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

JOSE DECASTRO,)
)
Plaintiff,)
)
v.)
)
KATHERINE PETER; DANIEL CLEMENT;)
13 MICHAEL PIERATTINI; DAVID OMO JR.;)
14 and DOES 1 TO 30, inclusive,)
)
Defendants.)

Case No. 23SMCV00538
Assigned for all purposes to the Honorable
H. Jay Ford, Dept. O
**DEFENDANT MICHAEL PIERATTINI'S
REPLY TO OPPOSITION TO MOTION
FOR SUMMARY JUDGMENT OR IN THE
ALTERNATIVE SUMMARY
ADJUDICATION**
Date: July 30, 2024
Time: 8:30 A.M.
Dept: O

[Declaration of R. Paul Katrinak, Declaration
of Michael Pierattini, Objections, Responsive
Separate Statement, and Request for Judicial
Notice filed concurrently]

RES ID: 927212480364

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1 **I. INTRODUCTION**

2 Defendant Michael Pierattini’s (“Mr. Pierattini”) Motion for Summary Judgment or in
3 the alternative, Summary Adjudication should be granted. From the beginning of counsel for
4 Mr. Pierattini’s involvement in this matter, counsel for Mr. Pierattini has been begging Plaintiff
5 for any information concerning Mr. Pierattini’s alleged liability in this matter. After multiple
6 Motions to Compel and after the filing of this Motion for Summary Judgment, it is without
7 dispute that Plaintiff has no evidence to establish that Mr. Pierattini is liable for any of the
8 myriad causes of action in Plaintiff’s First Amended Complaint. Plaintiff has no evidence.
9 Plaintiff speculates, but speculation is not enough.

10 **An Examination of the Entire Arugment Section is Two Paragraphs and Does Not Relate**
11 **to Anything Other Than the Frivolous Defamation Claim, and There is a Waiver on all**
12 **other Causes of Action Except Defamation Which Fails for the Reasons set Forth Below**

13 The entire argument section in the Opposition is two paragraphs. Plaintiff’s Opposition
14 provides no basis for the denial of Mr. Pierattini’s Motion. In fact, Plaintiff failed to present
15 any legal argument or evidence concerning all of the causes of action asserted. The failure to
16 address a legal argument in opposition constitutes a waiver of any opposition. *See Nelson v.*
17 *Avondale HOA* (2009) 172 Cal.App.4th 857, 862; *In re Marriage of Falcone* (2008) 164
18 Cal.App.4th 814, 830. Therefore, as there is no legal argument in Opposition, Mr. Pierattini’s
19 Motion should be granted.

20 **DeCastro regularly posted videos and worked from jail, and there is no basis to continue**
21 **under 437c(h)**

22 DeCastro was released from jail on July 10, 2024. He does not explain anywhere in his
23 opposition how having more than two weeks would have changed anything. He does not do
24 anything to meet 437c(h). In fact, DeCastro was doing a TV show from jail. He
25 was producing shows regularly from jail.

26 https://www.youtube.com/channel/UCF08Wb_1z0ONDwh4Lvhu2AA

27 It is disingenuous to claim that he needs to postpone this when he is able to go so far as
28 producing YouTube videos in jail, and then he had two weeks out of jail to opposed this (he
was released by his own admission on 7/10/24).

1 Additionally, there are two critical problems with Plaintiff's CCP § 437c(h) request for
2 a continuance. First, Plaintiff has failed to establish how the discovery could provide evidence
3 that was necessary in order to oppose Defendants' Motion for Summary Judgment. Plaintiff
4 filed this action and should have some evidence, any evidence, which he does not. Plaintiff is
5 relying solely on gross speculation that there is something out there. There is not. Second,
6 Plaintiff has failed to establish the requisite diligence required for such a continuance. This
7 case has been pending for a year and a half, since February 6, 2023. For over a year and a half,
8 Plaintiff did not conduct any depositions or discovery. If the depositions and discovery were
9 so critical to the opposition, it is not, Plaintiff should have conducted the depositions and
10 discovery long ago. Again, Plaintiff is merely speculating and there is no basis for Plaintiff's
11 speculation. Plaintiff has not met his burden for a continuance to conduct discovery.

12 **II. PLAINTIFF FAILED TO ADDRESS THE LEGAL ARGUMENTS AND**
13 **EVIDENCE ESTABLISHING NO LIABILITY FOR MR. PIERATTINI**

14 At the outset, Plaintiff provided no legal arguments in response to Defendants' legal
15 authorities and arguments in support of Defendants' Motion for Summary Judgment. It is without
16 dispute that the failure to address a legal argument in opposition constitutes a waiver of any
17 opposition. *See Nelson v. Avondale HOA* (2009) 172 Cal.App.4th 857, 862; *In re Marriage of*
18 *Falcone* (2008) 164 Cal.App.4th 814, 830 ("The absence of timely, cogent legal argument or
19 citation to authority allows this court to treat the contentions as waived."). Here, Plaintiff made no
20 legal arguments and provided no opposition to Defendants' arguments concerning no ownership
21 and control, no legal duty, and causation. This failure constitutes a waiver and Defendants are
22 entitled to summary judgment on each cause of action.

24 **III. STATEMENTS PLAINTIFF CLAIMS ARE DEFAMATORY**

25 Plaintiff falsely asserts in his Separate Statement in Response that the following
26 alleged statements by Mr. Pierattini are somehow allegedly defamatory:

27 a. That my brain was being "turned to glue" because of repeated concussions as a
28 professional fighter. I did not have repeated concussions or brain damage from such
 fights, there are no medical records of any concussions, and I did not suffer brain
 damage. [This is plainly non-actionable opinion].

1 b. I “defamed” Pierattini. I didn’t publish any false statements of fact about
2 Pierattini to third parties. [Plaintiff claiming someone defamed you is not
defamation].

3 c. That I had a restraining order with a “victim there,” implying that I assaulted
4 or harmed a “victim.” Although I have had multiple restraining orders filed against
me for bogus reasons, there “victims” that were harmed or in danger of being harmed
5 by me in connection with any of those restraining order applications. [This is not
defamatory, as it is grounded on a true or reasonable basis. There are multiple
6 Restraining Orders against Plaintiff (See RJN, Nos 5, 8, 9, 10, 12, 14, and 15)].

7 d. That I stole my roommate’s ID and got my roommate a traffic ticket by using
it. This is false as I never an ID from my roommate, nor did such non-existent theft
8 result in my roommate getting a traffic ticket that should have been attributed to me.
[Again, this is based on a true or reasonable basis and is not defamatory (See RJN,
9 No. 2)].

10 e. That I stole my roommate’s ID because I was on probation and didn’t want to
go back to jail. I was never on probation, and at the time the video was published I
11 had never been to jail so I couldn’t be sent back. [Again, these statements by Mr.
Pierattini were founded on a true or reasonable basis. (See RJN, No. 2)].

12 f. That Pierattini was a criminal investigator in the United States Army, worked
13 counter-narcotics, and a licensed private investigator. In fact, rather than serve in the
US Army as a police officer or criminal investigator, Pierattini played tuba in the
14 Army Reserve and was not licensed as a private investigator in any state. Further
attempting to embellish his credibility, Pierattini even appeared on the Dr. Phil
15 television show a “former military police officer.” [This is does not pertain to
Plaintiff and is therefore not actionable].

16 g. Repeatedly calls me a scammer or says that I am running a scam because of
17 the legal information products that I sell, like a trifold to be used in traffic stops. I
have very high customer satisfaction as demonstrated by the incredibly low return rate
18 for the products. [The term “scammer” is opinion-based and is therefore not
actionable].

19 As noted in the next section, each of these fail because Plaintiff is a public figure and there
20 is no showing of malice. Moreover, each of these statements are protected as true or are opinion.

21 **IV. MR. PIERATTINI IS ENTITLED TO SUMMARY ADJUDICATION AS TO**
22 **PLAINTIFF’S FIRST CAUSE OF ACTION FOR “LIBEL, SLANDER, AND**
23 **FALSE LIGHT”**

24 As pointed out in the Motion, the threat to freedom of expression posed by protracted
litigation is a danger that has been recognized by the courts. (See, e.g., *Reader’s Digest Ass’n v.*
25 *Superior Court*, (1984) 37 Cal.3d 244, 252.) The California Supreme Court instructed in *Blatty v.*
26 *New York Times Co.*, (1986) 42 Cal.3d 1033, 1041-43 that “the First Amendment establishes a
27 broad zone of protection within which the press may publish without fear of incurring liability on
28 the basis of injurious falsehood.” It is Mr. Pierattini’s position that there is no cognizable legal

1 theory that would operate to strip him of this presumptive constitutional protection. Summary
2 judgment must be granted because to rule otherwise would countenance a “forbidden intrusion on
3 the field of free expression.” (*Bose Corp. v. Consumers Union*, (1984) 466 U.S. 485, 486.)¹

4 **a. Plaintiff is a Public Figure**

5 There are two types of public figures: “all purpose” and “limited purpose” public figures.
6 (*Reader’s Digest, supra*, 37 Cal.3d at 253.) An “all purpose” public figure has “achiev[ed] such
7 pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts,”
8 while a “limited purpose” public figure “voluntarily injects himself or is drawn into a particular
9 public controversy and thereby becomes a public figure for a limited range of issues.” (*Ibid.*)

10 Plaintiff does not dispute that he is a public figure. He provides no argument, case law or
11 discussion about his status as a public figure, so he waived the argument that he is not a public
12 figure. In order to establish his claim, Plaintiff must present evidence of actual malice.

13 **b. Any Alleged Defamatory Statement by Mr. Pierattini Was Not Published With**
14 **The Requisite Actual Malice**

15 As pointed out in the Motion, because he is a public figure, Plaintiff must not only prove
16 that the matters complained of are false, but must also prove with clear and convincing evidence –
17 and not simply by a preponderance of the evidence – that Mr. Pierattini acted with actual malice –
18 i.e., that he knew the alleged statements were false, and published them anyway. (*New York Times*
19 *Co. v. Sullivan*, (1964) 376 U.S. 254, 279-280.) A defendant acts with reckless disregard if he
20 publishes a statement with a “high degree of awareness” of its “probable falsity”. (*St. Amant v.*
21 *Thompson*, (1968) 390 U.S. 727, 731.)²

22 _____
23 ¹ Error in free debate is inevitable and even demonstrably false statements are protected by the First Amendment in the
24 absence of actual malice. (*McCoy v. Hearst Corporation* (1986) 42 Cal.3d 835, 860; *Philadelphia Newspapers, Inc. v.*
25 *Hepps*, (1986), 475 U.S. 767, 778.) The US Supreme Court has stated that the plaintiff must demonstrate a “high
26 degree of awareness of...probable falsity” in order to prevail. (*Garrison v. State of La.* (1964) 379 U.S. 64, 74.) The *St.*
27 *Amant* test, --- which requires evidence that the defendant entertained serious doubts as to the truth of his publication –
28 directs attention to the “defendant’s attitude toward the truth or falsity of the material published...[not] the defendant’s
attitude toward the plaintiff.” (*Widener v. Pacific Gas & Electric Co.*, (1977) 75 Cal.App.3d 415, 434 [disapproved on
other grounds in *McCoy, supra*, 42 Cal.3d at 846 n. 9].)

² Moreover, since actual malice must be proved separately with respect to each defendant (*St. Amant, supra*, 390
U.S. at 730) and since malice cannot be imputed under a respondent superior theory absent an employer-employee
relationship (*Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 253 (1974); *Hunt V. Liberty Lobby*, 720 F.2d
631, 648-9 (11th Cir. 1983)), the state of mind of others is immaterial. Put another way, the alleged conduct of
others cannot be considered actual malice of Plaintiff.

1 Plaintiff does present any evidence or argument in his Opposition that Mr. Pierattini acted
2 with malice.

3 **c. Plaintiff has been convicted of the crimes alleged, so any statements by Mr.**
4 **Pierattini are protected as being true under the “Gist” Rule**

5 “If the defamatory statement is a specific allegation of the commission of a particular
6 crime, the statement is deemed true for purposes of a substantial truth defense if the plaintiff
7 did commit that crime.”³ Here, at least the “gist” of the statements are true, so they are not
8 defamatory. As noted in the RJN, each factual statement is true.

9 **d. Mr. Pierattini’s Opinions are not actionable**

10 Opinions are not actionable.⁴ In making the distinction between a provably false
11 factual assertion and nonactionable opinion, “the courts have regarded as opinion any broad,
12 unfocused and wholly subjective comment, such as that the plaintiff was a ‘shady practitioner,’
13 ‘crook,’ or ‘crooked politician.’” *Copp v. Paxton* (1996) 45 Cal.App.4th 829, 837 (citations
14 omitted.). (See also, *Moyer v. Amador Valley J. Union High School Dist.* (1990) 225
15 Cal.App.3d 720, 725),

16 While no California appellate decision has analyzed the issue, Judge Murphy of this
17 court ruled that “scammer” is an opinion which cannot support defamation. (See *McKay v.*
18 *Patrick* (Cal.Super.2016) 2016 WL 11646012, at *2; See RJN Ex 19).⁵ Judge Murphy
19 explained:

20 ³ *Thomas v. Telegraph Publishing Co.* (2007) 155 N.H. 314, 337, citing *Restatement (Second) of Tort* § 581A
21 comment c at 236; See also *Hardiman v. Aslam* (Ill. App. Ct. 2019) 125 N.E.3d 1185 (holding defendant’s statement
22 about plaintiff’s conviction not actionable because they were substantially true); *Collins v. University of New*
23 *Hampshire* (D.N.H. 2010) 746 F.Supp.2d 358 (finding statement asserting plaintiff has been placed on leave due to
24 criminal charges as substantially true); *Bruss v. Vindicator Printing Co.* (Ohio Ct. App. 1996) 109 Ohio App.3d
25 396 (determining statement that plaintiff had been charged was substantially true and was not actionable); and
26 *Nichols v. Moore* (6th Cir. 2007) 477 F.3d 396 (holding statements regarding plaintiff’s arrest and charges to be
27 substantially true and not actionable).

28 ⁴ See *Okun v. Superior Court* (1981) 29 Cal.3d 442, 450:

“An essential element of libel . . . is that the publication in question must contain a false statement of fact . . . This
requirement . . . is constitutionally based. The reason for the rule, well stated by the high court, is that “Under the
First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for
its correction not on the conscience of judges and juries but on the competition of other ideas.””

(*Ibid*, citing *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 339-340).

⁵ An internet post made by individual associated with cosmetic laser procedure provider about former patient, which
stated that former patient was a scammer, that her organization was A FAKE ORGANIZATION, STEALING
WOMENS [sic] MONEY, and that state Attorney General had charged patient and organization for deceptive
businesses and ripping people off, constituted statement of pure opinion which was based upon disclosed,

1 "Plaintiff's defamation action is premised on Defendant's statement: "I did a
2 search and determined that his Las Vegas "office" was a UPS Store and decided
3 he was a scammer." (Compl. ¶ 24.) Defendant contends that this statement is
4 merely an opinion, not an actionable false statement of fact. ... Based on the
5 foregoing, the Court finds that the statements alleged in the complaint are
6 opinions, and are not actionable false statements of fact."

7 Here, the statements complained of (eg. "scammer" and "his brain turned to glue") that
8 are not true are not actionable opinion.⁶ Moreover, calling him a scammer in this context, is
9 even less likely to be defamatory than in those other cases. Here, you have the Plaintiff, who is
10 a non-lawyer, selling legal advice on the Internet. His legal advice has caused him to spend a
11 great deal of time in jail, so it is not working out very well for him. There is a litany of criminal
12 complaints against him and he is repeatedly convicted. It could certainly be a matter of opinion
13 that someone giving legal advice when they are not a lawyer and they spend this much time in
14 jail is a scammer as a matter of opinion.

15 **e. Plaintiff's False Light Claims Also Fail as a Matter of Law**

16 Here, there is no argument, evidence or discussion of Plaintiff's false light claim, so
17 Plaintiff waived any argument, and Mr. Pierattini is entitled to summary Judgment

18 **V. MR. PIERATTINI IS ENTITLED TO SUMMARY ADJUDICATION AS TO**
19 **PLAINTIFF'S FOURTH CAUSE OF ACTION FOR "HARASSMENT AND**
20 **CIVIL CONSPIRACY"**

21 **a. Mr. Pierattini Is Entitled To Summary Adjudication As To the Harassment**
22 **Claim Contained in Plaintiff's Fourth Cause of Action**

23 As pointed out in the Motion, the fourth cause of action in the FAC fails to state any statutory
24 or common law basis, and simply asserts "For Harassment." As a matter of law, there is no common
25 law cause of action for harassment, because such a cause of action is a creature of statute. (*Medix*
26 *Ambulance Service, Inc. v. Superior Court* (2002) 97 Cal.App.4th 109, 118.) Plaintiff does not
27 dispute these contentions or proffer any evidence to support his claim.

28 _____
substantially true facts, and thus, was not actionable as defamation. (*Perchuk v. Perfect Body Image, LLC*, (2d Dep't
2023) 220 A.D.3d 894, 198 N.Y.S.3d 562.)

⁶ The court in *Moyer*, for instance, concluded that a student's statement that plaintiff was the "worst teacher" at
school contained "no factual assertion capable of being proved true or false" and instead was a classic
inactionable "expression of subjective judgment" containing no verifiable facts. 225 Cal.App.3d at p. 725. The
"worst teacher" statement evaluated in *Moyer* is analogous to Ms. Bleckman's statements regarding Defendant.
(See Opposition p. 15, ll. 10-28). The *Moyer* court's ruling also is relevant as these statements are all similar
"expressions of [the speaker's] subjective judgment" without implication of verifiable fact. *Moyer* 225 Cal.App.3d
at 725.

1 **Mr. Pierattini Is Entitled To Summary Adjudication As To the Civil**
2 **Conspiracy Claim Contained in Plaintiff's Fourth Cause of Action**

3 As pointed out, to support a civil conspiracy claim, a plaintiff must establish the following
4 elements: “(1) the formation and operation of the conspiracy, (2) wrongful conduct in furtherance
5 of the conspiracy, and (3) damages arising from the wrongful conduct.” (*AREI II Cases* (2013) 216
6 Cal.App.4th 1004, 1022.) Because civil conspiracy is so easy to allege, plaintiffs have a weighty
7 burden to prove it. (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 333.) Here, Plaintiff
8 does not dispute this and does not proffer any evidence to supports a conspiracy claim. Therefore,
9 Mr. Pierattini is entitled to Summary Judgment.

10 **VI. MR. PIERATTINI IS ENTITLED TO SUMMARY ADJUDICATION AS TO**
11 **PLAINTIFF'S SECOND CAUSE OF ACTION FOR BATTERY, THIRD CAUSE**
12 **OF ACTION FOR TRESPASS, FIFTH CAUSE OF ACTION FOR “STALKING,**
13 **CYBER-STALKING, AND CIVIL CONSPIRACY,” SIXTH CAUSE OF**
14 **ACTION FOR ASSAULT**

15 Plaintiff has alleged no evidence or argument concerning the Second, Third, Fifth and Sixth
16 Causes of Action. Therefore, Plaintiff waived any argument and Mr. Pierattini is entitled to
17 judgment as a matter of law.

18 **VII. MR. PIERATTINI IS ENTITLED TO SUMMARY ADJUDICATION AS TO**
19 **PLAINTIFF'S SEVENTH CAUSE OF ACTION FOR “ECONOMIC**
20 **INTERFERENCE”**

21 It is unclear whether Plaintiff's eighth cause of action in the FAC is alleging tortious
22 interference with contract or tortious interference with prospective economic advantage. Either
23 way, Plaintiff has not provided any evidence that would establish liability for either type of
24 interference as to Mr. Pierattini. There is no evidence of economic interference of any kind by Mr.
25 Pierattini and there is no evidence of any damages allegedly suffered by Plaintiff. In any case,
26 Opposition is waived.

27 **VIII. MR. PIERATTINI IS ENTITLED TO SUMMARY ADJUDICATION AS TO**
28 **PLAINTIFF'S EIGHTH CAUSE OF ACTION FOR “RIGHT TO PUBLICITY**
 TORTS”

 As pointed out in the motion, the elements for common law misappropriation of name and
 likeness (which mirror those required for a claim under Cal. Civ. Code § 3344) are: “(1) the
 defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to

1 defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.”
2 (*Local TV, LLC v. Superior Court* (2016) 3 Cal.App.5th 1, 7–8.)⁷

3 Here, Plaintiff currently maintains a YouTube channel with over 559,000 subscribers on
4 which he has posted over 2,500 videos that have amassed over 241,783,000 views. (UDF Nos. 43-
5 45.) A cursory scroll through Plaintiff’s YouTube channel shows that his videos often garner
6 thousands of views each, with some even garnering tens or hundreds of thousands of views. (UDF
7 No. 46.) A YouTube channel titled “Our Nevada Judges, Inc.” which posts recordings of court
8 hearings in Nevada, has garnered hundreds of thousands of views by posting recordings of
9 Plaintiff’s criminal hearings. (UDF No. 47.) To say that Plaintiff’s actions have created a “bona
10 fide attention” to his activities would be an understatement. Any analysis or commentary by Mr.
11 Pierattini regarding the deluge of content Plaintiff has posted to the internet for his thousands of
12 subscribers simply did not require that Mr. Pierattini acquire Plaintiff’s permission to make such
13 commentary. (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 544 [affirming grant of
14 summary judgment where defendant used famous surfer’s interview in his documentary without
15 surfer’s consent to use his name, likeness, and voice].)⁸

16 **IX. THERE HAS BEEN NO EVIDENCE PRODUCED TO SUPPORT PLAINTIFF’S**
17 **FRIVOLOUS CLAIMS**

18 The California Appellate Courts have directed the trial courts to shut down frivolous
19 litigation when a party refuses to properly respond to discovery requests. A defendant has met his
20 or her burden on a summary judgment motion by demonstrating to the court that a complainant has
21 not produced discovery responses in support of his contentions. (*Union Bank v. Superior Court*
22 (1995) 31 Cal.App.4th 573, 580.) In directing the trial courts to stamp out frivolous litigation,
23 the *Union Bank* court stated:

24 ⁷ Not every publication of someone's name or likeness gives rise to an appropriation action, as “[p]ublication of matters
25 in the public interest, which rests on the right of the public to know and the freedom of the press to tell it, is not ordinarily
26 actionable.” (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 542; see also Civ. Code, § 3344(d).) Public
interest attaches to people who by their actions create a “bona fide attention to their activities.” (*Dora, supra*, 15
Cal.App.4th at 542.)

27 ⁸ The First Amendment protects an individual from any liability for use of someone’s likeness or image in reporting on
28 someone that is newsworthy, concerning public affairs, or on a political campaign. (See *Montana v. San Jose Mercury*
News, Inc. (1995) 34 Cal.App.4th 790; *Johnson v. Harcourt, Brace, Jovanovich, Inc.* (1974) 43 Cal.App.3d 880; *Sipple*
v. Chronicle Publishing Co. (1984) 154 Cal.App.3d 1040.)

1 Now, a moving defendant may rely on factually devoid discovery responses to shift the
2 burden of proof pursuant to section 437c, subdivision (o)(2). Once the burden shifts as
3 a result of the factually devoid discovery responses, the plaintiff must set forth the
4 specific facts which prove the existence of a triable issue of material fact.

(*Id.* at 590.)⁹

5 California law does not allow Plaintiff to ignore discovery in order to place himself in a
6 better position. The law is well settled that a party cannot benefit from its own wrong (here,
7 refusing to respond to basic discovery). (See *St. James Armenian Church of Los Angeles v.*
8 *Kurkjian* (1975) 47 Cal.App.3d 547, 552). Plaintiff cannot refuse to provide discovery responses
9 then claim that he should win because Defendant has no responses. Here, Plaintiff provided
10 nothing but factually devoid responses and objections to Mr. Pierattini’s discovery requests, thus
11 raising an inference that Plaintiff cannot prove the elements of his claims against Mr. Pierattini.
12 (UDF No. 49.)¹⁰ Of course, Mr. Pierattini has submitted evidence that he did not take the actions
13 complained of.

14 **X. PLAINTIFF HAS NOT MET HIS BURDEN FOR A CCP § 437c(h)**
15 **CONTINUANCE**

16 California Code of Civil Procedure Section 437c(h) permits a continuance on a
17 summary judgment motion in order to “mitigate summary judgment harshness” for counsel
18 who has “not had the opportunity to marshal the evidence.” *Cooksey v. Alexakis* (2004) 123
19 Cal. App. 4th 246, 253. In *Cooksey*, the court denied a continuance and granted summary
20 judgment partly on the basis that “failed to explain why the discovery sought could not have
21 been completed sooner.” *Id* at 255. The court in *Cooksey* explained:

22 _____
23 ⁹ See also *Certain Underwriters at Lloyd's of London v. Superior Court* (1997) 56 Cal.App.4th 952; *Department of*
24 *Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084; *Lopez v. Superior Court* (1996) 45 Cal.App.4th
25 705; *Villa v. McFerren* (1995) 35 Cal.App.4th 733; *Hunter v. Pacific Mechanical Corp.* (1995) 37 Cal.App.4th 1282,
26 1287; Code Civ. Proc. § 437c(o)(2).

27 ¹⁰ “[a] moving defendant need not support his motion with affirmative evidence negating an essential element of
28 the responding party’s case. Instead, the moving defendant may (through factually vague discovery responses or
otherwise) *point to the absence of evidence to support the plaintiff’s case*. When that is done, the burden shifts to
the plaintiff to present evidence showing there is a triable issue of material fact. If the plaintiff is unable to meet her
burden of proof regarding an essential element of her case, all other facts are rendered immaterial.” (*Leslie G. v.*
Perry & Assocs. (1996) 43 Cal.App.4th 472, 482 [citing Code Civ. Proc., § 437c, subd. (o)(2)]; see also *Collin v.*
CalPortland Co. (2014) 228 Cal.App.4th 582, 589 [noting that plaintiff’s factually insufficient responses to
defendant’s discovery requests could raise an inference that plaintiff could not prove relevant causation element of
claim].)

1 “We agree with the majority of courts holding that lack of diligence may be a
2 ground for denying a request for a continuance of a summary judgment motion
3 hearing. Although the statute does not expressly mention diligence, it does
4 require a party seeking a continuance to declare why “facts essential to justify
5 opposition ... cannot, for *reasons stated, then* be presented” (§ 437c, subd. (h),
6 italics added), and courts have long required such declarations to be made in
7 good faith.”

8 *Id* at 257. But, *Cooksey* is not alone. There are a litany of cases where the request for a
9 continuance was denied due to the lack of diligence.¹¹

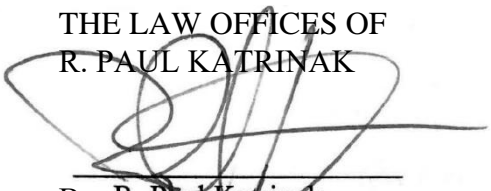
10 Aside from not showing the requisite diligence, as noted in the preceding paragraph,
11 Plaintiff has also failed to establish how the discovery could provide evidence that was necessary
12 in order to oppose Defendants’ Motion for Summary Judgment. Plaintiff filed this action and
13 should have some evidence, but he does not. Plaintiff is relying solely on gross speculation that
14 there is something out there. Speculation is not a showing of need. Here, Plaintiff has failed to
15 establish the requisite diligence required for such a continuance. This case has been pending for a
16 year and a half, since February 6, 2023. For over a year and a half, Plaintiff did not conduct any
17 depositions or discovery. If the depositions and discovery were so critical to the opposition, it is
18 not, Plaintiff should have conducted the depositions and discovery long ago. Again, if this
19 deposition was so critical it could have been taken and should have been taken long ago.

20 **XI. CONCLUSION**

21 For the foregoing reasons, Mr. Pierattini respectfully requests that the Court grant its
22 Motion for Summary Judgment or in the alternative Summary Adjudication.

23 DATED: July 30, 2024

24 THE LAW OFFICES OF
25 R. PAUL KATRINAK

26 
27 By: R. Paul Katrinak
28 Attorneys for Defendant
Michael Pierattini

29 ¹¹ See *Braganza v. Albertson’s LLC* (2021) 67 Cal.App.5th 144 (Request denied due to lack of diligence);
30 *Rodriguez v. Oto* (2013) 212 Cal.App.4th 1020 (Request denied due to lack of diligence); *Knapp v. Doherty* (2004)
31 123 Cal.App.4th 76 (Request denied due to failure to make showing justifying the request); *Roth v. Rhodes* (1994)
32 25 Cal.App.4th 530 (Request denied due to lack of diligence); *Johnson v. Alameda County Medical Center* (2012)
33 205 Cal.App.4th 521 (Request denied due to a lack of diligence).

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA
3 COUNTY OF LOS ANGELES

4 I am employed in the County of Los Angeles, State of California; I am over the age of
5 18 and not a party to the within action; my business address is 9663 Santa Monica Boulevard,
Suite 458, Beverly Hills, California 90210.

6 On July 30, 2024, I served the foregoing document(s) described as:

7 **DEFENDANT MICHAEL PIERATTINI'S REPLY TO OPPOSITION TO**
8 **MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE**
SUMMARY ADJUDICATION

9 on the interested parties to this action addressed as follows:

10 Steven Gebelin
11 LESOWITZ GEBELIN LLP
8383 Wilshire Blvd #520
12 Beverly Hills, CA 90211
contact@lawbylg.com

13 (BY MAIL) I deposited such envelope in the mail at Los Angeles, California.
14 The envelope was mailed with postage thereon fully prepaid and addressed to the person
above.

15 (BY PERSONAL SERVICE) by causing a true and correct copy of the above
16 documents to be hand delivered in sealed envelope(s) with all fees fully paid to the person(s) at
the address(es) set forth above.

17 X (BY EMAIL) I caused such documents to be delivered via electronic mail to the
18 email address for counsel indicated above.

19 Executed July 30, 2024, at Los Angeles, California.

20 I declare under penalty of perjury under the laws of the United States that the above is
21 true and correct.

22 
23 _____
24 R. Paul Katrinak