the first part of that interview, which was done in
18 conformity with guidelines provided by Hutton. Hutton Deposition,
19 pp. 44-45; Abbate Deposition, p. 109-110. Abbate provided an
20 additional eight months of financial analysis at the District
21 Attorney's request. Hutton Deposition, p. 44; Abbate Deposition,
22 p. 79. Hutton spent approximately 20 hours doing his work on the
23 Fenters case, while Abbate worked 35 hours, not including time he
24 spent assisting in interviews at Hutton's direction. Hutton
25 Deposition, p. 57; Abbate Deposition, p. 61-62. All of Hutton's
26 investigation is reflected in his initial and follow up reports.

1 Hutton Deposition, p. 57. Bacciarini, the lead prosecutor at the
2 preliminary hearing and at trial, has as many contacts with
3 Abbate as he did Hutton in preparation for the preliminary
4 hearing. Bacciarini Deposition, pp. 10-11. Additionally, James
5 Swanson, who was the prosecutor handling the case against
6 Fenters after the preliminary hearing until just before it went
7 to trial, told Fenters' attorney that he was not permitted to
8 resolve the case via a misdemeanor petty theft plea. See Virgil
9 Fenters Deposition, pp. 32, 35-36. This is further circumstantial
10 evidence of the District Attorney's compromised status in the
11 Fenters criminal case.

12 *Court Ruling:* DISPUTED.

13 DUF 11: The District Attorney's Office, including
14 its investigators, controlled the investigation into Fenters'
15 alleged embezzlement. Supporting Evidence: see DUF 10.

16 *Plaintiff's Response:* Disputed on identical
17 grounds set forth in response to DUF 10.

18 *Court Ruling:* Disputed.

19 DUF 12: Wayne Hutton was the lead investigator for the
20 District Attorney's office in the criminal case against Fenters.

21 *Plaintiff's Response:* UNDISPUTED, although for
22 reasons stated in response to DUF 10, Abbate was functionally the
23 lead investigator.

24 DUF 13: Hutton had not met Abbate prior to the
25 criminal action.

26 *Plaintiff's Response:* UNDISPUTED.

1 DUF 14: Abbate prepared a spreadsheet recording
2 average voided transactions and the dollar amount of those
3 transactions, of Fenters, Aceves, and other employees in the gas
4 station (the "Abate Spreadsheet"), which was attached to Hutton's
5 investigation report.

6 *Plaintiff's Response*: Disputed as to the good
7 faith and completeness of the spreadsheet document. Until the
8 time the Cassabon firm was retained after the preliminary
9 hearing, the District Attorney's Office relied on Abbate to
10 review the financial information pertinent to the case against
11 Fenters. Hutton Deposition, p. 33-34. Abbate's financial analysis
12 was one of the reasons that Hutton submitted the case against
13 Fenters for filing. Hutton Deposition, p. 82. Indeed, the Abbate
14 spreadsheet was the only financial evidence then available in a
15 prospective
16 financial crime case. Hutton Deposition, pp. 82-83. Abbate
17 conceded on crossexamination at the preliminary hearing that the
18 voids attributable to Fenters were overstated in his
19 spreadsheet. See Preliminary Hearing Transcript, pp. 52-59.
20 Abbate also conceded that certain entries in his spreadsheet
21 appeared to be entered wrongly, and he spent no time reviewing
22 the initial draft spreadsheet he prepared. See Preliminary
23 hearing Transcript, pp. 60-61; Abbate Deposition, p. 60, 64.
24 Abbate also attributed certain shifts to Fenters, even though the
25 underlying pay point reports did not contain her genuine
26 signature. See Trial Transcript, pp. 491- 492. Abbate also did

1 not provide any tax returns or other financial documents
2 reflecting a drop in revenues during the time when the
3 embezzlement was allegedly occurring. Hutton Deposition, p. 22.
4 Abbate also did not provide Hutton with any videotapes from the
5 register area. Hutton Deposition, p. 23. This is further
6 circumstantial evidence of his intent to conceal the truth and
7 unduly influence the criminal proceedings against Fenters.

8 *Court Ruling:* DUF 14 is UNDISPUTED; Plaintiff's
9 evidence does not contradict the fact that Abbate prepared the
10 spreadsheet attached to Hutton's investigative report.

11 DUF 15: On June, 4, 2003, Aceves met Abbate
12 at his office.

13 *Plaintiff's Response:* UNDISPUTED.

14 DUF 16: On June 4, 2003, Aceves again confessed to
15 Abbate that he had been stealing through a voiding transaction
16 scheme.

17 *Plaintiff's Response:* Disputed. During his trial
18 testimony, Aceves testified that he learned how to do illegal
19 voids himself, in order to obtain extra money. See Trial
20 Transcript, pp. 266-267, 276, 285, 287. Aceves never told
21 Abbate he had seen Fenters do any illegal voids or steal any
22 money from the store. Trial Transcript, pp. 275. In connection
23 with his firing of Aceves, Abbate first brought up Fenters' name,
24 saying that "he knew Tiffany was in it." Trial Transcript, p.
25 291. Aceves thereafter only implicated Fenters and other
26 employees in an attempt to deflect blame from himself and also

1 because Abbate seemed to focus on her. See Trial Transcript, pp.
2 272-273, 291-292. Aceves also mentioned Fenters at the
3 subsequent June 4, 2003 meeting because she was first suggested
4 by Abbate himself. See Trial Transcript, p 268, 270, 272.
5 Abbate indicated that Aceves could receive a shorter sentence if
6 he helped make the case against Fenters easier. See Trial
7 Transcript, p. 294. The prosecution echoed this offer. Bacciarini
8 Deposition, p. 64. Abbate also told Aceves that if Aceves could
9 get evidence to convict Fenters that he could benefit in his own
10 case. See Trial Transcript, pp. 295. Bacciarini recalls that
11 Aceves may have told him that he was pressured by Abbate to
12 implicate Fenters. Bacciarini Deposition, p. 48-49. There is
13 thus ample evidence that Abbate suggested Fenters as a possible
14 embezzler and that Aceves never implicated her of his own accord.
15 Aceves provided similar and more extensive testimony during his
16 deposition. In addition to confirming that the subject events
17 were fresher in his mind at the time of his criminal testimony,
18 see Aceves Deposition, p. 168, Aceves confirmed that Abbate was
19 the first person to suggest Tiffany Fenters. Aceves Deposition,
20 p. 170, 171, 172, 182. Aceves was never pressured for additional
21 information about anyone else who was identified as a possible
22 embezzler, just Tiffany. Aceves Deposition, p. 173, 178. Despite
23 the focus on Fenters, no one ever asked Aceves to provide details
24 regarding any alleged conversations he had with Fenters, identify
25 any dates where the two of them met, provide any phone records,
26 identify any shift records where the two of them worked together,

1 review any videotapes from the cash register area where the
2 illicit instruction allegedly took place, or provide any bank
3 records or other evidence of his obtaining illicit funds. See
4 Aceves Deposition, p. 175-177, 187-188. Aceves testified "that's
5 why it was kind of easy to lie because nobody actually went into
6 detail." Aceves Deposition, p. 175. It seemed that the objective
7 of Abbate and Hutton was to pursue Fenters and have him testify
8 against her. Aceves Deposition, p. 178, 181. This evidence
9 further demonstrates that Abbate and Hutton's entire object was
10 to construct a case against Fenters, even if it meant
11 disregarding the truth.

12 *Court Ruling:* DUF 16 is UNDISPUTED. The record
13 establishes that on June 4, 2003, Aceves again confessed to
14 Abbate that he had been stealing through a voiding transaction
15 scheme; that Aceves changed his position at trial does not
16 contradict this fact.

17 DUF 17: On June 4, 2003, Aceves again told Abbate that
18 Fenters was the person that had taught him how to steal through
19 the voiding transaction scheme.

20 *Plaintiff's Response:* Disputed on identical
21 grounds stated in response to DUF 16.

22 *Court Ruling:* DUF 17 is UNDISPUTED; Plaintiff's
23 evidence does not contradict what Aceves told Abbate on June 4,
24 2003.

25 DUF 18: Aceves testified in deposition that he was not
26 under any threats or coercion when he went to meet with Abbate on

1 June 4, 2003, and told him how he was stealing. Supporting
2 Evidence: Supporting Evidence: Exh. F, Aceves Depo. 98:918,
3 99:9-102:3, 103:3-22, 105:2-12, 106:20-108:21, 110:2-112::23,
4 129:13-23, 176:5-22, 194:4-196:2; Exh. B, Aceves trial testimony
5 267:3-12.

6 *Plaintiff's Response:* Disputed on identical
7 grounds stated in response to DUF 16.

8 *Court Ruling:* DUF 18 is UNDISPUTED; Aceves so
9 testified under oath in his deposition. Further, Plaintiff does
10 not dispute DUF 8.

11 DUF 19: Aceves testified in deposition that he was not
12 under any threats or coercion when he went to meet with Abbate on
13 June 4, 2003, and told him that Fenters taught him how to steal.
14 Supporting Evidence: Exh. F, Aceves Depo., 50:11-51:5, 111:8-
15 115:21, 117:7-119:14, 129:13-132:17, 159:4-160:13.

16 *Plaintiff's Response:* Disputed on identical
17 grounds stated in response to DUF 16.

18 *Court Ruling:* DUF 19 is UNDISPUTED; Aceves so
19 testified under oath at his deposition. Plaintiff has not
20 provided evidence Aceves was under any threat or coercion when he
21 gave his deposition testimony.

22 DUF 20: Aceves ultimately pled no contest to felony
23 embezzlement for stealing from Yosemite Chevron.

24 *Plaintiff's Response:* UNDISPUTED.

25 DUF 21: Aceves readily admits that he stole from
26 Yosemite Chevron through voiding transactions.

1 *Plaintiff's Response: UNDISPUTED.*

2 DUF 22: On June 23, 2003, the District Attorney
3 filed a Complaint against Fenters for Embezzlement titled the
4 People of the State of California v. Tiffany Michelle Fenters,
5 Merced County Superior Court Case No. MF36082.

6 *Plaintiff's Response: UNDISPUTED.*

7 DUF 23: Abbate did not participate in or control the
8 decision to file the Complaint. Supporting Evidence: Exh. O,
9 Criminal Complaint; Exh. P, Bacciarini Decl, ¶ 5; Exh. M, Abbate
10 Depo., 121:7-16; Exh. A, Abbate Decl., ¶ 7.

11 *Plaintiff's Response: Disputed on identical*
12 *grounds stated in response to DUF 10.*

13 *Court Ruling: DISPUTED.* There is evidence from
14 which it may be inferred that Abbate influenced the filing
15 decision in the criminal case.

16 DUF 24: Mark Bacciarini ("Bacciarini") was the
17 Deputy District Attorney for the District Attorney's Office that
18 conducted the preliminary hearing and jury trial.

19 *Plaintiff's Response: UNDISPUTED.*

20 DUF 25: It was the District Attorney's decision to
21 take the matter to preliminary hearing. Supporting Evidence:
22 Exh. I, Bacciarini Depo., 74:15-75:22.

23 *Plaintiff's Response: Disputed on identical*
24 *grounds stated in response to DUF 10.*

25 *Court Ruling: DUF 25 is UNDISPUTED; Plaintiff's*
26 *evidence does not contradict that the District Attorney made the*

1 decision to proceed to a preliminary hearing, even if influenced
2 by Abbate.

3 DUF 26: On July 30, 2004, a preliminary hearing
4 was held in People v. Fenters.

5 *Plaintiff's Response*: UNDISPUTED.

6 DUF 27: Judge Ronald R. Hansen ruled at the
7 preliminary hearing that the Abbate Spreadsheet was inadmissible.

8 *Plaintiff's Response*: UNDISPUTED.

9 DUF 28: Judge Hansen also ruled at the preliminary
10 hearing there was sufficient evidence to show the alleged felony
11 was committed by Fenters.

12 *Plaintiff's Response*: UNDISPUTED, although
13 Plaintiff contends this finding was based on false and fabricated
14 evidence.

15 DUF 29: On August 12, 2004, the District Attorney
16 filed the Information in People of the State of California v.
17 Tiffany Michelle Fenters, Merced County Superior Court Case No.
18 29142.

19 *Plaintiff's Response*: UNDISPUTED.

20 DUF 30: Abbate did not participate in or control the
21 decision to file the Information. Supporting Evidence: Exh. Q,
22 Criminal Information; Exh. P, Bacciarini Decl., ¶ 4; Exh. I,
23 Bacciarini Depo. 74:15-75:22; Exh. A, Abbate Decl., ¶ 8.

24 *Plaintiff's Response*: Disputed on identical
25 grounds stated in response to DUF 10.

26 *Court Ruling*: DUF 30 is UNDISPUTED; Plaintiff's

1 evidence does not negate the absence of evidence that Abbate did
2 not participate in or control the decision to file the
3 Information, even if he influenced the decision.

4 DUF 31: After the preliminary hearing, the District
5 Attorney hired an outside accounting expert, Cassabon &
6 Associates, as a witness for the prosecution.

7 *Plaintiff's Response*: UNDISPUTED.

8 DUF 32: The District Attorney hired Cassabon &
9 Associates based on its prosecutorial discretion. Supporting
10 Evidence: Exh. G, Spencer Depo., 66:7-24, 77:17-78:3; Exh. P,
11 Bacciarini Decl., ¶ 2.

12 *Plaintiff's Response*: Disputed on the identical
13 grounds stated in response to DUF 10.

14 *Court Ruling*: DUF 32 is UNDISPUTED. Plaintiff's
15 evidence does not contradict that the District Attorney hired
16 Cassabon & Associates to provide expert services and testimony
17 for the prosecution and provides no evidence that Abbate had any
18 participation in that decision.

19 DUF 33: Cassabon & Associates' assignment was to
20 analyze daily register records to determine if anything was
21 suspicious with the transactions taking place at Yosemite
22 Chevron. Supporting Evidence: Exh. T, Fung Depo., 20:9-19; Exh.
23 B, Jury Trial Transcript, 320:19-22.

24 *Plaintiff's Response*: Disputed. As defendant Fung
25 testified at the criminal trial, his assignment was "to
26 determine whether there [were] assets misappropriated at the

1 Yosemite Chevron gas station, and if any, estimate the amount of
2 . . . embezzlement." Trial Transcript, p. 320. In his deposition,
3 Fung described his assignment as "[t]racing the money." Fung
4 Deposition, p. 12.

5 *Court Ruling: DISPUTED. Defendants'*
6 characterization of the employment of Cassabon & Associates is
7 too limited; it included a fraud investigation, calculating the
8 amount of loss, and tracing the money.

9 DUF 34: Cassabon & Associates went through the daily
10 register records (Pay Point Reports) to analyze the frequency of
11 voided transactions in relationship to the total amount of sales
12 transactions among the various employees.

13 *Plaintiff's Response: UNDISPUTED.*

14 DUF 35: Victor Fung ("Fung"), of Cassabon &
15 Associates, performed an analysis of Yosemite Chevron's daily
16 register records (Pay Point Reports) and determined that Fenters
17 embezzled cash from Yosemite Chevron, as memorialized in his
18 Report of October 31, 2004. Supporting Evidence: Ex. B, Jury
19 Trial Transcript, 320:23:321:9. 322:1-10, 344:3-10

20 *Plaintiff's Response: Disputed.* Fung did not
21 "determine" anything, but merely reached an opinion that cash was
22 taken. Additionally, Fung reached this opinion without
23 considering a number of factors, including how voids could occur,
24 whether multiple employees worked on the register during a given
25 shift, the internal controls of the business, and the videotapes
26 that would have shown what the ordinary course of business was.

1 Trial Transcript, pp. 345-354. Fung attributed all of the voids
2 on the shifts Fenters worked to her, even though there was
3 preceding trial testimony that established that multiple
4 employees worked and used the register each shift. See Trial
5 Testimony, pp. 242, 347, 349. During the criminal trial,
6 plaintiff's accounting expert, John Bettercourt, testified that
7 it was necessary for a forensic accountant under the
8 circumstances presented to evaluate the internal controls of the
9 subject business, as well as its cash register policies, both as
10 written and practiced. See Trial Transcript, p. 521-522.
11 Bettencourt visited Yosemite Chevron posing as a customer five
12 times and found internal controls lacking, with multiple
13 employees working the cash register during a given shift. See
14 Trial Transcript, pp. 528. As many as eight people were found to
15 use a register during a two shift period. See Trial Transcript,
16 pp. 537-538. Bettencourt also found that Fung's reliance on an
17 "acceptable void" figure to be specious because nine of the
18 twelve employees exceeded that average, and, under Fung's
19 criteria, would have been stealing. See Trial Transcript, pp.
20 544. In his deposition, Fung acknowledged that he was not
21 trained as a forensic accountant and had only been a CPA for two
22 months at the time he was assigned the Fenters case. Fung
23 Deposition, pp. 14, 17. Fung was not attempting to follow
24 any accounting standards or protocols in this case. Fung
25 Deposition, p. 15. Fung did not contact Abbate or anyone else
26 affiliated with Yosemite Chevron. Fung Deposition, p. 23. Fung

1 never visited the business location, reviewed the model cash
2 register used at the business, or reviewed any surveillance
3 videos from the business. Fung Deposition, p. 23-24. Fung also
4 did not review any financial or profit/loss statements of
5 Yosemite Chevron. Fung Deposition, p. 24. No one ever offered
6 these documents to Fung, and he did not request them. Fung
7 Deposition, p. 25, 62. Fung also did not receive a list of
8 Yosemite Chevron employees. Fung Deposition, p. 25. Fung
9 described his approach to his assignment as figuring out the
10 frequency of void transactions in relation to the total sales
11 transactions and then make an employee by employee comparison.
12 Fung Deposition, p. 30. Fung only reviewed the pay point reports
13 and the criminal report, which included Abbate's spreadsheet.
14 Fung Deposition, p. 23, 31. Fung assumed that an employee who
15 signed a pay point report was responsible for every transaction
16 reflected therein, even though he never tested that assumption.
17 Fung Deposition, p. 40. Fung considered the possibility that a
18 pay point report might reflect more than one employee's work
19 product but discounted it in his methodology, based on the
20 further assumption that "that chance is the same for all
21 employees." Fung Deposition, p. 41,43. Fung felt this variable
22 could be discounted even if certain employees were intentionally
23 stealing and were therefore trying to conceal their identities.
24 Fung Deposition, p. 42-43. Fung did not take any action in an
25 attempt to validate this assumption, such as sampling reports or
26 interviewing employees. Fung Deposition, p. 45. Fung also did not

1 consider that different numbers of people worked different
2 shifts. Fung Deposition, p. 46-47. Fung did not consider the
3 days and shifts on which inventory was recorded in his
4 analysis. Fung Deposition, p. 52. Fung also did nothing to assess
5 the quality of the controls in place at Yosemite Chevron,
6 although he recognized that this could affect the reliability of
7 the records he reviewed. Fung Deposition, p. 53-54. Overall,
8 Fung's approach was similar to the Abbate's spreadsheet approach.
9 Bacciarini Deposition, p. 14. In Bettencourt's expert report, he
10 declared that the spreadsheet provided by defendant Robert Abbate
11 and the work product of Cassabon were indicative of false,
12 fabricated and/or misleading work product Bettencourt opined that
13 the defendants' accounting work was not merely substandard or
14 negligent but instead is reflective of false, fabricated, and/or
15 misleading work. See Bettencourt Report, Exhibit A. In his
16 deposition, Bettencourt confirmed his report and further
17 testified that Abbate's and Cassabon's work product
18 was misleading and misstated the evidence. See Bettencourt
19 Deposition, pp. 33, 38, 78, 97. Bettencourt testified that it
20 was not reasonable or in good faith actions to attribute all of
21 the voids on a particular shift to a specific employee.
22 Bettencourt Deposition, p. 157-158, 161. Both Abbate's
23 spreadsheet and Fung's report were similar in this respect.
24 Bettencourt Deposition, p. 160, 161. Bettencourt is of the
25 opinion that these actions could raise an inference of bad faith
26 that could be found by a jury. Bettencourt Deposition, p. 163.

1 *Court Ruling:* DUF 35 is UNDISPUTED that Fung
2 analyzed the daily register records (Pay Point Reports) and
3 opined that Fenters embezzled cash from Yosemite Chevron, as
4 memorialized in his Report of October 31, 2004. That Plaintiff
5 claims her evidence shows that Fung's analysis was incomplete,
6 dishonest and incompetent, does not contradict this fact.

7 DUF 36: Fung did not rely upon the spreadsheet or
8 analysis of Robert Abbate in preparing his Report in the criminal
9 action. Supporting Evidence: Exh. B, Jury Trial Transcript, 320-
10 321:9; Exh. T, Bettancourt Depo., 85:7-11, 121:6-8; Exh. S, Fung
11 Decl. ¶ 16.

12 *Plaintiff's Response:* Disputed. Fung testified in
13 his deposition that the first thing he did after Cassabon's
14 retention was to meet with defendant Hutton and the then assigned
15 prosecutor, James Swanson. Fung Deposition, p. 18. During a one
16 hour meeting, Fung was told that the prosecution suspected that
17 Fenters was stealing money by voiding transactions. Fung
18 Deposition, p. 18. Fung was told the prosecution wanted him
19 to analyze the pay point reports, a box of which he received on
20 that occasion. Fung Deposition, p. 20. Fung also received
21 Hutton's report which had Abbate's spreadsheet as an attachment.
22 Fung Deposition, pp. 19, 22. Fung was told the attachment was a
23 spreadsheet prepared by Abbate himself. Fung Deposition, p. 22.
24 Overall, Fung's approach was similar to the Abbate's spreadsheet
25 approach. Bacciarini Deposition, p. 14.

26 *Court Ruling:* DUF 36 is DISPUTED. Plaintiff's

1 evidence raises a question of fact that Fung relied on or
2 analyzed Abbate's spreadsheet and attached to Hutton's report.

3 DUF 38: Fung decided on the methodology to
4 be utilized for his analysis. Supporting Evidence: Exh. T, Fung
5 Depo., 30:10-15, 35:15-17, 36:5-11; Exh. S, Fung Decl. ¶ 6; Exh.
6 U, Bettancourt Depo. 45:4-10

7 *Plaintiff's Response*: Disputed on the identical
8 grounds stated in response to DUF 37.

9 *Court Ruling*: DUF 38 is DISPUTED. Plaintiff's
10 evidence permits the inference that Fung was so inexperienced and
11 incompetent as to raise a question of fact that Fung decided the
12 methodology utilized for his analysis.

13 DUF 39: Cassabon & Associates, including Fung, had no
14 contact with Abbate at any time regarding the criminal action.

15 *Plaintiff's Response*: UNDISPUTED.

16 DUF 40: Fung was not told anything about the
17 individual who was the principal for the victim, Yosemite
18 Chevron, during the course of his work in the criminal action.
19 Supporting Evidence: Exh. T, Fung Depo., 60:16-19.

20 *Plaintiff's Response*: Disputed on the identical
21 grounds stated in response to DUF 37.

22 *Court Ruling*: DUF 40 is UNDISPUTED. Plaintiff's
23 evidence does not contradict Fung's deposition testimony that he
24 was not told anything about Abbate.

25 DUF 41: Cassabon & Associates, including
26 Fung, never went to Yosemite Chevron as part of their work in

1 People v. Fenters.

2 *Plaintiff's Response: UNDISPUTED.*

3 DUF 42: Cassabon & Associates, including Fung, never
4 contacted any employees from Yosemite Chevron as part of their
5 work in People v. Fenters.

6 *Plaintiff's Response: UNDISPUTED.*

7 DUF 43: Fung never contacted any accountant or
8 bookkeeper that had any relationship with Yosemite Chevron.

9 *Plaintiff's Response: UNDISPUTED.*

10 DUF 44: Bacciarini never discussed the Abbate family
11 with Fung or Cassabon & Associates.

12 *Plaintiff's Response: UNDISPUTED.*

13 DUF 45: Fung did not have any contact with members of
14 the Abbate family during the course of his work in the criminal
15 action.

16 *Plaintiff's Response: UNDISPUTED.*

17 DUF 46: Fung never asked to review any materials that
18 were not provided to him.

19 *Plaintiff's Response: UNDISPUTED.*

20 DUF 47: The criminal trial in People v. Fenters
21 took place between October 5 to 13, 2005.

22 *Plaintiff's Response: UNDISPUTED.*

23 DUF 48: Bacciarini did not mention or reference
24 the Abbate Spreadsheet in his Opening Statement at the criminal
25 trial. Supporting Evidence: Exh. B, Jury Trial Transcript, 171-
26 181; Exh. I, Bacciarini Depo., 72:6-25.

1 *Plaintiff's Response:* Disputed. As the transcript
2 of the opening statement at trial shows, Bacciarini argued for
3 Fenters' guilt based on several factors, not merely the financial
4 analysis performed by Cassabon. Bacciarini also recalls that
5 Abbate's financial analysis was part of his presentation at both
6 the preliminary hearing and at trial. Bacciarini Deposition, .
7 83-84.

8 *Court Ruling:* DUF 48 is UNDISPUTED. Plaintiff's
9 evidence does not contradict that Bacciarini did not mention or
10 refer to the Abbate Spreadsheet in his opening statement.
11 Bacciarini's deposition testimony cited by Plaintiff does not
12 state that Bacciarini relied on Abbate's analysis at trial.

13 DUF 49: In his Opening Statement, Bacciarini argued
14 Fenters was guilty based on Fung's Report. Supporting Evidence:
15 Exh. B, Jury Trial Transcript, 171-181.

16 *Plaintiff's Response:* Disputed on identical
17 grounds stated in response to DUF 48.

18 *Court Ruling:* DUF 49 is DISPUTED to the extent
19 that Bacciarini relied on other factors as well as the report
20 prepared by Fung; but UNDISPUTED that Bacciarini did not refer to
21 the Abbate Spreadsheet.

22 DUF 50: At the criminal trial, Bacciarini relied
23 upon Cassabon & Associates' analysis of Yosemite Chevron's daily
24 register records. Supporting Evidence: Exh. B, Jury Trial
25 Transcript, 171-181, 318-363, 642-657, 694, 697, 198-224, 222:22-
26 255, 245-250; Exh. I, Bacciarini Depo., 72:2-19.

1 *Plaintiff's Response:* Disputed on identical
2 grounds stated in response to DUF 48.

3 *Court Ruling:* DUF 50 is UNDISPUTED. Plaintiff's
4 evidence does not contradict that Bacciarini relied, at least in
5 part, on Fung's report.

6 DUF 51: The District Attorney did not mark or
7 introduce the Abbate Spreadsheet into evidence at the criminal
8 trial.

9 *Plaintiff's Response:* Disputed. Bacciarini
10 recalls that Abbate testified at both the preliminary hearing
11 and the criminal trial regarding his financial analysis.
12 Bacciarini Deposition, p. 83-84. Overall, Fung's approach was
13 similar to the Abbate's spreadsheet approach. Bacciarini
14 Deposition, p. 14.

15 *Court Ruling:* DUF 51 is UNDISPUTED. Abbate's
16 testimony at the preliminary hearing is irrelevant to DUF 51
17 because his spreadsheet was ruled inadmissible at the preliminary
18 hearing. More importantly, DUF 51 pertains to the introduction
19 of Abbate's spreadsheet at the criminal trial. Plaintiff
20 presents no evidence that the Abbate Spreadsheet was introduced
21 at the criminal trial.

22 DUF 52: During the criminal trial, the District
23 Attorney did not ask Abbate to testify about his analysis or
24 findings from the Abbate Spreadsheet. Supporting Evidence: Exh.
25 B, Jury Trial Transcript 198-224, 222:22-255, 245-250; Exh. I,
26 Bacciarini Depo., 72:6-19.

1 *Plaintiff's Response: Disputed.* Bacciarini recalls
2 that Abbate testified at both the preliminary hearing and the
3 criminal trial regarding his financial analysis. Bacciarini
4 Deposition, p. 83-84. Abbate testified about his investigation
5 into Fenters' and Aceves' voided transactions on pages 221-222 of
6 the criminal trial transcript. Even though he did not make
7 specific reference to his spreadsheet, Abbate did testify about
8 his findings and underlying methodology. It is because of this
9 direct examination testimony that the defense was able to
10 question Abbate about the spreadsheet itself on cross
11 examination. See Trial Transcript, pp. 236-241. Even Hutton
12 acknowledges this took place. Hutton Deposition, p. 82.

13 *Court Ruling: DISPUTED.*

14 DUF 53: During the criminal trial, Fung did not
15 testify about the calculations or analysis made by Abbate.

16 *Plaintiff's Response: Disputed,* as Bacciarini
17 recalls that Fung's approach was similar to the Abbate's
18 spreadsheet approach. Bacciarini Deposition, p. 14.

19 *Court Ruling: DUF 53 is UNDISPUTED.* Plaintiff
20 points to no testimony by Fung, which speaks of itself,
21 pertaining to the calculations or analysis made by Abbate; that
22 the Cassabon Defendants' analysis was similar to that of Abbate
23 does not negate that Fung did not testify about Abbate's
24 calculations or analysis.

25 DUF 54: Bacciarini did not mention or reference the
26 Abbate Spreadsheet in his Closing Statement at the criminal

1 trial.

2 *Plaintiff's Response:* Disputed. As the transcript
3 of the trial shows, Bacciarini argued for Fenters' guilt
4 based on several factors, not only the financial analysis
5 performed by Cassabon. Bacciarini also recalls that Abbate's
6 financial analysis was part of his presentation at both the
7 preliminary hearing and at trial. Bacciarini Deposition,
8 83-84.

9 *Court Ruling:* DUF 54 is UNDISPUTED. Plaintiff's
10 evidence does not contradict that Bacciarini did not mention or
11 reference the Abbate Spreadsheet during his closing argument.

12 DUF 55: In his Closing Statement, Bacciarini argued
13 Fenters was guilty based on the Fung Report and Aceves
14 statements. Supporting Evidence: Exh. B, Jury Trial Transcript
15 642-657, 694-697.

16 *Plaintiff's Response:* Disputed on identical
17 grounds stated in response to DUF 54.

18 *Court Ruling:* DUF 55 is UNDISPUTED that Bacciarini
19 relied primarily on the Fung report and the Aceves statements in
20 his closing argument.

21 DUF 56: The first time Aceves told anyone from the
22 District Attorney's office that Fenters was not involved in the
23 voiding transaction scheme was during the criminal trial.
24 Supporting Evidence: Exh. I, Bacciarini Depo., 47:6-48:5; Exh. B,
25 Jury Trial Transcript 648:9-17; Exh. F, Aceves Depo., 69:11-25,
26 70:13-20, 185:23-186:15, 129:13-132:18.

1 *Plaintiff's Response:* Disputed. Defendant Hutton
2 was present at the June 4, 2003 meeting when Aceves only
3 mentioned Fenters because she was first suggested by Abbate
4 himself. See Trial Transcript, p 268, 270, 272. Abbate indicated
5 that Aceves could receive a shorter sentence if he helped make
6 the case against Fenters easier. See Trial Transcript, p. 294.
7 The prosecution echoed this offer. Bacciarini Deposition, p.
8 64. Abbate also told Aceves that if Aceves could get evidence to
9 convict Fenters that he could benefit in his own case, in part in
10 order to "lure him in." See Trial Transcript, pp. 295; Abbate
11 Deposition, p. 107. There is thus ample evidence that Abbate
12 suggested Fenters as a possible embezzler and that Aceves never
13 implicated her of his own accord. There is thus evidence that
14 Hutton, who was present for the interview, was on notice of
15 these facts as of June 2003.

16 *Court Ruling:* DUF 56 is UNDISPUTED. The
17 transcript of the June 4, 2003 interview between Aceves, Abbate
18 and Hutton does not support Plaintiff's assertions. The
19 transcript is clear that Aceves was the first person to mention
20 Fenters as a participant in Aceves' scheme to embezzle from
21 Yosemite Chevron. Further, Plaintiff's evidence does not
22 contradict the evidence that the first time Aceves told anyone
23 from the District Attorney's office that Fenters was not involved
24 in the voiding transaction scheme was during the criminal trial

25 DUF 57: Aceves never told Abbate that he was not
26 telling the truth when he said Fenters had taught him how to

1 steal. Supporting Evidence: Exh. F, Aceves Depo. 69-11:25,
2 70:13-20, 185:23-186:15, 129:13-132:18.

3 *Plaintiff's Response:* Disputed on identical
4 grounds stated in response to DUF 16.

5 *Court Ruling:* DUF 57 is UNDISPUTED. Plaintiff's
6 evidence does not contradict Aceves deposition testimony that he
7 did not tell Abbate that he was lying about Plaintiff.

8 DUF 58: Abbate was not in charge of the investigation
9 of the criminal case against Fenters. Supporting Evidence: Exh.
10 I, Bacciarini Depo. 74:15-17.

11 *Plaintiff's Response:* Disputed on identical
12 grounds stated in response to DUF 10.

13 *Court Ruling:* DUF 58 is UNDISPUTED as there is not
14 evidence that Abbate was in charge of the investigation of the
15 criminal case, even though there is evidence from which it may be
16 inferred that Abbate influenced the investigation.

17 DUF 59: It was within the District Attorney's
18 Office, including its investigators, discretion to determine what
19 evidence to gather to prosecute Fenters.

20 *Plaintiff's Response:* Disputed on identical
21 grounds stated in response to DUF 10.

22 *Court Ruling:* DUF 59 is UNDISPUTED. Although
23 there is evidence that Abbate sought to influence the prosecution
24 and trial of Plaintiff, those decisions were made by the
25 prosecution.

26 DUF 60: From commencement of the criminal action until

1 its conclusion, the District Attorney's office had the discretion
2 whether to file the complaint and information, prosecute, dismiss
3 or plea bargain.

4 *Plaintiff's Response:* Disputed on identical
5 grounds states in response to DUF 10.

6 *Court Ruling:* DUF 60 is UNDISPUTED. Although
7 there is evidence that Abbate sought to influence the prosecution
8 and trial of Plaintiff, those decisions were made by the
9 prosecution.

10 DUF 61: Deputy District Attorney Bacciarini did not
11 prosecute the case any differently because the victim was a
12 member of the Abbate family.

13 *Plaintiff's Response:* Disputed. Bacciarini
14 testified that he did not know why Abbate's complaint did not
15 go to the Merced Police Department first. Bacciarini Deposition,
16 p. 55. Hutton acknowledges that Abbate could have taken his
17 allegations to the Merced Police Department instead of the
18 District Attorney's Office. Hutton Deposition, p. 45. Moreover,
19 the District Attorney's Office has directed similar potential
20 cases to the Merced PD. See Exhibit B, Email communication from
21 the Merced DA's Office re: a potential embezzlement case in the
22 City of Merced. Spencer could not provide only two examples of
23 embezzlement cases in the last five years of his tenure where his
24 officer was the lead investigating agency. Spencer Deposition,
25 p. 35-38.

26 *Court Ruling:* DUF 63 is UNDISPUTED. Plaintiff's

1 evidence does not show whether Baccarini's prosecution of the
2 criminal case was different from other cases he prosecuted.

3 DUF 62: Abbate did not control the District Attorney's
4 decision to proceed to trial.

5 *Plaintiff's Response*: Disputed on identical
6 grounds stated in response to DUF 10.

7 *Court Ruling*: DUF 62 is UNDISPUTED. Plaintiff's
8 evidence does not raise an inference that Abbate controlled the
9 District Attorney's decision to proceed to trial, although there
10 is evidence that Abbate sought to influence the prosecution.

11 DUF 63: The District Attorney did not prosecute or
12 take the criminal case to trial due to pressure from Robert
13 Abbate or the Abbate family. Supporting Evidence: Exh. G,
14 Spencer Depo. 73:1-8; Exh. J, Souza Depo., 31:8-12, 126:19-
15 127:13, 158:16-22, 40:14-18, 102:15-20; Exh. W, Hutchins Depo.,
16 25:21-25, 29:20-30:1, 44:23-45:17, 46:16-48:15; Exh. U,
17 Bettancourt Depo., 26:25-27:4, 28:13-17, 31:6-10, 33:16-21, Exp.
18 P, Bacciarini Decl. ¶ 5; Exh. E, Plaintiff Depo., 14:14-17,
19 16:19-17-25.

20 *Plaintiff's Response*: Disputed on identical
21 grounds stated in response to DUF 10.

22 *Court Ruling*: DUF 65 is UNDISPUTED. Plaintiff's
23 evidence does not contradict that Plaintiff was not prosecuted
24 only because of pressure from Abbate or the Abbate family,
25 although there is evidence from which it may be inferred that
26 Abbate sought to influence the prosecution.

1 DUF 64: The District Attorney relied upon Aceves'
2 confession and statements in prosecuting Fenters.

3 *Plaintiff's Response*: Disputed on identical
4 grounds stated in response to DUF 10 and DUF 48.

5 *Court Ruling*: DUF 64 is UNDISPUTED. Plaintiff's
6 evidence does not contradict that the prosecution relied on and
7 used the Aceves' statements in prosecuting Plaintiff.

8 DUF 65: The District Attorney also relied upon the
9 forensic accounting performed by Cassabon & Associates to
10 prosecute Fenters.

11 *Plaintiff's Response*: Disputed on identical
12 grounds stated in response to DUF 48.

13 *Court Ruling*: DUF 65 is UNDISPUTED that the
14 prosecution relied on Cassabon's Fung Report and work in
15 prosecuting Plaintiff.

16 DUF 66: Bacciarini would have prosecuted and taken
17 this matter to trial based alone on the statements of Aceves and
18 evaluation done by Cassabon & Associates.

19 *Plaintiff's Response*: Disputed on identical
20 grounds stated in response to DUF 10.

21 *Court Ruling*: DISPUTED based on Abbate's
22 participation in the investigation.

23 DUF 67: If Abbate never would have prepared a
24 spreadsheet, Bacciarini would still have prosecuted and taken
25 this matter to trial based on the statement of Aceves and Report
26 of Cassabon & Associates.

1 *Plaintiff's Response:* Disputed on identical
2 grounds stated in response to DUF 10.

3 *Court Ruling:* DISPUTED.

4 DUF 68: The only post-verdict contract Bacciarini had
5 with Robert Abbate was when he called Abbate and told him about
6 the not guilty verdict, to which Abbate had no specific reaction.

7 *Plaintiff's Response:* UNDISPUTED.

8 DUF 69: Bacciarini never spoke to any member of the
9 Abbate family in relation to the criminal matter other than
10 Robert Abbate.

11 *Plaintiff's Response:* UNDISPUTED.

12 DUF 70: Bacciarini did not know Robert Abbate, or any
13 Abbate family member, prior to becoming involved in the criminal
14 action.

15 *Plaintiff's Response:* UNDISPUTED.

16 DUF 71: Bacciarini was not aware of any relationship
17 between Gordon Spencer and Robert Abbate or the Abbate family
18 during the criminal action. Supporting Evidence: Exh. I,
19 Bacciarini Depo., 39:11-19.

20 *Plaintiff's Response:* Disputed. Plaintiff saw
21 Abbate, Bacciarini and Spencer having conversations outside
22 of court in connection with her court appearances. Plaintiff's
23 Deposition, p. 32-34.

24 *Court Ruling:* DUF 71 is UNDISPUTED. Plaintiff
25 merely saw the District Attorney, the prosecutor and Robert
26 Abbate conversing outside the courtroom during her criminal

1 trial. Plaintiff does not testify as to the content of those
2 conversations; this evidence does not contradict Bacciarini's
3 testimony that he was unaware of any relationship between Spencer
4 and Abbate during the criminal trial.

5 DUF 72: Bacciarini was never told by anyone to
6 prosecute the case differently because the victim was Robert
7 Abbate or a member of the Abbate family. Supporting Evidence:
8 Exh. I, Bacciarini Depo., 70:19-22; 71:7-10, 67:8-17.

9 *Plaintiff's Response*: Disputed, as there is ample
10 circumstantial evidence that this case was not handled in the
11 normal manner. Disputed. Bacciarini testified that he did not
12 know why Abbate's complaint did not go to the Merced Police
13 Department first. Bacciarini Deposition, p. 55. Hutton
14 acknowledges that Abbate could have taken his allegations to the
15 Merced Police Department instead of the District Attorney's
16 Office. Hutton Deposition, p. 45. Moreover, the District
17 Attorney's Office has directed similar potential cases to the
18 Merced PD. See Exhibit B, Email communication from the Merced
19 DA's Office re: a potential embezzlement case in the City of
20 Merced. Spencer could not provide only two examples of
21 embezzlement cases in the last five years of his tenure where his
22 officer was the lead investigating agency. Spencer Deposition,
23 p. 35-38.

24 *Court Ruling*: DUF 72 is UNDISPUTED. Plaintiff's
25 evidence relates to the investigation of Abbate's complaint, not
26 to the prosecution of the criminal charge eventually brought

1 against her. Plaintiff presents no evidence of what statement,
2 if any, was made to Bacciarini about prosecuting the case.

3 DUF 73: No one ever told Bacciarini to fabricate
4 evidence to support the charges against Fenters. Supporting
5 Evidence: Exh. I, Bacciarini Depo., 71:3-6, 73:2-4.

6 *Plaintiff's Response*: Disputed on identical
7 grounds stated in response to DUF 10.

8 *Court Ruling*: DUF 73 is UNDISPUTED. Plaintiff's
9 evidence pertains to the investigation conducted by Abbate and
10 Hutton and does not evidence that Bacciarini was told to
11 fabricate evidence to support the criminal charge against
12 Plaintiff.

13 DUF 74: Abbate did not fabricate any Pay Point
14 Reports to show embezzlement.

15 *Plaintiff's Response*: Disputed, as the evidence
16 shows the bad faith of the spreadsheet document. Until the time
17 the Cassabon firm was retained after the preliminary hearing, the
18 District Attorney's Office relied on Abbate to review the
19 financial information pertinent to the case against Fenters.
20 Hutton Deposition, p. 33-34. Abbate's financial analysis was one
21 of the reasons that Hutton submitted the case against Fenters
22 for filing. Hutton Deposition, p. 82. Indeed, the Abbate
23 spreadsheet was the only financial evidence then available in a
24 prospective financial crime case. Hutton Deposition, pp. 82-83.
25 Abbate conceded on cross-examination at the preliminary hearing
26 that the voids attributable to Fenters were overstated in his

1 spreadsheet. See Preliminary Hearing Transcript, pp. 52-59.
2 Abbate also conceded that certain entries in his spreadsheet
3 appeared to be entered wrongly, and he spent no time reviewing
4 the initial draft spreadsheet he prepared. See Preliminary
5 hearing Transcript, pp. 60-61; Abbate Deposition, p. 60, 64.
6 Abbate also attributed certain shifts to Fenters, even though the
7 underlying pay point reports did not contain her genuine
8 signature. See Trial Transcript, pp. 491-492. Abbate also did
9 not provide any tax returns or other financial documents
10 reflecting a drop in revenues during the time when the
11 embezzlement was allegedly occurring. Hutton Deposition, p.
12 22. Abbate also did not provide Hutton with any videotapes from
13 the register area. Hutton Deposition, p. 23. This is further
14 circumstantial evidence of his intent to conceal the truth and
15 unduly influence the criminal proceedings against Fenters.

16 *Court Ruling: DISPUTED.* This is a matter for
17 resolution by the trier of fact.

18 DUF 75: Plaintiff's Accounting Expert, John
19 Bettencourt ("Bettencourt"), testified that he has performed no
20 analysis on the Abbate Spreadsheet since the preliminary
21 hearing because it was ruled inadmissible.

22 *Plaintiff's Response: UNDISPUTED.*

23 DUF 76: Bettencourt testified that he found
24 numerical error in the Abbate Spreadsheet which may all be
25 innocent mistakes. Supporting Evidence: Exh. U, Bettancourt
26 Depo., 56:3-6, 75:10-77:11.

1 *Plaintiff's Response:* Disputed. In Bettencourt's
2 expert report, he declared that the spreadsheet provided by
3 defendant Robert Abbate and the work product of Cassabon were
4 indicative of false, fabricated and/or misleading work product.
5 Bettencourt opined that the defendants' accounting work was not
6 merely substandard or negligent but instead is reflective of
7 false, fabricated, and/or misleading work. See Bettencourt
8 Report, Exhibit A. In his deposition, Bettencourt confirmed
9 his report and further testified that Abbate's and Cassabon's
10 work product was misleading and misstated the evidence. See
11 Bettencourt Deposition, pp. 33, 38, 78, 97. Bettencourt testified
12 that it was not reasonable or in good faith actions to attribute
13 all of the voids on a particular shift to a specific employee.
14 Bettencourt Deposition, p. 157-158, 161. Both Abbate's
15 spreadsheet and Fung's report were similar in this respect.
16 Bettencourt Deposition, p. 160, 161. Bettencourt is of the
17 opinion that these actions could raise an inference of bad faith
18 that could be found by a jury. Bettencourt Deposition, p.
19 163.

20 *Court Ruling:* DISPUTED.

21 DUF 77: Bettencourt testified that he is offering
22 an opinion that Abbate made numerical errors in the Abbate
23 Spreadsheet, but he is not offering an opinion that Abbate
24 deliberately fabricated the Spreadsheet. Supporting Evidence:
25 Exh. U, Bettancourt Depo., 99:2-19, 123:5-10, 123:5-125:12.

26 *Plaintiff's Response:* Disputed on identical

1 grounds stated in response to DUF 76.

2 *Court Ruling: DISPUTED.*

3 DUF 78: Bettencourt has no knowledge that Abbate
4 deliberately fabricated any numbers in his analysis or
5 spreadsheet. Supporting Evidence: Exh. U, Bettancourt Depo.
6 99:2-19, 114:1-5, 146:10-20, Exh. E., Plaintiff Depo. 68:23-69:3.

7 *Plaintiff's Response: Disputed on identical*
8 grounds stated in response to DUF 76.

9 *Court Ruling: DISPUTED.*

10 DUF 79: Bettencourt did not perform any analysis of
11 the errors in the Abbate Spreadsheet that would show a pattern of
12 bias indicating that Abbate was attempting to falsify charges of
13 embezzlement against Fenters. Supporting Evidence: Exh. U,
14 Bettancourt Depo., 101:3-108:13, 109:5-110:5, 126:16-128:7.

15 *Plaintiff's Response: Disputed on identical*
16 grounds stated in response to DUF 76.

17 *Court Ruling: DISPUTED.*

18 DUF 80: Bettencourt did not perform any analysis of
19 the materiality of the errors in the Abbate Spreadsheet that
20 would indicate that the errors had a greater tendency to show
21 embezzlement. Supporting Evidence: Exh. U, Bettancourt Depo.,
22 101:3-108:13, 109:5-111:3, 115:9-117:23, 118:16-119:5.

23 *Plaintiff's Response: Disputed on identical*
24 grounds stated in response to DUF 76.

25 *Court Ruling: DISPUTED.*

26 DUF 81: Bettencourt did not perform any analysis to

1 determine if a different conclusion should have been reached as
2 to embezzlement if the purported errors made by Abbate had been
3 corrected in the Abbate Spreadsheet. Supporting Evidence: Exh.
4 U, Bettancourt Depo., 126:16-128:7, 129:1-5.

5 *Plaintiff's Response:* Disputed on identical
6 grounds stated in response to DUF 76.

7 *Court Ruling:* DUF 81 is UNDISPUTED; Plaintiff's
8 evidence does not contradict Bettancourt's deposition testimony.

9 DUF 82: Bettencourt did not perform any analysis on
10 whether Abbate's purported error of listing no midshift, where
11 there was a dual shift, had a material impact or was indicative
12 of misleading work. Supporting Evidence: Exh. U, Bettancourt
13 Depo., 102:9-103:24.

14 *Plaintiff's Response:* Disputed on identical
15 grounds stated in response to DUF 76.

16 *Court Ruling:* DUF 82 is UNDISPUTED; Plaintiff's
17 evidence does not contradict Bettancourt's deposition testimony.

18 DUF 83: Bettencourt testified that he has not formed
19 an opinion as to whether the Abbate Spreadsheet was false or
20 fabricated because that goes to state of mind. Supporting
21 Evidence: Exh. U, Bettancourt Depo., 96:6-97:17.

22 *Plaintiff's Response:* Disputed on identical
23 grounds stated in response to DUF 76.

24 *Court Ruling:* DUF 83 is UNDISPUTED; Plaintiff's
25 evidence does not contradict Bettancourt's deposition testimony.

26 2. Issue No. 2: Plaintiff Cannot Maintain a Claim for

1 Malicious Prosecution Because She Cannot Meet the Requisite
2 Elements.

3 DUF 84: The Abbate Defendants incorporate by
4 reference Fact Nos. 1-83 and 87-103.

5 *Plaintiff's Responses and Court Rulings: See*
6 *supra.*

7 3. Issue No. 3: Plaintiff Cannot Maintain a Claim for
8 Violation of Civil Code § 52.1 Because She Cannot Meet the
9 Requisite Elements.

10 DUF 85: The Abbate Defendants incorporate by
11 reference Fact Nos. 1-83.

12 *Plaintiff's Responses and Court Rulings: See*
13 *supra.*

14 DUF 86: Abbate never threatened, coerced, or
15 intimidated Fenters. Supporting Evidence: Exh. E, Plaintiff
16 Depo., 156:2-6; Exh. F, Aceves Depo., 144:14-22; Exh. U,
17 Bettancourt Depo., 138:24-139:11; Exh. X, Plaintiff's Responses
18 to Robert Abbate's Special Interrogatories, Set One, No. 5.

19 *Plaintiff's Response: Disputed. As a result of*
20 *Abbate's and the other defendants' misconduct, Fenters was*
21 *threatened with the prospect of conviction and incarceration. See*
22 *Plaintiff's Deposition, p. 401-402. Indeed, the lead prosecutor*
23 *testified that he would have indeed sought to incarcerate and*
24 *seek full restitution against Fenters had she been convicted. See*
25 *Bacciarini Deposition, p. 64-66.*

26 *Court Ruling: UNDISPUTED. There is no direct or*

1 circumstantial evidence that Abbate threatened or coerced
2 Plaintiff.

3 4. Issue No. 4: Plaintiff Cannot Maintain a Claim for
4 Violation of 29 U.S.C. § 215 Because She Cannot Meet the
5 Requisite Elements.

6 DUF 87: The Abbate Defendants incorporate by
7 reference Fact Nos. 1-87 and 99-103.

8 *Plaintiff's Responses and Court Rulings: See*
9 *supra.*

10 DUF 88: Abbate brought a complaint to the District
11 Attorney's office based on a good faith suspicion and belief that
12 Fenters had been stealing from Yosemite Chevron. Supporting
13 Evidence: Exh. A, Abbate Decl. ¶ 6; Exh. B, Bettancourt Trial
14 Testimony, 573:6-10.

15 *Plaintiff's Response:* Disputed on grounds stated
16 in response to DUF 10.

17 *Court Ruling:* Disputed.

18 DUF 89: Abbate never consulted with an attorney about
19 potential work-related complaints that could be brought by
20 Plaintiff. Supporting Evidence: Exh. A, Abbate Decl. ¶ 10.

21 *Plaintiff's Response:* Disputed. Abbate was not
22 permitted to testify on this subject during his deposition
23 on privilege grounds and must now abide by that assertion of
24 privilege. See Abbate Deposition, p. 140. A party can not invoke
25 and waive privileges at his convenience, thereby using them as
26 both swords and shields in the same case. See United States v.

1 Rylander, 460 U.S. 752, 759 (1983); Williams v. Florida, 399 U.S.
2 78, 83-84 (1970).

3 *Court Ruling:* DISPUTED.

4 DUF 90: Fenters admitted her allegations, that
5 Abbate's motive to accuse her of embezzlement was because of her
6 potential harassment lawsuit, is based on speculation.
7 Supporting Evidence: Exh. E, Plaintiff Depo. 162:6-11, 185:15-19,
8 186:10-189:5.

9 *Plaintiff's Response:* Disputed, as Fenters
10 clarified in her deposition testimony that she was only
11 testifying based on her personal knowledge and did not intend to
12 characterize the entirety of her evidence. See Plaintiff's
13 Deposition, p. 400-401. The evidence set forth above shows
14 Abbate's bad faith motive independent of what Fenters personally
15 has knowledge of.

16 *Court Ruling:* DISPUTED.

17 DUF 91: Fenters did not have any conversations with
18 Abbate about her feeling that Ed Montes was harassing her at
19 work. Supporting Evidence: Exh. E, Plaintiff Depo., 191:16-19.

20 *Plaintiff's Response:* Disputed. Fenters told
21 Abbate about Montes' misconduct, and Abbate spoke with Montes
22 about it thereafter. Abbate Deposition, p. 70-71. Abbate claims
23 he thereafter did his best to ensure that Montes and Fenters did
24 not work the same shift. Abbate Deposition, p. 72.

25 *Court Ruling:* DUF 91 is UNDISPUTED. Plaintiff
26 testified that she had no conversations with Abbate that Montes

1 was harassing Plaintiff at work; Plaintiff's evidence relates to
2 an incident reported by Plaintiff to Abbate that occurred at
3 Montes' residence.

4 DUF 92: There is no evidence that Abbate was aware
5 that Fenters had made any complaints about Montes or any other
6 employees harassing her at work. Supporting Evidence: Exh. E,
7 Plaintiff Depo., 191:16-19.

8 *Plaintiff's Response*: Disputed on grounds stated
9 in response to DUF 91.

10 *Court Ruling*: DUF 92 is UNDISPUTED. Plaintiff
11 testified that she had no conversations with Abbate that Montes
12 was harassing Plaintiff at work; Plaintiff's evidence relates to
13 an incident reported by Plaintiff to Abbate that occurred at
14 Montes' residence.

15 DUF 93: Fenters never mentioned to Abbate that she
16 intended to bring a lawsuit against him. Supporting Evidence:
17 Exh. E, Plaintiff Depo., 163:8-14.

18 *Plaintiff's Response*: Disputed, as Fenters
19 complained about overtime, salary and sexual harassment
20 issues to Abbate and Yosemite management, even if she made no
21 specific threat of a lawsuit. See Plaintiff's Deposition, p. 164-
22 166, 167-168, 169-170, 172-174, 177-178, 179-180, 181-183, 188-
23 192.

24 *Court Ruling*: DUF 93 is UNDISPUTED; Plaintiff
25 never told Abbate that she intended to file a lawsuit against
26 him.

1 DUF 94: Fenters never mentioned to any Yosemite
2 Chevron employee that she intended to bring a lawsuit against
3 Abbate or Yosemite Chevron.

4 *Plaintiff's Response*: Disputed on grounds stated
5 in response to DUF 93.

6 *Court Ruling*: DUF 94 is UNDISPUTED for the same
7 reason as DUF 93.

8 DUF 95: Bacciarini never heard or talked to Bruce
9 Sousa or Abbate about any potential civil lawsuit against Abbate
10 by Fenters.

11 *Plaintiff's Response*: UNDISPUTED.

12 DUF 96: Aceves testified that Fenters never complained
13 to him about specific problems with working at Yosemite Chevron.
14 Supporting Evidence: Exh. F, Aceves Depo., 34:24-35:24.

15 *Plaintiff's Response*: Disputed, as this fact is
16 of no significance. Aceves and Fenters were merely coworkers and
17 had no contact outside of the workplace. See Aceves Deposition,
18 pp. 23-27. There is nothing suggesting that Fenters would have
19 told such a person about the subject matters at issue.

20 *Court Ruling*: DUF 96 is UNDISPUTED as Plaintiff
21 admits no such conversation.

22 DUF 97: Aceves testified that Fenters never
23 complained to him about any of the coworkers at Yosemite Chevron.

24 *Plaintiff's Response*: Disputed on grounds stated
25 in response to DUF 96.

26 *Court Ruling*: DUF 97 is UNDISPUTED.

1 5. Issue No. 5: Plaintiff Cannot Maintain a Claim for
2 Violation of 29 U.S.C. § 201 Because She Cannot Meet the
3 Requisite Elements.

4 DUF 98: The Abbate Defendants incorporate by
5 reference Fact Nos. 1-98.

6 *Plaintiff's Responses and Court Rulings: See*
7 *supra.*

8 DUF 99: Yosemite Chevron paid all required overtime
9 under the laws of California based on the time cards submitted by
10 Fenters. Supporting Evidence: Exh. A, Abbate Decl. ¶ 11.

11 *Plaintiff's Response:* Disputed. Fenters
12 testified that she was not paid time and a half for overtime,
13 even if she could not at her deposition provide a calculation as
14 to that time. See Plaintiff's Deposition, p. 305, 355-356.

15 *Court Ruling:* DISPUTED.

16 DUF 100: Fenters has no evidence to show that
17 Yosemite Chevron's timecards are inaccurate. Supporting
18 Evidence: Exh. E, Plaintiff Depo. 349:16-355:10.

19 *Plaintiff's Response:* Disputed on grounds stated
20 in response to DUF 99.

21 *Court Ruling:* DISPUTED as per Plaintiff's
22 deposition testimony.

23 DUF 101: At deposition, Fenters could not identify any
24 specific date that she was not paid for overtime. Exh. E,
25 Plaintiff Depo., 163:24-164:18, 349:16-355:10, 355:20-357:3.

26 *Plaintiff's Response:* Disputed on grounds stated

1 in response to DUF 99.

2 *Court Ruling:* DUF 101 is UNDISPUTED.

3 DUF 102: At deposition, Fenters could not identify any
4 specific hour of overtime that she has not been paid for by
5 Yosemite Chevron. Supporting Evidence: Exh. E, Plaintiff Depo.,
6 305:1-18, 349:16-355:10, 355:20-357:3.

7 *Plaintiff's Response:* Disputed on grounds stated
8 in response to DUF 99.

9 *Court Ruling:* DUF 102 is UNDISPUTED.

10 DUF 103: At deposition, Fenters testified that there
11 could be zero hours of overtime that have been unpaid.
12 Supporting Evidence: Exh. E, Plaintiff Depo., 305:1-18.

13 *Plaintiff's Response:* Disputed on grounds stated
14 in response to DUF 99.

15 *Court Ruling:* DUF 103 is UNDISPUTED; Plaintiff so
16 testified at her deposition.

17 D. FIRST CLAIM FOR RELIEF FOR VIOLATION OF SECTION 1983.

18 The first claim for relief in the FAC alleges violations of
19 42 U.S.C. § 1983 against all Defendants:

20 34. The defendants' intentional and reckless
21 acts, as described above, constitute a
22 deprivation of Tiffany's ... rights under the
23 Fourth Amendment not to have her liberty
24 restricted without legal basis, to be
25 arrested without probable cause, and not to
26 be prosecuted maliciously without probable
cause. With respect to these constitutional
violations, as alleged hereinabove,
defendants Yosemite Chevron, Abbco, Abbate,
Fung, McIlhatton, and Cassabon were acting in
joint activity with and/or conspiring with
Spencer and Hutton.

1 The Abbate Defendants move for summary judgment on the
2 grounds that the District Attorney's Office acted with
3 independent discretion to prosecute; that Plaintiff cannot show
4 that Abbate controlled the investigation or decision to
5 prosecute; and that the Abbate Defendants are entitled to
6 absolute witness immunity.

7 1. Smiddy Presumption.

8 The Ninth Circuit has long recognized that "[f]iling a
9 criminal complaint immunizes investigating officers ... from
10 damages suffered thereafter because it is presumed that the
11 prosecutor filing the complaint exercised independent judgment in
12 determining that probable cause for an accused's arrest exists at
13 that time." *Smiddy v. Varney*, 665 F.2d 261, 266 (9th
14 Cir.1981) (*Smiddy I*). In *Smiddy v. Varney*, 803 F.2d 1469, 1471
15 (9th Cir.1986) (*Smiddy II*), the Ninth Circuit held that Smiddy had
16 not overcome this presumption because he produced no evidence
17 "that the district attorney was subjected to unreasonable
18 pressure by the police officers, or that the officers knowingly
19 withheld relevant information with the intent to harm [him], or
20 that the officers knowingly supplied false information."² As
21 explained in *Newman v. County of Orange*, 457 F.3d 991, 994 (9th
22 Cir.2006), *cert. denied*, 549 U.S. 1253 (2007):

23 Our later cases further explained the types

24
25 ²Defendants cited *Alvarez-Machain v. United States*, 331 F.3d
26 604 (9th Cir.2002), as authority supporting their claim for summary
judgment. The Ninth Circuit's decision was reversed by the Supreme
Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

1 of evidence necessary to overcome the
2 presumption. In *Borunda v. Richmond*, 885
3 F.2d 1384, 1390 (9th Cir.1988), we affirmed
4 an award of damages that included attorneys'
5 fees incurred defending against criminal
6 charges of which the plaintiffs were
7 acquitted. The prosecutor based the decision
8 to prosecute solely on the information
9 contained in the officers' reports, but the
10 plaintiffs highlighted striking omissions in
11 those reports as well as the fact that the
12 officers themselves offered conflicting
13 stories. *Id.* On the basis of such evidence,
14 '[t]he jury was entitled to find ... that
15 [the officers] procured the filing of the
16 criminal complaint by making
17 misrepresentations to the prosecuting
18 attorney.' *Id.*

19 In *Barlow v. Ground*, 943 F.2d 1132 (9th
20 Cir.1991), ... we held that a civil rights
21 plaintiff seeking attorneys' fees had also
22 produced sufficient evidence to overcome the
23 *Smiddy* presumption. There ... the prosecutor
24 relied solely on the arresting officers'
25 reports, which omitted critical information
26 ... Further, an independent witness
corroborated at least part of the plaintiff's
version of events and the officers' accounts
conflicted

*In contrast, we have stated that a
plaintiff's account of the incident in
question, by itself, does not overcome the
presumption of independent judgment. Sloman
v. Tadlock, 21 F.3d 1462, 1474 (9th
Cir.1994).*

20 *See also Beck v. City of Upland*, 527 F.3d 853, 862 (9th
21 Cir.2008) (presumption "may be rebutted if the plaintiff shows
22 that the independence of the prosecutor's judgment has been
23 compromised").

24 Plaintiff argues that summary judgment is not appropriate
25 because of evidence that the Abbate Defendants fabricated
26 allegations against Plaintiff and brought them to the District

1 Attorney's Office through "unconventional channels" based on a
2 preexisting personal relationship between the Abbate family and
3 Defendant Spencer; that Aceves was coerced by Abbate and
4 Defendant Hutton into falsely implicating Plaintiff; that Abbate,
5 "and to a lesser extent, Hutton," withheld exculpatory
6 information in the spreadsheet and reports that caused the
7 prosecution against Plaintiff to be initiated; and that these
8 incidents of misconduct followed closely in time Plaintiff's
9 resignation after complaining about wage and hour, reimbursement,
10 and sexual harassment issues.

11 Defendants reply that the evidence shows that Abbate, before
12 reporting suspected embezzlement to law enforcement, caught
13 Aceves stealing money from Yosemite Chevron by falsely voiding
14 transactions. Aceves testified that he implicated Plaintiff when
15 he was first caught stealing because he wanted to put the blame
16 on someone else, not because of any threats or coercion, and that
17 he was not under any threats or coercion when he later implicated
18 Plaintiff during the June 4, 2003 meeting with Abbate and
19 Defendant Hutton. Defendants argue that the only evidence that
20 can be offered of Abbate's involvement in the criminal case was
21 the initial reporting of the suspected crime, providing business
22 records, participating in Defendant Hutton's interview of Aceves,
23 and his testimony at the preliminary hearing. The fact that
24 Abbate prepared a spreadsheet with a record of voided
25 transactions that Plaintiff's expert opines contained numerical
26 errors does not raise an inference of liability under Section

1 1983. Defendants contend that Plaintiff does not refute that
2 Abbate's spreadsheet was ruled inadmissible at the preliminary
3 hearing, that the prosecuting attorney did not rely on Abbate's
4 spreadsheet during the criminal trial, and that the District
5 Attorney's Office retained Cassabon & Associates after the
6 preliminary hearing to evaluate Yosemite Chevron's business
7 records and that Victor Fung was the only witness to testify at
8 the trial. Defendants argue that there is no evidence to suggest
9 that the District Attorney's Office proceeded with the
10 prosecution or trial due to pressure from Abbate or based on
11 fabricated evidence. Defendants refer to the prosecuting
12 attorney's testimony that he would have prosecuted Plaintiff even
13 if Abbate had not prepared the spreadsheet.

14 The Abbate Defendants' motion for summary judgment on the
15 ground of the *Smiddy* presumption is DENIED.

16 2. Control of Investigation or Prosecution.

17 Defendants argue that summary judgment is appropriate
18 because Plaintiff cannot show that the Abbate Defendants
19 controlled the District Attorney's Office investigation or the
20 prosecution of Plaintiff.

21 The Abbate Defendants cite *Arnold v. Intern. Business*
22 *Machines*, 637 F.2d 1350 (9th Cir.1981). There, Arnold brought an
23 action against IBM and various of its employees for alleged
24 violations of Arnold's civil rights. The Ninth Circuit affirmed
25 the grant of summary judgment for defendants, holding that in the
26 absence of evidence that IBM and its employees controlled the

1 police investigation, which led to Arnold's arrest on charges of
2 stealing corporate documents and trade secrets and the search of
3 Arnold's residence, the involvement of IBM and the employees in
4 the investigation was not the proximate cause of Arnold's
5 injuries and Arnold could not recover under statutes authorizing
6 civil actions for deprivation of rights under color of law and
7 conspiracy to defraud persons of their civil rights. In so
8 holding, the Ninth Circuit stated:

9 ... It is clear that 'but for' IBM's
10 involvement, there would have been no
11 investigation, and Arnold never would have
12 been arrested or indicted or had his
13 residence searched.

14 There is nothing in the record, however, to
15 indicate that defendants exerted any control
16 over the decision making of the Task Force.
17 Deputy District Attorney Bender testified
18 that the Task Force used the information
19 supplied by IBM to determine which companies
20 might be in possession of IBM documents, but
21 that the Task Force conducted a full and
22 independent investigation. Bender and
23 Sergeant Frechette both testified that
24 neither Callahan nor IBM controlled the
25 investigation. Arnold has pointed to no
26 facts that indicate that IBM in any way
 controlled the police investigation or that
 the Task Force was in any sense a mere
 conduit for carrying out IBM's will.

21 637 F.2d at 1357. The Abbate Defendants also cite *Mann v. City*
22 *of Tucson Dept. of Police*, 782 F.2d 790, 793 (9th Cir.1986), a
23 case involving dismissal, wherein the Ninth Circuit held in
24 pertinent part:

25 [D]ismissal of these claims against
26 defendants other than the Tucson police
 defendants was proper for other reasons. The
 substantive constitutional violation charged

1 consisted of two unlawful searches of Mann's
2 apartment. The search was performed by the
3 Tucson police officers. All but two of the
4 other defendants are private persons who
5 allegedly instigated, aided, or participated
6 in the searches. Under *Arnold v. IBM Corp.*,
7 ... in order to establish the requisite
8 proximate cause between the conduct of
9 private persons and searches in violation of
10 section 1983, a plaintiff must prove the
11 private individuals exercised control over
12 the decisionmaking in a police investigation.
13 Mann has failed to allege that these other
14 defendants controlled the investigation or
15 directed that the searches be conducted, and
16 the facts alleged would not support such a
17 claim. For this reason, the section 1983
18 claims against these private defendants were
19 properly dismissed.

20 782 F.2d at 793.

21 In *King v. Massarweh*, 782 F.2d 825, 829 (9th Cir.1986), the
22 district court's dismissal of a Section 1983 claim against the
23 defendant landlord was affirmed. Citing *Arnold*, the Ninth
24 Circuit affirmed:

25 ... Massarweh's involvement with the police
26 is even more attenuated [than the involvement
of IBM in *Arnold*]. Massarweh's sole act was
to call the police. Nothing in the record
indicates that Massarweh exerted any control
over the officers' decision to search
appellants' apartments or to arrest the
appellants. On the facts alleged by the
appellants, Massarweh sought the appellants'
removal as trespassers, but the police
conduct that allegedly violated the
plaintiffs' Fourth Amendment rights took
place on the officers' own initiative.

27 782 F.2d at 829. In *Franklin v. Fox*, 312 F.3d 423 (9th
28 Cir.2002), the Ninth Circuit affirmed the district court's grant
29 of summary judgment in favor of Franklin-Lipsker, the daughter of
30 plaintiff, who plaintiff alleged conspired with state prosecutors

1 in violation of his civil rights:

2 Furthermore, to the extent that Franking aims
3 to hold his daughter responsible for
4 [District Attorney] Murray's facilitation of
5 the visit or trial prosecutor Tipton's use of
6 his jailhouse silence against him at trial,
7 his claim fails. In order for a private
8 individual to be liable for a § 1983
9 violation when a state actor commits the
10 challenged conduct, the plaintiff must
11 establish that the private individual was the
12 proximate cause of the violation

13 *Arnold* ... is instructive. There a task
14 force including law enforcement officials,
15 the district attorney, and an IBM security
16 manager investigated trade secret leaks from
17 within IBM. After his arrest and indictment
18 and the search of his home, the plaintiff
19 sued IBM under § 1983 based on his
20 involvement with the investigation. We held
21 that, although IBM provided the task force
22 with its security manager, information,
23 funding, and grand jury witnesses, the
24 company was not the proximate cause of the
25 plaintiff's injuries because it did not
26 direct the task force to take action against
him

Here, there is no evidence that Murray and
Tipton were under Franklin-Lipsker's control
or that they failed to exercise their own
independent judgment when they violated
Franklin's rights. Murray's response to
Franklin-Lipsker's request for help to visit
her father and to offer her advise as to the
advisability of a visit did not turn
Franklin-Lipsker into a facilitator or a
cause of the state's violation. With respect
to the violation at trial, one of the bases
upon which Franklin's conviction was
overturned, there is no evidence that
Franklin-Lipsker was even aware of Tipton's
decision to allude to Franklin's silence
during the jail visit as evidence of guilt.

312 F.3d at 445-446. In *Crowe v. County of San Diego*, the
district court granted summary judgment for defendant Blum, a

1 psychologist in private practice who consulted with the Escondido
2 Police Department during the murder investigation because Blum
3 did not participate in the arrests of the boys or the searches of
4 their residences and "there is absolutely no evidence that
5 defendant Blum had any control over the other defendants'
6 decision to conduct the challenged searches and arrests." 303
7 F.Supp.2d at 1063-1064.

8 Plaintiff responds by citing *Allen v. Woodford*, 2006 WL
9 1748587 (E.D.Cal.2006):

10 'Actions taken by a private individual may be
11 "under color of state law" where there is a
12 significant state involvement in the action."
13 *Franklin v. Fox*, 312 F.3d 423, 444 (9th
14 Cir.2002); *Johnson v. Knowles*, 113 F.3d 1114,
15 1118 (9th Cir.1997) ... The extent of state
16 involvement in the action is a question of
17 fact ... The Supreme Court has articulated
18 four distinct tests for determining whether
19 the actions of private individuals amount to
20 state action: 1) the public function test; 2)
21 the joint action test; 3) the state
22 compulsion test; and 4) the governmental
23 nexus test. *Franklin*, 312 F.3d at 444-445
24

18 Under the public function test, a private
19 party is viewed as a state actor if the
20 plaintiff establishes that, in engaging in
21 the challenged conduct, the private party
22 performed a public function that has been
23 'traditionally the exclusive prerogative of
24 the state.' ... Under the joint action test,
25 state action is found where a private person
26 is a 'willful participant in joint activity
with the State or its agents' that effects a
constitutional deprivation ... Under the
state compulsion test, a private party is
fairly characterized as a state actor when
the state has exercised coercive power or has
provided such significant encouragement,
either overt or covert, that the [challenged
conduct] must in law be deemed to be that of

1 the State ... Lastly, under the governmental
2 nexus test, the issue is whether there is a
3 sufficiently close nexus between the State
4 and the challenged action of the regulated
entity so that the action of the latter may
be fairly treated as that of the State itself
....

5 While these factors are helpful in
6 determining the significance of state
involvement, 'there is no specific formula
7 for defining state action.' ... The extent of
state involvement remains a factual inquiry.
8 'Only by sifting facts and weighing
circumstances can the non-obvious involvement
9 of the state in private conduct be attributed
its true significance.'

10 Plaintiff argues that evidence of Abbate's involvement in the
11 criminal investigation suffices to raise a question of fact that
12 he was a state actor under any of the four distinct tests.

13 The parties are talking apples and oranges. Defendants move
14 for summary judgment that Abbate did not control the
15 investigation, i.e., he was not the proximate cause of the
16 decision to bring criminal charges against Plaintiff. The Abbate
17 Spreadsheet was ruled inadmissible at the preliminary hearing and
18 played no part in the decision by the Superior Court to hold
19 Plaintiff to answer. Although Plaintiff makes much of Aceves'
20 trial testimony, Aceves testified at his deposition that he lied
21 to Abbate and Hutton about Plaintiff's involvement in the
22 embezzlement and did not recant his statements until the trial.
23 There is evidence that Hutton's investigation may have been
24 incomplete and there is evidence that Hutton relied on Abbate to
25 provide the financial evidence, i.e., the Abbate Spreadsheet, to
26 substantiate the alleged embezzlement. There is evidence that

1 Abbate provided misleading and inaccurate information to Hutton
2 and that Abbate encouraged the prosecution. The link between
3 Abbate and the prosecutor is less clear. This is an extremely
4 close call better resolved by the trier of fact.

5 Summary judgment for the Abbate Defendants on the issue
6 whether they controlled the District Attorney's investigation or
7 prosecution of Plaintiff is DENIED.

8 3. Witness Immunity.

9 Defendants move for summary judgment as to Plaintiff's cause
10 of action for violation of Section 1983 on the grounds of
11 absolute witness immunity.

12 In *Briscoe v. LaHue*, 460 U.S. 325, 326 (1983), the Supreme
13 Court held that a witness has absolute immunity from liability
14 for civil damages under Section 1983 for giving perjured
15 testimony at trial. In *Franklin v. Terr*, 201 F.3d 1098 (9th
16 Cir.2000), the Ninth Circuit applied *Briscoe's* immunity to Terr,
17 a psychiatrist called by the prosecution who testified in
18 Franklin's criminal trial based on charges by his daughter,
19 Franklin-Lipsker, that Franklin had murdered a childhood friend
20 twenty years earlier, and who was later sued by Franklin under
21 Section 1983. Franklin alleged that Terr had conspired with
22 others to present perjured testimony at the criminal trial. The
23 Ninth Circuit held:

24 In the instant case, Franklin is attempting
25 to circumvent Terr's absolute witness
26 immunity by alleging that Terr conspired with
others to present false testimony. We are
persuaded that allowing a plaintiff to

1 circumvent the *Briscoe* rule by alleging a
2 conspiracy to present false testimony would
3 undermine the purposes served by granting
4 witnesses absolute immunity from liability
5 for damages under § 1983. Absolute witness
6 immunity is based on the policy of protecting
7 the judicial process and is 'necessary to
8 assure that judges, advocates, and witnesses
9 can perform their respective functions
10 without harassment or intimidation.' ... As
11 the Court stated in *Briscoe*, '[a] witness's
12 apprehension of subsequent damages liability
13 might induce two forms of self censorship.
14 First, witnesses might be reluctant to come
15 forward to testify. And once a witness is on
16 the stand, his testimony might be distorted
17 by the fear of subsequent liability.' ...
18 Moreover, as the district court correctly
19 observed, '[a]ny other holding would
20 eviscerate absolute immunity since a witness
21 rarely prepares her testimony on her own.'

12 Franklin alleges that Terr conspired with
13 Franklin-Lipsker by interviewing her before
14 Franklin's trial and by then incorporating
15 information obtained from those interviews
16 into her own testimony. Franklin also
17 alleges that Terr provided Franklin-Lipsker
18 'with a description of the sort of details
19 that would make her testimony more
20 persuasive, which Franklin-Lipsker then
21 incorporated into her continually evolving
22 "recollection" of the Nason murder.' The
23 ostensible purpose of this conspiracy was to
24 ensure that one person's testimony did not
25 contradict the other's testimony. But
26 because Terr's alleged conspiratorial
behavior is inextricably tied to her
testimony, we find that she is immune from
damages. We are not presented with, and do
not decide, the question whether § 1983
provides a cause of action against a
defendant who conspired to present the
perjured testimony of another but did not
testify as a witness herself.

24 201 F.3d at 1101-1102. See also *Paine v. City of Lompoc*, 265
25 F.3d 975, 983 (9th Cir.2001):

26 Our cases and *Spurlock [v. Satterfield]*, 167

1 F.3d 995 (6th Cir.1999)], demonstrate that
2 ... absolute witness immunity does not shield
3 an out-of-court, pretrial conspiracy to
4 engage in non-testimonial acts such as
5 fabricating or suppressing physical or
6 documentary evidence of suppressing the
7 identities of potential witnesses.

8 In *Grey v. Poole*, 275 F.3d 1113 (D.C.Cir. 2002), a social
9 worker submitted a statement to the court in connection with a
10 child neglect action. The District of Columbia Circuit held that
11 Poole was entitled to absolute witness immunity, concluding that
12 "[i]t does not matter whether Poole's sworn statement was given
13 in oral or written form; what matters is that her statement was
14 the equivalent of sworn testimony in a judicial proceeding." 275
15 F.3d at 1118; see also *Morstad v. Dept. of Corrections & Rehab.*,
16 147 F.3d 741, 744 (8th Cir.1998) ("Because the court directed
17 Veenestra to evaluate Morstad and to testify at Morstad's
18 probation revocation hearing, we conclude that Veenestra was
19 performing functions essential to the judicial process ... and
20 affirm the district court's determination that Veenestra was
21 entitled to absolute immunity." In *Buckley v. Fitzsimmons*, 919
22 F.2d 1230 (7th Cir.1990), reversed on other grounds, 509 U.S. 259
23 (1993), the Seventh Circuit addressed whether three expert
24 witnesses had absolute immunity for their pretrial activities of
25 evaluating the footprint, writing reports, discussing the case
26 with prosecutors, and preparing to testify. 509 U.S. at 1244-
1245. The Seventh Circuit held:

... We agree with the district court that
they do. *Briscoe* holds that the presentation
of testimony may not be the basis of

1 liability, even if the witness deliberately
2 misleads the court. It would be a hollow
3 immunity if the aggrieved party could turn
4 around and say, in effect: 'True, your
5 delivery of bad testimony is immunized, but
6 preparing to deliver that testimony is not,
7 so I can litigate the substance of your
8 testimony.' Substance is exactly what
9 *Briscoe* puts off limits.

10 As expert could violate a suspect's rights
11 independently of the litigation. The expert
12 might, for example, break into the suspect's
13 home to obtain samples for analysis.
14 Absolute immunity would not apply to that
15 theft, for the same reason it does not apply
16 to prosecutorial infliction of punishment
17 without trial. A non-testimonial expert
18 could violate a suspect's rights by 'cooking'
19 a laboratory report in a way that misleads
20 the testimonial experts. Experts, like the
21 police, 'cannot hide behind [the immunity of]
22 the officials whom they have defrauded.' ...
23 But nothing in the complaint suggests that
24 the three experts hid evidence, as opposed to
25 misinterpreting it.

26 Discussions between the prosecutors and the
experts violated none of Buckley's rights.
Preparing to commit slander or perjury is not
actionable. The testimony itself is covered
by immunity. Buckley makes it clear that the
testimony is the real gravamen of his
complaint. Olsen, he submits, 'wrongfully
changed his initial opinion'; Robbins was an
'utterly disreputable witness-for-hire.'
Maybe so, but cross-examination rather than a
suit for damages is the right way to
establish these things. Junk science is a
plague of contemporary litigation, but the
peddlers of poorly supported theories do not
expose themselves to liability by doing
research out of court or appearing in more
than one case.

White v. Frank, 855 F.2d 956 (2nd Cir.1988)
holds that *Briscoe* does not apply to
'complaining witnesses'. Buckley contends
that the three experts are in this category,
because but for their opinions the State's
Attorney would not have obtained an

1 indictment. The parallel is not apt. None
2 of the experts invented the report of a crime
3 or brought the fable to the state's
4 attention. Jeanine Nicarico is dead. Each
5 expert was brought into the case by the
6 prosecutors, who sought to evaluate the
7 strength of the evidence against Buckley. We
8 therefore need not decide whether to follow
9 *White*.

10 919 F.2d at 1245.

11 Defendants argue that summary judgment on this ground is
12 appropriate because there is no evidence that the Abbate
13 Defendants created false ledgers, receipts, daily register
14 reports or any other records to set up Plaintiff. All Plaintiff
15 will be able to argue is that Abbate provided false testimony as
16 the complaining witness, which is insufficient to circumvent
17 *Briscoe*.

18 Plaintiff refers to the Order denying the Abbate Defendants'
19 motion to dismiss the Complaint, that "[t]he Abbate Defendants
20 are not entitled to dismissal of the First Cause of Action on
21 this ground to the extent that the Complaint can be construed as
22 alleging that the Abbate Defendants fabricated evidence or
23 conspired to do so." Plaintiff contends:

24 There is evidence that the Abbate defendants
25 fabricated allegations against Fenters and
26 brought them to the District Attorney's
Office through unconventional channels based
on a preexisting personal relationship
between the Abate [sic] family and defendant
Spencer. The record also suggests that
Aceves was coerced by Abbate and Hutton into
falsely implicating Fenters and that these
two defendants acted in bad faith in doing
so. The evidence also shows that Abbate,
and, to a lesser extent, Hutton, withheld
exculpatory information in the spreadsheet

1 and reports that caused the prosecution
2 against Fenters to be initiated. Finally,
3 the evidence shows that these incidents of
4 misconduct closely in time followed Fenters'
5 resignation after complaining about wage and
6 hour, reimbursement, and sexual harassment
7 issues. These actions are more than
8 sufficient to deprive Abbate and the related
9 entity defendants of witness immunity.

10 There is no evidence that Abbate *fabricated* any evidence
11 against Plaintiff. The evidence is that the financial support in
12 the Abate Spreadsheet for the alleged embezzlement was incomplete
13 and did not account for certain factors that Plaintiff's expert
14 considers necessary to consider. There is some evidence that
15 Abbate may have withheld exculpatory information; he provided all
16 of the business records to Hutton and, eventually, to the
17 Cassabon Defendants. Aceves' deposition testimony and the record
18 of his interview with Abbate and Hutton establishes that Aceves
19 lied to Abbate and Hutton and that he was not coerced or
20 intimidated by Abbate in any way. Aceves testified at his
21 deposition that he did not tell Abbate or Hutton about his lies
22 and that he only recanted his statements during the trial.
23 However, there is evidence that Abbate did not provide complete
24 information to Hutton in his investigation. Drawing inferences
25 in favor of Plaintiff, Abbate had a motive to discredit and deter
26 Plaintiff. He sought to influence Hutton. If Bettancourt's
27 testimony is believed, Abbate's incomplete and inaccurate
28 information facilitated what Bettancourt opines was a false,
29 misleading or fabricated financial analysis by Fung. The Abbate
30 Defendants' motion for summary judgment on the ground of absolute

1 witness immunity is DENIED.

2 E. CONSPIRACY.

3 Defendants move for summary judgment on the ground that
4 Plaintiff has no evidence to support her claim that the Abbate
5 Defendants conspired with the other defendants to violate
6 Plaintiff's constitutional rights.

7 To prove a conspiracy, Plaintiff must show "an agreement or
8 'meeting of the minds' to violate constitutional rights."
9 *Franklin v. Fox, supra*, 312 F.3d at 441. Each individual does
10 not need to know the plan; sharing the common purpose of the
11 conspiracy is sufficient. *Id.* A private individual may be
12 liable if he conspired with a state actor. *Id.*

13 "The defendants must have, by some concerted action,
14 intended to accomplish some unlawful objective for the purpose of
15 harming another which results in damage." *Mendocino Env'tl. Ctr.*
16 *v. Mendocino County*, 192 F.3d 1283, 1301 (9th Cir.1999). This
17 agreement or meeting of the minds may be inferred on the basis of
18 circumstantial evidence, such as the actions of the defendants.
19 *Id.* A showing that defendants committed acts that 'are unlikely
20 to have been undertaken without an agreement' may support the
21 inference of a conspiracy. *Id.* Nonetheless, Plaintiff is
22 "required to produce 'concrete evidence' of an agreement or
23 'meeting of the minds" between Defendants Spencer and Hutton and
24 the Abbate and Cassabon Defendants to violate Plaintiff's
25 constitutional rights. *Radcliffe v. Rainbow Const. Co.*, 254 F.3d
26 772, 782 (9th Cir.), *cert. denied*, 534 U.S. 1020 (2001).

1 Plaintiff argues that Defendants are not entitled to summary
2 judgment as to the alleged conspiracy:

3 The record ... shows that there was a
4 preexisting and extensive personal
5 relationship between the Abbates and
6 defendant Spencer, consisting of personal,
7 financial and political ties. The evidence
8 also shows that Abbate defendants brought
9 their claim to the District Attorney's Office
10 through unconventional channels, instead of
11 proceeding to the Merced Police Department.
12 The evidence further shows that, contrary to
13 common practice, the District Attorney did
14 not utilize a forensic accountant or fraud
15 examiner in the investigation stage but
16 relied upon Abbate's misleading analysis with
17 no scrutiny or even review. The evidence
18 further shows that Hutton and Abbate worked
19 together to obtain a misleading statement
20 from Aceves as to Fenters' alleged
21 embezzlement, failing to report or otherwise
22 bring out the exculpatory fact that Fenters'
23 involvement was suggested first by Abbate and
24 that Aceves was 'lured in' to adopting this
25 version. The evidence further shows that the
26 prosecution took on the embezzlement case
against Fenters without testing the facts or
even knowing the magnitude of her alleged
embezzlement, only after a brief meeting.
The evidence also shows contact between the
various principals during the course of the
prosecution, as well as their extensive
cooperation with a non-law enforcement and
involved individual, Abbate himself, during
the investigation stage.

20 In *Radcliffe, supra*, 254 F.3d at 783, the Ninth Circuit
21 explained:

22 The plaintiff's point to Massini's subsequent
23 zeal in prosecuting and her lack of research
24 or discussion with her deputies who had dealt
25 with the earlier cases, as evidence of
26 conspiracy. The plaintiffs also suggest that
one motive of Massini was to curry
Richardson's support for Massini's upcoming
re-election bid. But zealous prosecution, is
not sufficient to raise a triable issue of

1 conspiracy with the citizen complainant. A
2 relationship of cause and effect between the
3 complaint and the prosecution is not
4 sufficient, or every citizen who complained
5 to a prosecutor would find himself in a
6 conspiracy. The plaintiffs must provide
7 evidence of 'an agreement or meeting of the
8 minds to violate constitutional rights.'

9 Plaintiff's argument that the prosecutor relied on Abbate's
10 spreadsheet as evidence of conspiracy to prosecute Plaintiff
11 without probable cause is unsupported. Abbate's spreadsheet was
12 ruled inadmissible at the preliminary hearing. It was the
13 Cassabon report that was admitted at trial. There is no evidence
14 that Abbate and Hutton worked together to obtain a false
15 statement from Aceves; Aceves' deposition testimony and the
16 report of the interview of Aceves by Abbate and Hutton establish
17 the contrary. Hutton's report to the prosecutor contained
18 Hutton's report and the transcript of the meeting between Aceves,
19 Abbate and Hutton, which shows that Aceves mentioned Plaintiff
20 first, not Abbate. The fact that the District Attorney's Office
21 decided to investigate the claim of embezzlement after a brief
22 meeting and without knowing the magnitude of the embezzlement
23 means is not wrongful given that Aceves had told Abbate that
24 Aceves had been embezzling from Yosemite Chevron and that Fenters
25 had told him how to do it.

26 Summary judgment for Defendants is GRANTED as to Plaintiff's
claim of conspiracy.

F. THIRD CAUSE OF ACTION FOR VIOLATION OF CALIFORNIA CIVIL

1 CODE § 52.1.³

2 The Third Cause of Action is pursuant to California Civil
3 Code § 52.1 against the Abbate Defendants and the Cassabon
4 Defendants and alleges in pertinent part:

5 45. The defendants' intentional and reckless
6 acts, as described above, constitute a
7 deprivation of plaintiff['s] ... rights,
8 privileges and immunities under both article
9 I of the California Constitution and the
10 Fourth Amendment, specifically, her rights
11 not to have her liberty restricted without
12 legal basis, to be arrested without probable
13 cause, and to be prosecuted maliciously
14 without probable cause. The defendants'
15 interference with these constitutional rights
16 was accomplished by means of force, coercion,
17 and intimidation, and/or the threat thereof.
18 Plaintiff clarifies that the defendants'
19 liability under this cause of action is not
20 based on the privileged acts of reporting
21 criminal activity and/or testifying in court,
22 but, rather, fabricating evidence used to
23 justify the filing and continuation of
24 baseless criminal charges, as set forth
25 hereinabove.

16 Defendants move for summary judgment as to the Third Cause

18 ³California Civil Code § 52.1(b) provides that "[a]ny
19 individual whose exercise or enjoyment of rights secured by the
20 Constitution or laws of the United States, or of rights secured by
21 the Constitution or laws of this state, has been interfered with,
22 or attempted to be interfered with, as described in subdivision
23 (b), may institute and prosecute ... a civil action for damages,
24 including, but not limited to, damages under Section 52, injunctive
25 relief, and other appropriate equitable relief to protect the
26 peaceable exercise or enjoyment of the right or rights secured."
Section 52.1(a) provides for an action by the Attorney General,
district attorney or city attorney "[i]f a person or persons,
whether or not acting under color of law, interferes by threats,
intimidation, or coercion, or attempts to interfere by threats,
intimidation, or coercion, with the exercise or enjoyment by any
individual ... of rights secured by the Constitution or laws of the
United States, or the rights secured by the Constitution or laws of
this state"

1 of Action on the grounds that the cause of action is barred by
2 the statute of limitations; there is no evidence that Abbate
3 threatened, intimidated or coerced Plaintiff; and the cause of
4 action is barred by the litigation privilege set forth in Civil
5 Code § 47(b) .

6 1. Statute of Limitations.

7 Defendants contend that the Third Cause of Action is barred
8 by the one year statute of limitations applicable to Section
9 52.1, citing *Gatto v. County of Sonoma*, 98 Cal.App.4th 744
10 (2002). In *Gatto*, the Court ruled:

11 Gatto's complaint relies entirely on
12 allegations of the denial of full and equal
13 access to public accommodations guaranteed
14 under section 51, subdivision (b) [of the
15 Civil Code] and free speech guaranteed under
16 article I, section 2 of the California
17 Constitution, which Gatto seeks to enforce
18 under section 52.1. As we have seen, the
19 first claim clearly derives from common law
20 principles and is for that reason subject to
21 the one-year statute. The second is
22 analogous to a federal claim for personal
23 injury under 42 United States Code section
24 1983 which ... sounds in tort ... and this
25 claim is therefore also subject to the one-
26 year claim.

27 The July 14, 2006 Order re Defendants' motions to dismiss
28 the Complaint, notes:

29 In their brief, these defendants refer to the
30 "two-year" statute of limitations set forth
31 in CCP § 340. However, Section 340 sets
32 forth the one-year statute of limitations.
33 Because *Gatto* also refers to the one-year
34 statute of limitations applicable to actions
35 under Section 1983 as being the limitations
36 applicable to claims under Civil Code § 52.1,
37 it is apparent that the reference in the
38 brief to CCP § 340 is a typographical error.

1 Effective January 1, 2003, California Code of
2 Civil Procedure § 335.1 provides for a two-
3 year statute of limitations for "an action
4 for assault, battery, or injury to, or for
5 the death of an individual caused by the
6 wrongful act or neglect of another." For
7 actions under 42 U.S.C. § 1983, the Ninth
8 Circuit applies the forum state's statute of
9 limitations for personal injury actions.
10 *Jonas v. Blanas*, 393 F.3d 918, 927 (9th
11 Cir.2004). Therefore, the Abbate Defendants
12 should have referred to the two-year statute
13 of limitations set forth in CCP § 335.1.

14 Consequently, Defendants' contention that the Third Cause of
15 Action is subject to a one-year statute of limitation based on
16 *Gatto* has been rejected by the Court. Defendants' motion for
17 summary judgment based on the bar of the statute of limitations
18 is DENIED.

19 2. Threats or Coercion.

20 Defendants move for summary judgment on the ground that
21 there is no evidence that Abbate threatened or coerced Plaintiff.

22 In *Jones v. Kmart Corp.*, 17 Cal.4th 329, 334 (1998), the
23 California Supreme Court explained that "section 52.1 does
24 require an attempted or completed act of interference with a
25 legal right, accompanied by a form of coercion." See also
26 *Venegas v. County of Los Angeles*, 32 Cal.4th 820, 843 (2004) ("the
language of section 52.1 provides remedies for 'certain
misconduct that interferes with' federal or state laws, if
accompanied by threats, intimidation, or coercion, and whether or
not state action is involved."). In *Venegas*, the California
Supreme Court explained:

In *Jones v. Kmart Corp.* . . . , we acknowledged

1 that Civil Code section 52.1 was adopted 'to
2 stem a tide of hate crimes.' But contrary to
3 the County's position, our statement did not
4 suggest that section 52.1 was limited to such
5 crimes, or required plaintiffs to demonstrate
6 that County or its officers had a
7 discriminatory purpose in harassing them,
8 that is, that they committed an actual hate
9 crime. We continued in *Jones* by simply
10 observing that the language of section 52.1
11 provides remedies for 'certain misconduct
12 that interferes with' federal or state laws,
13 if accompanied by threats, intimidation, or
14 coercion, and whether or not state action is
15 involved.

9 *Id.* at 843. "The essence of a Bane Act claim is that the
10 defendant, by the specified improper means (i.e., 'threats,
11 intimidation or coercion'), tried to or did prevent the plaintiff
12 from doing something he or she had the right to do under the law
13 or to force the plaintiff to do something that he or she was not
14 required to do under the law." *Austin B. v. Escondido Union*
15 *School Dist.*, 149 Cal.App.4th 860, 883 (2007).

16 *Kincaid v. City of Fresno*, 2008 WL 2038390 (E.D.Cal.2008),
17 included a concession that the California Supreme Court has not
18 defined the terms "threats, intimidation, or coercion, or
19 attempts to interfere by threats, intimidation, or coercion."
20 The Court referred to a decision by the Massachusetts Supreme
21 Judicial Court, construing language in a statute that formed the
22 model for the Bane Act:

23 [A] 'threat' consists of the intentional
24 exertion of pressure to make another fearful
25 or apprehensive of injury or harm.
26 'Intimidation' involves putting in fear for
the purpose of compelling or deterring
conduct. 'Coercion' is the application to
another of such force, either physical or

1 moral, as to constrain him to do against his
2 will something he would not otherwise have
3 done.

3 *Haufler v. Zotos*, 845 N.E.2d 322, 335-336 (Mass.2006).

4 Plaintiff responds that there is evidence that Abbate
5 coerced Aceves to give a statement implicating Plaintiff and that
6 Aceves told the prosecutor that he felt pressured by Abbate in
7 this regard. Plaintiff argues that evidence that Abbate
8 misrepresented and "fabricated" evidence against Plaintiff raised
9 the continuous prospect of her conviction and incarceration,
10 which Plaintiff testified threatened her. Plaintiff cites
11 *McCalden v. California Library Association*, 955 F.2d 1214 (9th
12 Cir.1989), *cert. denied*, 504 U.S. 957 (1992) as "finding a claim
13 for a violation of California Civil Code § 51.7 sufficient,
14 although it alleged non-contemporaneous intimidating conduct that
15 was not even conveyed directly to the victim."

16 In *McCalden*, the Ninth Circuit addressed the district
17 court's dismissal with prejudice of the claim by McCalden, a
18 self-described "Holocaust revisionist", under California Civil
19 Code § 51.7 on the ground that the complaint did not sufficiently
20 allege intimidation by threat of violence committed to
21 plaintiff's person or property as required by Section 51.7.
22 Section 51.7(a), as amended in 1984, provided in relevant part:

23 All persons within the jurisdiction of this
24 state have the right to be free from any
25 violence, or intimidation by threat of
26 violence, committed against their persons or
property because of their race, color,
religion, ancestry, national origin,
political affiliation, sex, sexual

1 orientation, age, disability, or position in
2 a labor dispute. The identification in this
3 subdivision of particular bases of
discrimination is illustrative only rather
than restrictive.

4 The Ninth Circuit ruled:

5 Liberally construed, the complaint contains
6 one allegation of a specific threat - the
7 AJC's alleged statement to the CLA, 'at the
8 urging and request and with the knowledge,
9 approval and cooperation of Defendants Marvin
10 Hier ... and Simon Wiesenthal Center' that if
11 the contract with appellants were not
12 canceled, "[d]efendant CLA's 1984 Annual
13 Conference would be disrupted, there would be
14 damage to property and the CLA would be
15 'wiped out.'" ... Appellees claim that this
16 language can be construed only as a threat
17 against the CLA, not against the person or
18 property of appellant. They cite *Coon v.*
19 *Joseph*, 192 Cal.App.3d 1269 ... (1987), in
20 which the court held that the plaintiff, a
21 gay man, could not state a § 51.7 claim
22 against a bus driver by alleging that his
23 lover was verbally abused and struck in his
24 presence. The court stated:

25 The complaint establishes that no
26 violence or intimidation was
committed or threatened against
[plaintiff's] person and thus no
cause of action exists in his own
right. Following [plaintiff's]
argument, any person would have the
right to recover damages for
himself or herself whenever the
rights of any other human being of
similar ... sexual orientation were
threatened.

27 *Id.* at 1277-78

28 On a motion to dismiss, all reasonable
29 inferences are to be drawn in favor of the
30 non-moving party ... Appellant alleges that
31 the appellees intended to disrupt his
32 presentation by creating a demonstration that
33 appellees knew and intended 'would create a
34 reasonable probability of property damage and

1 of violence against Plaintiff and members of
2 Defendant CLA.' ... In view of all the facts
3 pled, it is reasonable to infer that any
4 property damage or injury threatened could be
5 directed against appellant, because the
6 allegations clearly link the alleged threat
7 to an intent to disrupt appellant's exhibit
8 and program. This case must therefore be
9 distinguished from *Coon*, because it can be
10 reasonably inferred from the complaint that
11 the threatened violence was directed against
12 appellant.

13 Although appellees suggest that the statute
14 must be read as requiring the threat to be
15 conveyed directly to the person threatened,
16 the statute only requires that the plaintiff
17 be intimidated by threat of violence
18 committed against his person or property. In
19 construing a remedial statute, on a motion to
20 dismiss, in the absence of clear state court
21 direction, this court is reluctant to read
22 any unnecessary restrictions into § 51.7.

23 955 F.2d at 1221-1222.

24 Plaintiff argues that, because Section 52.1 does not require
25 proof of animus against the plaintiff, "[i]t would therefore make
26 little sense that the more general Bane Act would require a
27 closer nexus between the perpetrator's threatening acts and the
28 constitutional violation than does the Unruh Act." Contending
29 that Section 52.1 is a more general statute that should be
30 construed more broadly, Plaintiff argues:

31 [The] allegations that she was for the
32 duration of the prosecution against her,
33 subject to a legitimate threat of
34 prosecution, i.e., a loss of liberty, her
35 allegations under section 52.1 are
36 sufficient. Indeed, the defendants by
37 causing plaintiff's prosecution and raising
38 the prospect of her imprisonment, committed
39 acts that were inherently coercive and
40 threatening.

1 Aceves' deposition testimony and the record of his interview
2 with Abbate and Hutton establishes that Abbate did not coerce
3 Aceves to give a statement implicating Plaintiff in the alleged
4 embezzlement. However, there is evidence from which it may be
5 inferred that Abbate did not give Hutton complete financial and
6 other information during the course of his investigation. If the
7 trier of fact determines that Abbate was pursuing the criminal
8 prosecution to threaten and intimidate Plaintiff to deter her
9 from bringing claims related to her employment, the case
10 authority cited above permits an inference of conduct prohibited
11 by Section 52.1. Summary judgment on this ground is DENIED.

12 3. Civil Code § 47(b) Privilege.

13 Defendants move for summary judgment as to the Third Cause
14 of Action on the ground that Plaintiff's claim is barred by the
15 litigation privilege set forth in California Civil Code § 47(b).

16 Section 47(b) bars a civil action for damages based on
17 statements made in any judicial proceeding, in any official
18 proceeding authorized by law, or in the initiation or course of
19 any mandate-reviewable proceedings authorized by law. The
20 litigation privilege provided in Section 47(b) applies to any
21 communication (1) made in judicial or quasi-judicial proceedings;
22 (2) by litigants or other participants authorized by law; (3) to
23 achieve the objects of the litigation; and (4) that have some
24 connection or logical relation to the action. *A.F. Brown Elec.*
25 *Contractor, Inc. v. Rhino Elec.*, 137 Cal.App.4th 1118, 1126
26 (2006). Section 47(b) establishes an absolute privilege for such

1 statements and bars all tort causes of action based on them
2 except a cause of action for malicious prosecution. *Hagberg v.*
3 *California Federal Bank*, 32 Cal.4th 350, 360 (2004). ``Section
4 47 gives all persons the right to report crimes to the police,
5 the local prosecutor or an appropriate regulatory agency, even if
6 the report is made in bad faith.''' *Hagberg, id.* at 365. ``[A]
7 communication concerning possible wrongdoing, made to an official
8 governmental agency such as a local police department, and which
9 communication is designed to prompt action by that entity is as
10 much a part of an "official proceeding" as a communication made
11 after an official investigation has commenced ... After all,
12 '[t]he policy underlying the privilege is to assure utmost
13 freedom of communication between citizens and public authorities
14 whose responsibility it is to investigate and remedy wrongdoing.'
15 ... The importance of providing to citizens free and open access
16 to governmental agencies for the reporting of suspected criminal
17 activity outweighs the occasional harm that might befall a
18 defamed individual. Thus the absolute privilege is essential.'''
19 *Id.* at 364-365. Section 47(b)'s absolute privilege applies to
20 "communications intended to instigate official investigation into
21 [suspected] wrongdoing." *Id.* at 369. Statements made to prompt
22 an official investigation that may result in the initiation of
23 judicial proceedings also fall within the privilege set forth in
24 Section 47(b). *Id.* at 361-36.

25 Plaintiff responds that, to the extent the Third Cause of
26 Action alleges an unconstitutional malicious prosecution claim

1 under Section 52.1, it is not barred by the Section 47(b)
2 privilege. Plaintiff asserts that she "has found no case where a
3 malicious prosecution claim and/or a section 52.1 claim based on
4 malicious prosecution was dismissed based on an application of
5 section 47(b)."

6 In *Hagberg*, the plaintiff filed a complaint alleging claims
7 for false arrest, false imprisonment, slander, invasion of
8 privacy, intentional infliction of emotional distress, and race
9 discrimination in violation of the Unruh Civil Rights Act, Civil
10 Code §§ 51 and 52.1. The Supreme Court refused to address the
11 plaintiff's contention that Section 47(b) should not be
12 interpreted to bar liability where it is alleged that a business
13 establishment's communication to the police concerning suspected
14 criminal activity was motivated by racial or ethnic prejudice and
15 therefore constituted unlawful discrimination by the business
16 establishment in violation of the Unruh Civil Rights Act, because
17 the plaintiff's evidence did not suffice to raise a question of
18 fact that defendants were motivated by racial or ethnic
19 prejudice. 32 Cal.4th at 375-376. No case since *Hagberg*
20 discusses application of Section 47(b) to a claim for violation
21 of Section 52.1.

22 Summary judgment on this ground is DENIED.

23 G. FOURTH CAUSE OF ACTION FOR MALICIOUS PROSECUTION.

24 The Fourth Cause of Action is for malicious prosecution
25 under California common law against the Abbate Defendants and the
26 Cassabon Defendants and alleges in pertinent part:

1 49. The defendants' intentional and reckless
2 acts, as described above, caused plaintiff
3 ... to be maliciously prosecuted without
4 probable cause or other legal basis.
5 Plaintiff was acquitted at trial. Plaintiff
6 clarifies that the defendants' liability
7 under this cause of action is not based on
8 the privileged acts of reporting criminal
9 activity and/or testifying in court, but,
10 rather, fabricating evidence used to justify
11 the filing and continuation of baseless
12 criminal charges, as set forth hereinabove.

13 Defendants move for summary judgment as to the Fourth Cause
14 of Action for malicious prosecution on the ground that the
15 District Attorney's Office acted with independent discretion.

16 "To establish a cause of action for malicious prosecution, a
17 plaintiff must demonstrate that the prior action (1) was
18 initiated by or at the direction of the defendant and legally
19 terminated in the plaintiff's favor, (2) was brought without
20 probable cause, and (3) was initiated with malice." *Siebel v.*
21 *Mittlesteadt*, 41 Cal.4th 735, 740 (2007).

22 Defendants cite *Hogan v. Valley Hospital*, 147 Cal.App.3d 119
23 (1983). In *Hogan*, a doctor brought a malicious prosecution
24 action against certain hospitals and another doctor in which it
25 was alleged that defendants had filed a false report with the
26 Board of Medical Quality Assurance, which resulted in the filing
of charges against plaintiff. At the conclusion of the hearing
before the Board of Medical Quality Assurance, it was found that
no cause existed for the suspension or revocation of plaintiff's
medical certificate. The trial court sustained without leave to
amend a demurrer to plaintiff's complaint on the grounds that the

1 communication from the hospitals were absolutely privileged under
2 Section 47, that the Board had discretion to determine whether to
3 file charges against plaintiff, and thus defendants were not
4 responsible for the Board's ultimate decision to bring charges.
5 The Court of Appeal affirmed, holding that although defendants
6 would have been afforded absolute protection under Section 47 for
7 an action for libel or slander, no such absolute privilege is
8 afforded with respect to an action for malicious prosecution.
9 The Court held that the trial court properly sustained the
10 demurrer on the ground that the Board had conducted an
11 independent investigation and determination prior to proceeding
12 on the complaint, that it was the board, not defendants who
13 initiated or procured the disciplinary proceedings against the
14 plaintiff, and therefore plaintiff failed to allege the elements
15 required to establish an action for malicious prosecution:

16 The BMQA is similar to the State Bar
17 Association. Each is empowered and directed
18 to conduct an independent investigation of
19 all complaints from the public prior to the
20 filing of an accusation. (Bus. & Prof. Code,
21 § 2200; Gov. Code, §§ 11500-11528). As a
22 consequence, we are persuaded by the
23 reasoning of *Stanwyck* and *Werner* that
24 inasmuch as the BMQA conducted an independent
25 investigation and determined prior to
26 proceeding on the complaint, it was the BMQA,
27 not respondents, who initiated or procured
28 the disciplinary proceedings against
29 appellant. Therefore, appellant failed to
30 allege the elements required to establish an
31 action for malicious prosecution.

32 *Johnson v. Superior Court*, 25 Cal.App.4th 1564 (1994). In
33 *Johnson*, a psychologist sued expert consultants for malicious

1 prosecution in connection with disciplinary proceedings by the
2 California Board of Psychology and Board of Behavioral Science
3 Examiners against plaintiff. The Court of Appeal affirmed that
4 plaintiff did not state a claim for malicious prosecution because
5 it was the Boards, not the expert consultants, who filed the
6 disciplinary proceedings against the plaintiff. *Id.* at 1571.
7 *See also Stanwyck v. Horne*, 146 Cal.App.3d 450, 452
8 (1983) (independent investigation by State Bar presumed).

9 Plaintiff argues that the evidence is disputed whether the
10 District Attorney's Office conducted an independent
11 investigation, contending that there is evidence that Abbate
12 influenced the investigation by "making contrived allegations of
13 embezzlement against Fenters which he bolstered with a
14 fabricated, misleading spreadsheet and a coerced statement from
15 Aceves." Plaintiff asserts that there is evidence that Abbate
16 "withheld crucial information pertaining to how many employees
17 used the register on a given shift and Robert Wilson's being
18 fired for stealing from Fenters."

19 Aceves' deposition testimony establishes that Aceves was not
20 coerced by Abbate to make the statements he made to Abbate and
21 Hutton. However, there is evidence from which it may be inferred
22 that Abbate did not provide the described evidence to Hutton.
23 Summary judgment as to the Fourth Cause of Action is DENIED.

24 H. FIFTH CAUSE OF ACTION FOR VIOLATION OF 29 U.S.C. §§ 201
25 *et seq.*

26 The Fifth Cause of Action is alleged against the Abbate

1 Defendants pursuant to 29 U.S.C. § 201 *et seq.*:

2 52. By refusing to pay plaintiff ...
3 overtime and other compensation to which she
4 was clearly entitled, the defendants have
5 denied her wages that she earned during her
6 employment. The defendants are subject to
7 the terms of this statute, as they are
8 engaged interstate commerce.

9 53. The foregoing actions are in violation
10 of 29 U.S.C. § 201, *et seq.*, and dictate that
11 the defendants are liable to the plaintiff.
12 Moreover, the defendants' violation of
13 plaintiff's federal overtime and compensation
14 rights was willful and thus entitles her to
15 additional liquidated damages.

16 Defendants move for summary judgment as to Plaintiff's claim
17 that "[b]y refusing to pay plaintiff ... overtime and other
18 compensation to which she was clearly entitled, the defendants
19 have denied her wages that she earned during her employment" in
20 violation of 29 U.S.C. § 201 *et seq.*

21 Defendants refer to Plaintiff's deposition testimony that
22 Fenters has no evidence to show that Yosemite Chevron's timecards
23 are inaccurate; that she could not identify any specific date
24 that she was not paid for overtime; that she could not identify
25 any specific hour of overtime that she has not been paid for by
26 Yosemite Chevron; and her testimony that there could be zero
hours of overtime that have been unpaid. In addition, Defendants
refer to evidence that Yosemite Chevron paid all required
overtime under the laws of California based on the time cards
submitted by Plaintiff.

Plaintiff argues that summary judgment is not appropriate
because she testified at her deposition that she was not paid

1 time and a half for overtime, even if she could not at her
2 deposition provide a calculation as to that time.

3 An employee seeking to recover unpaid minimum wages or
4 overtime under the FLSA "has the burden of proving that he
5 performed work for which he was not properly compensated."

6 *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946).

7 In view of the remedial purposes of the FLSA and the employer's
8 statutory obligation "to keep proper records of wages, hours and
9 other conditions and practices of employment," this burden is not

10 to be "an impossible hurdle for the employee." *Id.* If an

11 employee establishes that overtime hours and wages were not

12 recorded by the employer as required by the FLSA, "an employee

13 has carried out his burden if he proves that he has in fact

14 performed work for which he was improperly compensated and if he

15 produces sufficient evidence to show the amount and extent of

16 that work as a matter of a just and reasonable inference. *Id.*

17 The burden then shifts to the employer to show the precise number

18 of hours worked or to present evidence sufficient to negate "the

19 reasonableness of the inference to be drawn from the employee's

20 evidence." *Id.* at 688. If the employer fails to make such a

21 showing, the court "may then award damages to the employee, even

22 though the result be only approximate." *Id.*

23 Summary judgment is GRANTED as to the Fifth Cause of Action.

24 Plaintiff's conclusory deposition testimony that she was not paid

25 overtime and the absence of evidence that Yosemite Chevron's

26 timecards are inaccurate fail to make a prima facie case. She

1 has no evidence as to dates or times proving that she worked any
2 uncompensated overtime hours as a matter of reasonable inference.
3 She testified at her deposition that there could be zero
4 hours of overtime that have been unpaid.⁴

5 I. SIXTH CAUSE OF ACTION FOR VIOLATION OF 29 U.S.C. § 215.

6 The Sixth Cause of Action is against the Abbate Defendants
7 for violation of 29 U.S.C. § 215 *et seq.*:

8 55. By retaliating against plaintiff ... for
9 her complaining about the denial of her
10 compensation and overtime rights, the
11 defendants have violated the anti-retaliation
12 provision of the Fair Labor Standards Act, 29
13 U.S.C. §§ 215, 219. The defendants are
14 subject to the terms of this statute, as they
15 are engaged in interstate commerce.

16 56. There was no valid, good faith basis to
17 retaliate against the plaintiff, and her
18 engaging in activity protected by the Fair
19 Labor Standards Act was a motivating factor
20 in their retaliation. Plaintiff was in all
21 respects qualified for her position and was
22 performing well.

23 Defendants move for summary judgment as to the Sixth Cause
24 of Action. 29 U.S.C. § 215(a)(3) provides that it is unlawful
25 for any person "to discharge or in any other manner discriminate
26 against any employee because such employee has filed any
complaint or instituted or caused to be instituted in any
proceeding under or related to this chapter, or has testified or
is about to testify in any such proceeding"⁵

24 ⁴This ruling makes unnecessary Defendants' alternative ground
25 for summary judgment based on the statute of limitations.

26 ⁵Plaintiff asserts that she complained to Abbate about sexual
harassment by another employee. This is not alleged in the Sixth
Cause of Action. Further, no legal authority has been discovered

1 Defendants move for summary judgment on the ground that
2 Plaintiff failed to exhaust administrative remedies before
3 bringing this cause of action.

4 *Lambert v. Ackerley*, 180 F.3d 997, 1002-1008 (9th Cir.1999),
5 *cert. denied*, 528 U.S. 1116 (2000), rejected the position that
6 the antiretaliation provision of Section 215(a)(3) extends only
7 to those employees who filed formal proceedings with the
8 Department of Labor, holding that "§ 215(a)(3) protects from
9 retaliation employees who complain to their employer about
10 alleged violations of the Act."

11 Defendants' motion for summary judgment on this ground is
12 DENIED.

13 As explained in *Wolf v. Coca-Cola Co.*, 200 F.3d 1337, 1342-
14 1343 (11th Cir.2000):

15 A prima facie case of FLSA retaliation
16 requires a demonstration by the plaintiff of
17 the following: '(1) she engaged in activity
18 protected under [the] act; (2) she
19 subsequently suffered adverse action by the
20 employer; and (3) a causal connection existed
21 between the employee's activity and the
22 adverse action.' ... If the employer asserts
23 a legitimate reason for the adverse action,
24 the plaintiff may attempt to show pretext ...
25 In demonstrating causation, the plaintiff
26 must prove that the adverse action would not
have been taken 'but for' the assertion of
FLSA rights.

27 Defendants argue that Plaintiff has no evidence that she

28 that allows a Section 215 claim of retaliation based on a complaint
29 of sexual harassment; such a claim is covered by Title VII.
30 Plaintiff cannot proceed under the Sixth Cause of Action for her
31 assertion that she complained to Abbate about the sexual harassment
32 by Montes.

1 "subsequently suffered an adverse action" by Yosemite Chevron
2 after allegedly making complaints to Abbate about wage and
3 overtime issues. Defendants note that Plaintiff resigned her
4 employment at Yosemite Chevron on March 28, 2003.

5 In *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir.2000), a
6 case involving Title VII, the Ninth Circuit held that "an action
7 is cognizable as an adverse employment action if it is reasonably
8 likely to deter employees from engaging in protected activity."⁶

9
10 ⁶In *Vasquez v. County of Los Angeles*, 307 F.3d 884, 891 (9th
11 Cir.2002), held that "the proper inquiry is to view the action
12 objectively to determine whether it was adverse" and that "a purely
13 subjective analysis is not appropriate when deciding whether an
14 employment action was adverse." However, the 2002 *Vasquez* opinion
15 was withdrawn and superceded by *Vasquez v. County of Los Angeles*,
16 349 F.3d 634, 646 (9th Cir.2003). The Ninth Circuit, discussing the
17 prima facie case analysis, stated:

18 This analysis requires us to examine
19 separately whether the 'adverse employment
20 action' is considered through an objective or
21 subjective lens. We addressed this question,
22 at least in passing, in *Ray v. Henderson*. We
23 adopted the EEOC standard from its compliance
24 manual, and held that 'an action is cognizable
25 as an adverse employment action if it is
26 reasonably likely to deter employees from
engaging in protected activity.' In context,
this is, at least in part, a subjective
standard because the EEOC manual speaks of
'any adverse treatment that is based on a
retaliatory motive and is reasonably likely to
deter the charging party or others from
engaging in protected activity.'"

Including behavior of the charging party in
the standard removes it from the hypothetical
'reasonable employee' approach and makes it
more subjective. Of course, it is not
entirely subjective as the conduct must be
'reasonably likely' to deter the protected
activity, even by the charging party.

1 Defendants argue that Plaintiff offers no legal authority to
2 support her claim that reporting a suspected crime to law
3 enforcement constitutes an adverse employment action, especially
4 when Plaintiff had already resigned before the suspected criminal
5 conduct was reported.

6 Plaintiff cites *E.E.O.C. v. Nalbandian Sales, Inc.*, 36
7 F.Supp.2d 1206, 1211 (E.D.Cal.1998), a case involving Title VII,
8 as supporting the conclusion that evidence Plaintiff resigned
9 because her complaints to Abbate about wage and hour, overtime,
10 reimbursement and sexual harassment issues and then was wrongly
11 prosecuted for embezzlement based on allegedly false and
12 fabricated evidence is sufficient to state a claim for relief
13 under Section 215.

14 In *Nalbandian Sales*, the plaintiff alleged that a former
15 employer refused to rehire the employee in retaliation for a
16 discrimination claim filed by the employee's sister. The Court
17 ruled that "this court exercises authority to broadly interpret
18 federal remedial legislation in order to effectuate the statute's
19 overarching purposes. The majority of courts, including the
20 Supreme Court 'have been willing to construe Title VII and
21 companion provisions under the Fair Labor Standards Act, 29

22
23 For purposes of analysis, we will assume that
24 the transfer met the Ray standard. However,
25 this does not save Vasquez's retaliation claim
26 because he has failed to show a causal link.

1 U.S.C. § 215(a) (3) ... broadly in order not to frustrate the
2 purposes of these Acts, which is to prevent fear of economic
3 retaliation from inducing employees "quietly to accept [unlawful]
4 conditions." 36 F.Supp.2d at 1211.

5 Summary judgment for Defendants on the Sixth Cause of Action
6 is GRANTED; there is no evidence from which it may be inferred
7 that the Abbate Defendants filed a criminal complaint against
8 Plaintiff based on her alleged complaints concerning wage and
9 hour, overtime, and reimbursement issues. Plaintiff had already
10 resigned her employment before the alleged embezzlement was
11 discovered.

12 CONCLUSION

13 For the reasons stated:

14 1. Defendants Yosemite Chevron, Abbco Investments, LLC, and
15 Robert Abbate's motion for summary judgment is GRANTED IN PART
16 AND DENIED IN PART;

17 2. Counsel for the Abbate Defendants shall prepare and
18 lodge a form of order that the rulings set forth in this
19 Memorandum Decision within five (5) days following the date of
20 service of this decision;

21 3. Consistent with Rule 56(d) (1), both parties shall have
22 five (5) days following service of this decision to file a list
23 of material facts which each party believes are not genuinely
24 issues for purposes of trial. If separately filed by the
25 parties, these lists shall not exceed five pages. To the extent
26 practicable, the parties shall meet and confer to determine

1 whether and to what extent any material facts are agreed upon for
2 purposes of trial. Agreed upon facts should be listed in a joint
3 filing.

4 IT IS SO ORDERED.

5 Dated: December 29, 2010

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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