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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

MAGDA GONZALEZ, et al.,
Plaintiffs,

vs.

COMPASS VISION, INC., et al.,
Defendants.

COMPASS VISION, INC.
Third-Party Plaintiff/Counterdefendant,

vs.

MAXIMUS, INC.
Third-Party Defendant/Counterclaimant.

DEBORAH JEAN SMITH AND JENNIFER
JEAN MCKEE,
Plaintiffs,

vs.

COMPASS VISION, INC. et al.

COMPASS VISION, INC.
Third-Party Plaintiff/Counterdefendant,

vs.

MAXIMUS, INC.
Third-Party Defendant/Counterclaimant.

CASE NOS. 07cv1951 BEN (AJB)
08cv1684 BEN (AJB)

**ORDER GRANTING MAXIMUS'
MOTIONS FOR SUMMARY
JUDGMENT**

[Dkt. Nos. 180, 181, 202 in 07cv1951]

[Dkt. Nos. 138, 139, 151 in 08cv1684]

1 Maximus did not promote the use of EtG testing, decide to implement EtG testing, or set the
2 cut-off levels used to determine if a test was positive. (JSUMF ¶¶ 9, 11.) Maximus did not determine
3 if a given test was positive or negative or decide if any action should be taken against the participant.
4 (JSUMF ¶ 9.) Rather, Compass informed Maximus if a test result was positive. (JSUMF ¶ 10.) After
5 testing began, Maximus proposed a higher cut-off level. (JSUMF ¶ 39.) Compass responded to the
6 proposal by telling the Boards that the test would not be worth using with a cut-off above 250 ng/mL.
7 (JSUMF ¶ 40.)

8 Compass was responsible for reporting information associated with positive tests. (JSUMF
9 ¶ 41.) “Maximus was a ‘middle man’ gathering and transmitting the test scores to the Board.”
10 (JSUMF ¶¶ 41, 50.) Maximus did not determine if the test met the cut-off levels, rather the lab
11 determined if a result was positive, subject to confirmation by Compass’ MRO. (JSUMF ¶ 41.)
12 “There is absolutely no causal link between MAXIMUS’ administration of the Program and the
13 alleged ‘harm to reputation’ and professional discipline, if any, imposed against the individual
14 Plaintiffs’ licenses.” (JSUMF ¶ 54.)

15 The contract between Compass and Maximus contained an indemnification provision. Under
16 the indemnification provision, Maximus agrees to

17 indemnify and hold COMPASS VISION harmless from and against any and all
18 claims, losses, liabilities or expenses (including without limitation attorneys’
19 fees) which may arise, in whole or in part, out of (I) the negligence or willful
20 misconduct of MAXIMUS, its employees or agents or (II) a breach by
21 MAXIMUS of its obligations under this Agreement.

22 DISCUSSION

23 Summary judgment should be granted when “the pleadings, the discovery and disclosure
24 materials on file, and any affidavits show that there is no genuine issue of material fact and that the
25 movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c).

26 While Compass asserts four separate claims, it is essentially seeking indemnity for Maximus’
27 negligence in its role with the diversionary programs.³ Compass claims that this litigation resulted

28 ³Compass’ breach of contract claim is based only on breach of the indemnity provision of the
contract between Compass and Maximus and Compass’ contractual indemnity claim relies on the
indemnity provision indemnifying Compass for Maximus’ negligence or willful misconduct.

1 from Maximus' negligence in the performance of its obligations under the programs, causing Compass
2 to be named as a defendant in this litigation and to incur attorneys' fees, costs, and potential liability
3 to the Plaintiffs. Maximus claims it is entitled to summary judgment because Compass cannot
4 establish Maximus caused any of the Plaintiffs' damages.

5 Maximus has met its initial burden on summary judgment. Maximus has produced evidence
6 by way of the parties' Joint Statement of Undisputed Material Facts that negates an essential element
7 of Compass' claims, specifically causation, and pointed to the absence of evidence to support
8 Compass' claims, specifically the absence of any evidence Maximus' conduct caused any of the
9 damages Plaintiffs seek to recover from Compass. *See Nissan Fire & Marine Ins. Co.*, 210 F.3d at
10 1102; *see also McGarry v. Sax*, 158 Cal. App. 4th 983, 995 (3rd Dist. 2008) (the elements of
11 negligence are duty, breach of the duty, *proximate cause*, and damages.).

12 Because Maximus met its initial burden, the burden shifted to Compass to present evidence
13 of negligent conduct by Maximus that caused the harm Plaintiffs allege. *Nissan Fire & Marine Ins.*
14 *Co.*, 210 F.3d at 1103. Plaintiffs allege that their damages resulted from the promotion and use of EtG
15 testing as a reliable method of detecting the consumption of alcohol when it was unreliable for that
16 purpose. "If [Compass] fails to produce enough evidence to create a genuine issue of material fact,
17 [Maximus] wins the motion for summary judgment." *Id.* Compass has failed to meet its burden in
18 two ways.

19 First, the undisputed facts Compass stipulated to preclude its claims.⁴ To establish causation,
20 Compass must prove that Maximus' conduct was "a substantial factor in bringing about the Plaintiffs'
21 harm." *Leslie G. v. Perry & Assocs.*, 43 Cal. App. 4th 472, 481 (2nd Dist. 1996) ("[T]he causation
22 element of negligence is satisfied when the plaintiff establishes (1) that the defendant's breach of duty
23 (his negligent act or omission) was a substantial factor in bringing about the plaintiff's harm and (2)
24 that there is no rule of law relieving the defendant of liability.").

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27 ⁴Compass is bound by the stipulated facts. "Litigants, we have long recognized, 'are entitled
28 to have their case tried upon the assumption that . . . facts, stipulated into the record, were
established.'" *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2983 (2010) (quoting *H. Hackfeld
& Co. v. United States*, 197 U.S. 442, 447 (1905)).

1 Compass has stipulated that Maximus did not promote the use of EtG testing, implement EtG
2 testing, set the cut-off levels used to establish a positive result, interpret test results, or determine if
3 tests were positive or negative. "Maximus was a 'middle man'" that simply transmitted the test scores
4 to the Boards. When Maximus suggested a higher cut-off level, Compass responded by telling the
5 Boards that using a cut-off less than 250 ng/mL would not be worth using. And, significantly,
6 Compass has agreed that there is "absolutely no causal link between Maximus' administration of the
7 Program and the alleged 'harm to reputation' and professional discipline . . . imposed against the
8 individual Plaintiffs' licenses." These facts collectively establish that there is no causal link between
9 Maximus and the damages Plaintiffs allege they suffered. Accordingly, Maximus is entitled to
10 summary judgment against Compass.

11 Second, even if Compass had not stipulated to these facts, Maximus would still be entitled to
12 summary judgment because Compass has failed to produce any evidence raising a genuine issue of
13 material fact as to causation. Compass has produced evidence that Maximus may have failed to
14 perform some of its obligations under its contract with the Boards, including appointment of a medical
15 advisor, identification of resources, and high staff turnover. But Compass fails to produce evidence
16 that any of this conduct caused Plaintiffs' injuries. *Saelzler v. Advanced Grp.* 400, 25 Cal. 4th 763,
17 781 (2001) (affirming summary judgment when plaintiff's evidence only raised a speculative
18 possibility that defendant's breaches caused the plaintiff's injuries). Another Court recently reached
19 the same conclusion in a very similar case, finding "[n]one of plaintiff's claims against Compass arise
20 from Maximus's conduct, and Compass is therefore not entitled to indemnity from plaintiff's claims."
21 *Fujisawa v. Compass Vision, Inc.*, No. 07-5642, 2010 WL 3222486, at *2 (N.D. Cal. 2010).

22 MOTIONS TO SEAL

23 The parties' applications for leave to file certain documents under seal in support of or
24 opposition to the motions for summary judgment in compliance with the requirements of the protective
25 order are **GRANTED**. (Dkt. Nos. 181, 202 in 07cv1951; Dkt. Nos. 139, 151 in 08cv1684.)

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CONCLUSION

Maximus' motions for summary judgment are **GRANTED**.

IT IS SO ORDERED.

DATED: October ⁰⁵, 2010


Hon. Roger T. Benitez
United States District Court Judge

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