Beth A. Kahn, Esq., SBN 134158
Dean A. Olson, Esq., SBN 126155
Pamela A. Palmer, Esq., SBN 259404
Ryan C. McKim, Esq., SBN 265941
MORRIS POLICH & PURDY LLP
1055 West Seventh Street, 24th Floor
Los Angeles, California 90017
Telephone: (213) 891-9100
Facsimile: (213) 488-1178
BKahn@mpplaw.com
DOlson@mpplaw.com
PPalmer@mpplaw.com
RMcKim@mpplaw.com

Francis J. McNamara, Esq.
(admitted Pro Hac Vice)
100 Watchtower Drive
Patterson, New York 12563

Attorneys for Defendant, Watchtower Bible and Tract Society of New York, Inc., sued herein as Doe 2, Supervisory Organization

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

JOSE LOPEZ, an Individual,

Plaintiff,

v.

DOE 1, LINDA VISTA CHURCH; DOE 2, SUPERVISORY ORGANIZATION; DOE 3, PERPETRATOR; and DOES 4 through 100, inclusive,

Defendants

Case No. 37-2012-00099849-CU-PO-CTL

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.'S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES

[Filed concurrently with Objections to Plaintiff's Evidence, Response to Plaintiff's Separate Statement of Disputed Facts, Reply Brief, and [Propose] Order]

Assigned to: Hon. Gregory W. Pollack
Dept.: 71

Date: May 24, 2017
Time: 10:00 a.m.

Trial Date: None

TO THE HONORABLE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, pursuant to California Evidence Code §§ 452(d), and 453, Watchtower Bible and Tract Society of New York, Inc. ("Watchtower") respectfully request that the Court take judicial notice of the following:

1. Plaintiff's Memorandum of Points and Authorities in Support of Notice of Motion and Motion to Strike or Tax Costs of Linda Vista Spanish Congregation. A true and correct copy of this document is attached hereto as Exhibit 1.
2. Watchtower's *Ex Parte* Application to Take the Hearing on Plaintiff's Motion for Discovery Sanctions against Watchtower off Calendar and to Separately Set a Motion for Protective Order; Declaration of Ryan C. McKim; [Proposed] Order, file stamped November 23, 2016. A true and correct copy of this document is attached hereto as Exhibit 2.

Dated: April 7, 2017

MORRIS POLICH & PURDY LLP

By: Ryan C. McKim
Beth A. Kahn
Dean A. Olson
Pamela A. Palmer
Ryan C. McKim
Attorneys for Defendant, Watchtower Bible and Tract Society of New York, Inc., sued herein as Doe 2, Supervisory Organization

EXHIBIT 1

IRWIN M. ZALKIN, ESQ. (#89957)
DEVIN M. STOREY, ESQ. (#234271)
LISA J. GARY, ESQ. (#272936)
ALEXANDER S. ZALKIN, ESQ. (#280813)
RYAN M. COHEN, ESQ. (#261313)
The Zalkin Law Firm, P.C.
12555 High Bluff Drive, Suite 301
San Diego, CA 92130
Tel: 858-259-3011
Fax: 858-259-3015
Email: Irwin@zalkin.com
dms@zalkin.com
lisa@zalkin.com
alex@zalkin.com
ryan@zalkin.com
Attorney for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

Jose Lopez, Individually, Plaintiff, v. Defendant Doe 1, Linda Vista Church; Defendant Doe 2, Supervisory Organization; Defendant Doe 3, Perpetrator; and Does 4 through 100, inclusive, Defendants.	Case No: 37-2012-0099849-CU-PO-CTL **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF NOTICE OF MOTION AND MOTION TO STRIKE OR TAX COSTS OF LINDA VISTA SPANISH CONGREGATION** **Date: 10-17-14** **Time: 8:30 a.m.** **Dept: 65** **Judge: Joan M. Lewis** **IMAGED FILE**

I. INTRODUCTION

Costs are allowable if actually incurred. Cal. Code Civ. Proc. § 1033.5 (c)(1). In this case, Linda Vista employed a litigation strategy of sitting back and riding Watchtower's coattails. Watchtower sought authorizations from Plaintiff and gathered records. Watchtower subpoenaed historical records, took depositions, and filed motions. Linda Vista sat quietly by and did none of these things. Now, after being voluntarily dismissed, Linda Vista claims to be a prevailing party entitled to repayment of all of Watchtower's costs in this litigation. Linda Vista's money grab is so profound as to include requests for travel expenses for Watchtower's lawyers, filing fees for motions involving only Watchtower, and the reimbursement of jury fees it never posted. As discussed below, the vast majority of the costs Linda Vista claims are not costs it actually incurred, and are therefore not recoverable.

Linda Vista also seeks exorbitant expert witness fees paid by Watchtower because Plaintiff understandably refused its patently unreasonable compromise offer, and as discussed below, Linda Vista seeks costs that are not allowable, are not reasonable in amount, and were incurred for its own convenience. Cal. Code Civ. Proc. § 1033.5 (c).

Linda Vista did not file its cost memorandum in good faith. This court should strike the entirety of the cost memorandum, or alternatively tax costs to allow Linda Vista $2,984.30.

II. IN NO EVENT MAY LINDA VISTA RECOVER COSTS IT DID NOT ACTUALLY PAY OR THAT WERE NOT INCURRED ON ITS BEHALF

Linda Vista's memorandum of costs seeks to recover monies that it never actually paid. The vast majority of the costs sought by Linda Vista are related to expenses and filing fees incurred solely by, and for the benefit of, Watchtower. These costs are improper and should be disallowed.

In *Fennessey v. Deleuw-Cather Corp.*, the plaintiff named six defendants in a wrongful termination action. (1990) 218 Cal.App.3 1192, 1194. All six defendants moved for summary

judgment, but only one was successful. *Id.* The prevailing defendant, Edward Gerulat, filed a memorandum of costs, which the plaintiff moved to strike or tax on the ground that Gerulat was not entitled to recover costs paid for the benefit of other defendants. *Id.* The motion was denied and the plaintiff appealed. *Id.*

The appellate court noted that once the plaintiff questioned the award to Gerulat of costs incurred for the benefit of other defendants:

> it was then up to the court to determine whether (1) Gerulat would have to prove he had personally incurred the challenged expenses; or (2) Gerulat was for some other reason entitled to the claimed costs (even if they were chargeable to all the defendants).

Id. at 1195-1196. The court held that "where a prevailing party incurs costs jointly with one or more parties who remain in the litigation, during the pendency of the litigation that party may recover only costs actually incurred by a party or in its behalf in prosecuting or defending the case." *Id.* at 1196 (internal italics omitted.)

The rationale in *Fennessey* was that, while the litigation continues (and here Watchtower has already filed a notice of appeal), the possibility remains that Watchtower may ultimately become a prevailing party who is, itself, entitled to recover costs. If Linda Vista has already recovered the costs paid by Watchtower, the specter of additional litigation over costs looms. Linda Vista is not entitled to any costs jointly incurred with Watchtower while the litigation against Watchtower remains active, unless Linda Vista proves that it actually paid the costs it seeks to recover. In no event may Linda Vista recover costs paid for Watchtower's benefit.

A. Filing and Motion fees

Linda Vista's memorandum of costs seeks $2,015 in filing and motion fees. Nearly every cost in this category is either a motion or ex parte fee filed jointly by both Linda Vista and Watchtower, or a motion or ex parte filed solely by Watchtower. Linda Vista should not

recover costs paid by Watchtower for motions and ex partes not involving Linda Vista, and Linda Vista should recover no more than half of the costs associated with joint filings.

1. Motions / Ex Partes Not Involving Linda Vista

On May 16, 2013, Watchtower filed a motion to compel deposition answers from Plaintiff. (PE 1, Stipulation to Take Motion Off Calendar.) On May 23, 2013, Watchtower filed a motion to compel non-party Samuel Kugel, M.D. to produce records. (PE 3, 5/23/2103 Notice of Motion to Compel.) On May 31, 2013, Watchtower brought an ex parte application to continue the trial date. (PE 4, 5/31/2013 Ex Parte Application for Trial Continuance.) On July 29, 2013 Watchtower filed a stipulation to take its previously filed motion to compel deposition answers off calendar. Linda Vista was not a signatory to the stipulation. (PE 1, Stipulation to Take Motion Off Calendar.)

On August 26, 2013, Watchtower notified Plaintiff that it would be appearing ex parte for an order establishing a hearing date for Watchtower's proposed motion for summary adjudication of Plaintiff's punitive damage claim. (PE 5, August 26, 2013 letter from Copley to Storey.) On September 12, 2013, Watchtower brought an ex parte application setting a hearing date for a motion to compel the deposition of non-party Dulcinea Esteban. (PE 6, 9/12/2013 Ex Parte Application for Hearing Date.) On December 24, 2013, Watchtower filed an ex parte application to bifurcate the trial. (PE 7, 12/24/2103 Ex Parte Application to Bifurcate Trial.) On February 4, 2014, Watchtower filed an ex parte application to stay the court's enforcement of discovery orders issues against Watchtower. (PE 8, 2/4/2014 Ex Parte Application for Stay of Discovery orders.) Linda Vista was not involved with any of these filings, but still seeks to recover the filing fees associated therewith. These costs should be disallowed.

2. Joint Motions / Ex Partes

On June 21, 2013, Watchtower and Linda Vista Jointly filed a motion for summary judgment. (PE 9, Notice of Joint Motion for Summary Judgment.) On September 4, 2013, Watchtower and Linda Vista Jointly filed a motion for summary adjudication of Plaintiff's causes of action based on a theory of ratification. (PE 10, Notice of Joint Motion for Summary Adjudication.) Linda Vista seeks to recover the full $1,000 in filing fees for these two motions. On April 4, 2014, Watchtower and Linda Vista jointly filed a motion for leave to file Amended Answers. (PE 11, Notice of Motion to File Amended Answers.) Linda Vista seeks to recover the full $60 filing fee from Plaintiff. Linda Vista is entitled to no more than half ($530_ of the filing fees for these joint motions.

3. Final Recoverable Filing Fees

If this Court determines that Linda Vista may recover its prorated portion of the costs expended, the costs in this category should be reduced to $1,045 ($515 for fees paid solely for benefit of Linda Vista [first appearance fee (9/18/2012), stipulation to continue the trial readiness conference (4/23/2013), and ex parte application for leave to file first amended answer (1/21/2014)] and $530 for half of the filing fee for jointly filed motions [joint motion for summary judgment, joint motion for summary adjudication, and joint motion to file amended answers].)

B. Jury Fees

Linda Vista seeks to recover $150 in jury fees. The docket in this case shows only that Plaintiff and Watchtower filed jury fees. There is no entry Linda Vista ever deposited jury fees. These fees should not be recovered, since Linda Vista never paid them.

C. Deposition Costs

Linda Vista again seeks a windfall requesting $21,743.23 in deposition costs that were incurred almost entirely by non-prevailing Defendant Watchtower. Linda Vista did not notice or take depositions in this action. It ceded that responsibility to Watchtower. Linda Vista cannot now recover costs it did not incur.

1. Costs of Transcripts / Video-recordings / Interpreters

Linda Vista seeks to recover the full amount of the transcribing, interpreting, and videotaping of the depositions of Leticia Lopez, Jose Lopez, Alvaro Garcia, Christian Carreno, Dulcinea Esteban, Michael Moreno, Robert Geffner (two volumes), Monica Applewhite, Manuela Perales, Jeffrey Younggren, Ramon Preciado, Richard Ashe (two volumes), and Mario Moreno. These items total $17,548.32. Linda Vista is not entitled to any of these costs.

Non-prevailing Defendant Watchtower undoubtedly paid for these depositions. Since Watchtower was doing the litigating and Linda Vista was tagging along, it is inconceivable that Linda Vista and Watchtower each purchased copies of these depositions. Because Linda Vista did not notice or take these depositions, did not file joinders in the taking of the depositions, and did not pay for copies, Linda Vista is not entitled to recover any portion of the depositions costs. This Court should require Linda Vista to prove it incurred these costs, and when it is unable to do so, should disallow the entire $17,548.32.

2. Travel Costs for Watchtower's Lawyers

Linda Vista requests costs associated with Rocky Copley's travel to New York for the deposition of Richard Ashe. These costs include cab fare, tolls and meal expenses totaling $380.21. The major problem with this request is that Mr. Copley did not represent Linda Vista at the time these charges were incurred. As such, these items are clearly not appropriate.

Similarly, Linda Vista lists three separate charges for airfare to New York for the depositions. Two of those flights were from San Diego (clearly one for Watchtower's lawyer, Mr. Copley, and one for Linda Vista's lawyer, James McCabe.) The charge for Mr. Copley is not a proper cost item. Since no proof has been given on the point, Plaintiff assumes for purposes of this motion that the larger of the two charges ($1,470 on March 14, 2014) was incurred by Mr. Copley. Similarly, there is a third flight listed on the memorandum of costs at a value of $579.50. The origin of the flight is not listed, but it is almost certainly Watchtower lawyer Calvin Rouse's flight to New York. Mr. Rouse did not represent Linda Vista at any time. Linda Vista is not entitled to recover these costs. As such, $2,429.71 should be disallowed from Linda Vista's memorandum of costs ($380.21 for travel expenses, $1,470 for Mr. Copley's flight, and $579.50 for Mr. Rouse's flight.)

3. Expenses for the Editing of the Deposition of Plaintiff and the Transcription of the Defense Mental Examination of Plaintiff

Linda Vista seeks to recover $221.40 paid to Videotrack for "videotaping" the deposition of Plaintiff. The deposition was actually recorded by Atkinson-Baker. The charge appears as though it may be for editing the deposition of the Plaintiff for presentation to the jury. Such costs are not recoverable. *Science Applications Internat. Corp. v. Superior Court* (1995) 39 Cal.App.4th 1095, 1105. Linda Vista also seeks $429.30 for transcribing the Defense Mental Examination of Plaintiff. This is not a cost that is expressly allowed. As such, it is up to this Court's discretion as to whether Linda Vista should be reimbursed. Cal. Code Civ. Proc. § 1033.5 (c)(4). As with other items, it was almost certainly Watchtower that paid to have the examination transcribed. Linda Vista should not recover this cost. Moreover, Linda Vista had an audio version of the examination, rendering the transcribed copy a mere convenience for defense counsel, this cost should be disallowed.

4. Final Recoverable Deposition Fees

If this Court determines that Linda Vista is entitled to any costs in this category, the amount should be limited to the $1,114.50 cost of James McCabe's flight from San Diego to New York for depositions.

D. Service of Process

Linda Vista seeks $6,192.54 for "service of process." The amount requested is exorbitant and includes many unreasonable charges incurred simply for the convenience of the Defendant. Moreover, the vast majority of these charges were not incurred by Linda Vista.

1. Linda Vista Claims Costs Watchtower Spent on Messenger Fees

Plaintiff executed authorizations allowing Watchtower's lawyer to obtain Plaintiff's employment and medical records. Linda Vista now seeks to recover $2,108.19 in attorney service charges for serving 23 of those authorizations. Messenger fees are not an allowable cost specifically identified by statute, but may be allowed at the discretion of the court. *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 132 (messenger fees are "of doubtful necessity and unreasonable on their face, when compared to the probable cost of alternatives such as mail, Federal Express, or personal filing.") Additionally, the costs of using authorizations to gather records should be excluded as "investigation expenses in preparing the case for trial," which is not an allowed expense. Cal. Code Civ. Proc. § 1033.5(b)(2).

These charges are unreasonable for a number of reasons. Initially, Linda Vista did not hire the attorney service that served these authorizations. Watchtower did. The authorizations were provided by Plaintiff to Watchtower's lawyer and entitled Watchtower's lawyer to receive copies of the records. (Declaration of Devin M. Storey at ¶ 3.) Linda Vista's lawyer did not request authorizations. Thus, Linda Vista could not have actually incurred these costs. Additionally, using a process server to serve the authorizations, rather than simply having office

staff mail or fax the authorizations is unreasonable and unnecessary. "Allowable costs shall be reasonably necessary to the conduct of the litigation rather than merely convenient." Cal. Code Civ. Proc. § 1033.5(c)(2).

2. Linda Vista's Claim for the Cost of Serving Deposition Subpoenas

Linda Vista seeks $419 for service of deposition subpoenas on Dulcinea Esteban, Christian Carreno, Alvaro Garcia, and Michael Moreno. These depositions were all noticed and taken by Watchtower, not Linda Vista. As such, Linda Vista would not have paid the costs to serve the subpoenas. These charges were not incurred by Linda Vista, and are not recoverable.

3. Business Records Subpoenas

Linda Vista seeks $1,297.47 spent by Watchtower to serve business record subpoenas. (Samuel Kugel, M.D., ($120); San Diego Sheriff's Department ($71.75); San Diego Police Department ($39.75); ADT Program ($73.75); UPAC ($73.71); Clark Clipson, Ph.D. ($73.71); San Diego Police Department ($104.24); San Diego County Probation Department ($90.98); Samuel Kugel, M.D. ($106.95); Joseph Sheridan, M.D. ($120.73); Medical Services Division SD Sheriff's Dept. ($183.49.); California Employment Development ($140.18); and Jess M. Grygorfan, M.D. ($98.23).) Each of these subpoenas was served by Watchtower, rather than Linda Vista. Linda Vista did not incur these costs and is not entitled to recover them.

4. Prohibited Photocopying Expenses

Linda Vista seeks to recover photocopying expenses totaling $2,014.12. (scanning photocopying (1/16/13) (76.84.); printing / reproduction (3/18/2013) (104.98); printing / reproduction SDPD (3/29/2013) (300.32); photocopy services (9/5/2013) ($105.62); service of subpoena and reproduction costs for Dr. Geffner Ph.D.'s file (11/6/2013) ($755.71); scan of Dr. Geffner Records to disk (11/14/2013) ($236.71); reproduction expense for duplication of Monica Applewhite's file (12/6/2013) ($433.94).) Costs incurred for photocopying documents

are expressly excluded from the list of recoverable costs. Cal. Code Civ. Proc. § 1033.5(b)(3). If Linda Vista could not copy the documents itself and pass those costs along to Plaintiff, it is not reasonable for Linda Vista to inflate those costs by having someone else do the copying for it. These costs are not recoverable.

5. Final Recoverable Service of Process Costs

Linda Vista seeks $354 spent in serving trial subpoenas (Dulcinea Esteban ($59), Christian Carreno ($59), Samuel Kugel ($59), Joseph Sheridan ($59), Michael Moreno ($118).) Assuming these costs were paid by Linda Vista, these appear to be recoverable.

E. Ordinary Witness Fees

Linda Vista seeks to recover $110.60 in ordinary witness fees paid to Alvaro Garcia, Christian Carreno, and Dulcinea Esteban. Linda Vista did not notice these depositions, and therefore clearly did not pay the witness fees. (PE 12, Notice of Taking Deposition of Alvaro Garcia; PE 15, Notice of Taking Deposition of Christian Carreno; PE 16, Notice of Taking Deposition of Dulcinea Esteban.) Linda Vista is not entitled to recover costs for fees it did not pay. The $110.60 in ordinary witness fees requested by Linda Vista should be taxed.

F. Court Reporter Fees

Linda Vista seeks $2,732.60 in court reporter fees. None of these charges are reasonable or necessary. Under Code of Civil Procedure § 1033.5(b)(5), "transcripts of court proceedings not ordered by the court" are not recoverable costs. None of the hearings for which Linda Vista seeks to recover court reporter's fees were ordered by the Court, nor did the Court order that a transcript must be taken. The entire $2,732.60 requested by Linda Vista should be disallowed.

Notwithstanding the generally non-recoverable nature of these costs, Linda Vista also seeks to recover transcript charges for hearings to which it was not a party. For instance, Linda Vista seeks to recover $304.45 for the reporter's transcript of the February 6, 2014 hearing on

Watchtower's ex parte application for a stay of discovery orders not involving Linda Vista. Linda Vista seeks $193.50 for the reporter's transcript of the hearing occurring on January 2, 2014. This hearing involved Watchtower's objections to the discovery referee's recommendation and Watchtower's application to bifurcation of the trial. Linda Vista also seeks $1,033.75 for the transcript of the May 2, 2014 hearing on Plaintiff's motion for monetary and terminating sanctions against Watchtower. Linda Vista was not involved in these hearings, but seeks to recover the full cost of the transcripts. These costs were not incurred by Linda Vista, and were certainly not "reasonably necessary to the conduct of the litigation." Cal. Code Civ. Proc. § 1033.5(c)(2). Linda Vista is not entitled to these costs.

Additional charges relate to transcripts of hearings and ex partes for which Linda Vista and Watchtower were both parties. Linda Vista seeks $446.60 for the transcript of the hearing on Defendant's joint motion for summary judgment heard on October 25, 2013, as well as $435 for the transcript of the hearing of Defendants' joint motion for summary adjudication heard on November 22, 2013. Linda Vista seeks $319.30 for the reporter's transcript of the January 30, 2014 ex parte application for leave to file a first amended answer to Plaintiff's first amended complaint. This hearing equally involved Watchtower's substantively identical request. As these were costs incurred on behalf of both Linda Vista and Watchtower, Linda Vista is not entitled to recover the entire cost, but is instead limited to the costs it actually paid.

In summary, Linda Vista is not statutorily entitled to recover the court reporter's fees for any of these hearings. However, if this Court is inclined to permit some recovery, it should be limited to $470.80 (half the cost of the October 25, 2013, November 22, 2013 and January 30, 2014 hearings).

III. LINDA VISTA IS NOT ENTITLED TO RECOVER EXPERT WITNESS FEES

A party is generally not entitled to recover fees paid to expert witnesses. *Martinez v. Brownco Const. Co., Inc.* (2013) 56 Cal.4th 1014, 1018-1019. "Such fees are recoverable, however, when a judgment following the nonacceptance of a pretrial settlement offer triggers operation of" California Code of Civil Procedure § 998. *Id.* at 1019. That section is intended to facilitate pretrial settlement. *Id.* Thus, if a defendant makes a statutory offer to compromise pursuant to section 998, that offer is not accepted by the plaintiff, and the plaintiff fails to obtain a more favorable judgment or award:

> the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant.

Cal. Code Civ. Proc. § 998, subdivision (c)(1) (underline emphasis added.)

The courts have read into section 998 a good faith requirement, which "requires that the settlement offer be 'realistically reasonable under the circumstances of the particular case.'" *Adams v. Ford Motor Co.* (2011) 199 Cal.App.4th 1475, 1483. "The offer must therefore 'carry with it some reasonable prospect of acceptance.'" *Id.* "[A] party having no expectation that his offer will be accepted 'will not be allowed to benefit from a no-risk offer made for the sole purpose of later recovering large expert witness fees.'" *Adams v. Ford Motor Co.* (2011) 199 Cal.App.4th 1475, 1483. "An offeree cannot be expected to accept an unreasonable offer." *Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 699.

1. Linda Vista's Offer to Compromise was a Token Offer and in Bad Faith

> "As a general rule, the reasonableness of a defendant's offer is measured, first, by determining whether the offer represents a reasonable prediction of the amount of money, if any, defendant would have to pay plaintiff following a trial, discounted by an appropriate factor for receipt of money by plaintiff before trial, all premised upon information that was known or reasonably should have been known to the defendant."

Elrod, 195 Cal.App.3d at 699.

In *Elrod*, the court determined that "[t]he ... $15,001.00 settlement offer in a case in which damages are ultimately determined to be in excess of $1,000,000.00, is a token or nominal offer that does not satisfy the requirements of CCP § 998." *Elrod*, 195 Cal.App.3d at 697-698; *see also Pineda v. Los Angeles Turf Club, Inc.* (1980) 112 Cal.App.3d 53, 62-63 (offer of $2,500 in wrongful death claim seeking $10,000,000 was not reasonable, even though defendants ultimately prevailed); *Mesa Forest Products, Inc. v. St. Paul Mercury Ins. Co* (1999) 73 Cal.App.4th 324, 334 ("if Mesa had accepted the $62,690 offer, it would have settled for a net gain of $20,690—approximately one-third of what it was owed on the lumber invoices. Such an offer hardly sounds realistic or reasonable.")

In this case, Linda Vista made a statutory offer of $66,675 on June 21, 2013. At that time, Linda Vista knew this case involved very serious claims of child molestation, that it had received a complaint in 1982 (four years prior to the molestation of Plaintiff) by a different child that he had been molested by Campos, that it had continued Campos in a position where he had access to children, and that Campos had admitted to the molestation of Plaintiff. Linda Vista could not help but be aware from media coverage of settlements and verdicts in similar claims that such actions routinely result in settlements and verdicts in the seven, and even eight-figure range. Linda Vista's offer was a pittance when compared to the actual value of this claim, and Linda Vista knew it.

Additionally, at the time that Linda Vista made the offer to compromise, it had been a party to two lawsuits involving the claims of six victims of molestation by Campos. Linda Vista had been involved with the settlement of those claims, including two that occurred prior in time to the molestation of Jose Lopez. While those actions settled for a confidential amount, Linda Vista knew the total aggregate settlement of the six claims, and that its offer was not reasonable in light of the average settlement value of those previous claims.

At the time of the settlement offer, Linda Vista knew there was no chance that its 998 offer would be accepted. Linda Vista is not entitled to recover expert witness fees.

2. This Court Should Exercise Its Discretion to Deny Linda Vista the Claimed Expert Witness Fees Because the Request is so Overstated as to Border on Fraudulent, and Would Ultimately Result in a Windfall for a Non-Prevailing Defendant, Watchtower

If the 998 offer was made in good faith, this Court has discretion to award Linda Vista a reasonable sum for expert witness fees actually incurred and reasonably necessary for Linda Vista's preparation of the case. Cal. Code Civ. Proc. § 998(c)(1). The court need not award Linda Vista anything. This Court should exercise its discretion to deny Linda Vista any recovery of expert witness fees because the requested amounts are not reasonable, are not apportioned between the multiple Defendants that designated each witness, and because allowing these fees will result in a windfall to a non-prevailing Defendant.

A. The Amount of Monica Applewhite's Fee is Remarkably Unreasonable

Linda Vista seeks to recover $59,071.09 paid to Monica Applewhite, Ph.D. Dr. Applewhite's fees in this matter were exorbitant, and Linda Vista's effort to collect these costs is underhanded. In this action, Dr. Applewhite was paid a lavish sum to do work she had already done, and offer very similar opinions to those she offered in *Dorman v. Doe 1, Linda Vista Church*. (PE 19, Monica Applewhite Key Opinions in Dorman; PE 20, Monica Applewhite Key Opinions in Lopez.) The amount billed by Dr. Applewhite is staggering in light of the fact that she had essentially already done this work. The amount billed is also particularly egregious because Plaintiff filed a motion in limine to exclude the testimony of Dr. Applewhite, which Plaintiff believes was likely to be granted. Finally, Watchtower (not Linda Vista) paid Dr. Applewhite's bills. (PE 21, Billings of Monica Applewhite dated 5/14/2013; 6/17/2014; 7/10/2013; and 11/13/2013.) This charge is incredibly unreasonable.

B. Linda Vista Cannot Obtain the Entire Amount Charged by Monica Applewhite and Jeffrey Younggren, Because Those Witnesses Were Also Designated by Watchtower

Linda Vista has requested $87,515.14 in expert witnesses fees paid to two witnesses, Monica Appelwhite and Jeffrey Younggren, Ph.D. These witnesses were designated by both Watchtower and Linda Vista. Linda Vista, who certainly did not pay these sums, seeks to recover the full amount paid to these experts on behalf of both Defendants. This is both unreasonable and dishonorable.

C. Awarding the Requested Expert Costs Would Result in a Windfall to Non-Prevailing Defendant Watchtower

This Court should deny expert witness fees to Linda Vista, because allowing the fees would ultimately result in a windfall to Watchtower, a non-prevailing defendant. Watchtower is not a prevailing Defendant and is not entitled to recover its costs. Notwithstanding this truth, Watchtower stands to obtain a windfall if this Court awards the full amounts requested by Linda Vista. Recent policy enacted by the Governing Body of Jehovah's Witnesses demand that local congregation may not keep large excess funds, but must instead send them to Watchtower (or a successor corporation). (PE 22, BOE Letter dated March 29, 2014, at p. 4.) As such, any fees awarded to Linda Vista in this category, will be given to Watchtower. This Court should not allow this perversion of the 998 process, and should award no expert witness fees.

IV. THIS COURT SHOULD STRIKE LINDA VISTA'S ENTIRE COST BILL, WHICH WAS NOT PROPERLY VERIFIED AND THEREFORE FAILS TO COMPLY WITH RULE 3.1700 OF THE CALIFORNIA RULES OF COURT

This Court should strike the entirety of Linda Vista's memorandum of costs. A memorandum of costs "must be verified by a statement of the party, attorney, or agent that to the best of his or her knowledge the items of cost are correct and were reasonably incurred in the case." Cal. R. Ct. 3.1700(a). Generally, the filing of this verified attestation is prima facie

evidence of the propriety of the claimed costs. *612 South LLC v. Laconic Ltd. Partnership* (2010) 184 Cal.App.4th 1270, 1285. Since the attestation is evidence sufficient to create a presumption the costs were reasonable and necessary, the verification must carry with it an implied good faith requirement. If there is no such good faith component to the verification, then there would be no justification for accepting the verification as evidence of the propriety of the costs. The vast majority of the costs claimed by Linda Vista are simply unsupportable under the law, and Mr. Copley's verified statement that the costs were reasonably and necessarily incurred was given in had faith. This offense cannot be corrected through the filing of a revised verification. As such, it is as though no verification was given at all. This court should strike Linda Vista's entire memorandum of costs.

V. CONCLUSION

For the foregoing reasons, this Court should strike Linda Vista's memorandum of costs, or alternatively tax costs and allow only $2,984.30.

Respectfully submitted,

Dated: 8-8-14

Devin M. Storey
Attorney for Plaintiff

EXHIBIT 2

Beth A. Kahn, Esq., SBN 134158
Dean A. Olson, Esq., SBN 126155
Ryan C. McKim, Esq., SBN 265941
MORRIS POLICH & PURDY LLP
1055 West Seventh Street, 24th Floor
Los Angeles, California 90017
Telephone: (213) 891-9100
Facsimile: (213) 488-1178
BKahn@mpplaw.com
DOlson@mpplaw.com
RMcKim@mpplaw.com

Attorneys for Defendant, Watchtower Bible and Tract Society of New York, Inc., sued herein as Doe 2, Supervisory Organization

SUPERIOR COURT OF THE STATE OF CALIFORNIA

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Plaintiff,

v.

DOE 1, LINDA VISTA CHURCH; DOE 2, SUPERVISORY ORGANIZATION; DOE 3, PERPETRATOR; and DOES 4 through 100, inclusive,

Defendants

Case No. 37-2012-00099849-CU-PO-CTL

***EX PARTE* APPLICATION TO TAKE THE HEARING ON PLAINTIFF'S MOTION FOR DISCOVERY SANCTIONS AGAINST WATCHTOWER OFF CALENDAR AND TO SEPERATELY SET A MOTION FOR PROTECTIVE ORDER; DECLARATION OF RYAN C. MCKIM; [PROPOSED] ORDER**

Assigned to: Hon. Gregory W. Pollack

Date: November 28, 2016
Time: 8:15 a.m.
Dept.: 71

Trial Date: None.

I. INTRODUCTION

This *ex parte* Application seeks to have the Court take Plaintiff Jose Lopez's motion for monetary sanctions for failure to produce documents off calendar and allow Watchtower to file a motion for a protective order so it can produce documents and to allow Watchtower to file dispositive motions against Plaintiff. Good cause supports this *ex parte* Application for two reasons. First, although Plaintiff scheduled a hearing on December 9, 2016 for a motion for discovery sanctions, Defendant Watchtower has agreed to produce documents in this case subject to the entry of a

protective order. Watchtower has provided a draft protective order to Lopez that was used and agreed upon between counsel for the parties in a separate case involving child sexual abuse. Lopez however refuses to sign the protective order. Accordingly, Lopez is creating a situation where Watchtower is unable to produce documents concerning child sexual abuse – sensitive documents that undoubtedly should only be produced subject to a properly executed protective order – and then taking advantage of that fact by filing a motion for sanctions on the basis that the documents have not been produced. This Court should take the sanctions motion off calendar. Watchtower has reserved a hearing for a motion for a protective order on March 3, 2017, the first available date. Once a protective order is in place, responsive documents will be produced and the case can proceed.

Second, Plaintiff's case against Watchtower has no merit. Watchtower's production of documents does not change this. Because Plaintiff's case has no merit, it would be unjust and inequitable to sanction Watchtower. Instead, Watchtower should be given an opportunity to resolve this case on the merits by dispositive motions. The underlying documents at issue in Plaintiff's motion for sanctions have nothing to do with Watchtower's intended dispositive motions. Thus, Watchtower should be spared from having to respond to Plaintiff's motion for sanctions, which is purely intended to take advantage of the timing of discovery in order to obtain a windfall through sanctions.

II. ALL PARTIES WERE GIVEN WRITTEN *EX PARTE* NOTICE

Watchtower gave written notice of this *ex parte* Application to counsel for Lopez via facsimile at 7:41 a.m. on November 23, 2016. (Declaration of Ryan C. McKim ("McKim Decl."), ¶ 2, Ex. A, Notice dated November 23, 2016, including fax transmission confirmation.) The notice advised that on November 28, 2016 at 8:15 a.m. in Department 71 of the Superior Court located at 330 West Broadway in San Diego, California 92101, Watchtower will seek an order continuing Lopez's motion for discovery sanctions. (*Ibid.*) Watchtower's written notice inquired whether Plaintiff will appear to oppose the *ex parte* Application. (*Ibid.*)

III. FACTUAL & PROCEDURAL BACKGROUND

A. Overview

This case involves an allegation of a single incident of child sexual abuse allegedly committed

in 1986 by Gonzalo Campos (sued as Doe 3, Perpetrator), a rank-and-file member of the Linda Vista Spanish Congregation (sued as Doe 1, Congregation) who had no position of authority in the congregation. (Second Amended Complaint, ¶¶ 2, 5-5.3.) Plaintiff Jose Lopez, who was born on October 23, 1978, was never in Watchtower Bible and Tract Society of New York, Inc.'s (sued as Doe 2, Supervisory Organization) custody and control. (*Ibid.*) Instead, the alleged abuse occurred off congregation property, during the course of Campos' personal activities, and after he obtained parental consent to take a child to a private residence. (*Ibid.*) Several decades later, on June 29, 2012, Lopez sued the Linda Vista Spanish Congregation and Watchtower. (Complaint, file stamped June 29, 2012.)

B. Pertinent Discovery Disputed

Lopez's motion for discovery sanctions concern requests for production nos. 5 and 12 in a person most qualified deposition notice. (McKim Decl., ¶ 4, Ex. B, Email from Storey to McKim, dated November 4, 2016.) Request no. 5 seeks: "Any and all individual written accounts, reports, summaries, letters, emails, facsimiles, and records, whether or not compiled, concerning reports of sexual abuse of children by members of the Jehovah's Witnesses, including but not limited to, Governing Body members, district overseers, circuit overseers, elders, ministerial servants, pioneers, publishers, baptized publishers, and individuals from the time period of 1979 to the present." (*Lopez, supra*, 246 Cal.App.4th at 576.) Request no. 12 seeks: "All letters, emails, facsimiles, or other documentary, tangible, or electronically stored information of any kind, Watchtower Bible and Tract Society of New York, Inc. received in response to the Body of Elder Letter Dated March 14, 1997." (*Id.* at 577.)

After failing to produce the responsive documents, Judge Lewis struck Watchtower's answer as a discovery sanction. (*Lopez, supra*, 246 Cal.App.4th at 586-587.) To avoid a trial against the Linda Vista Spanish Congregation and to obtain a default judgment against Watchtower, Lopez voluntarily dismissed the Linda Vista Spanish Congregation *with* prejudice on June 26, 2014. (McKim Decl. at ¶ 8, Ex. E, Dismissal with Prejudice, file stamped June 26, 2014.) On November 4, 2014, Judge Lewis entered a default judgment against Watchtower and in favor of Lopez. (*Ibid.*) Watchtower successfully appealed. (*Lopez, supra*, 246 Cal.App.4th at 606-607.)

C. Meet And Confer Efforts Regarding Watchtower's Production Of Documents Responsive To Requests Nos. 5 And 12

On November 2, 2016, Watchtower wrote to Lopez's counsel to request a stipulated protective order and non-disclosure agreement for its production of documents responsive to requests nos. 5 and 12. (McKim Decl., ¶ 6, Ex. D, Email from McKim to Storey dated November 2, 2016, including proposed stipulated protective order and non-disclosure agreement.) Watchtower's proposed stipulated protective order and non-disclosure agreement quotes Judge Lewis and the Court of Appeal: "the Court has ordered that '[t]o the extent the documents produced might invade the privacy rights of third parties, defendant may produce documents wherein the names, addresses, e-mail addresses, telephone numbers and social security number[s] of third-parties have been redacted' (Order on Recommendations of Discovery Referee, file stamped January 2, 2014, p. 4) (hereinafter 'January 2014 Protective Order')." Lopez's counsel refused to sign the stipulated protective order and non-disclosure agreement and even stated that if Watchtower redacted documents as permitted by Judge Lewis and the Court of Appeal, "there will be motion practice[.]" (McKim Decl., ¶ 4, Ex. B, Email from Storey to McKim dated November 4, 2016.) Lopez scheduled a hearing on December 9, 2016 for a motion for discovery sanctions. (McKim Decl., ¶ 6.)

IV. THE COURT SHOULD TAKE THE PLAINTIFF'S MOTION FOR DISCOVERY SANCTIONS OFF CALENDAR

Good cause supports taking Lopez's motion for discovery sanctions off calendar and separately setting a motion for protective order to the extent Lopez continues to refuse to sign a protective order to allow production of documents in this case. The discovery at issue identifies victims of alleged child sexual abuse, as well as witnesses that have reported abuse. Given the nature of the documents, a protective order is needed to ensure these documents will not be disseminated to any person not a party to this lawsuit.

Regardless of Watchtower's compliance with Judge Lewis's discovery order, Plaintiff has promised "that there will be law and motion practice" concerning Watchtower's production of documents. (McKim Decl., ¶ 4, Ex. B, Email from Storey to McKim, dated November 4, 2016.) As explained above, neither the Court nor Watchtower should be burdened with Lopez's "law and motion practice" because Watchtower has offered to make a production of documents so long as a

protective order is in place. Watchtower has reserved a hearing for a motion for a protective order on March 3, 2017, which is the first available date. (McKim Decl., ¶ 7.)

V. PLAINTIFF'S MOTION FOR MONETARY SANCTIONS SHOULD BE TAKEN OFF CALENDAR BECAUSE SANCTIONS WOULD GIVE PLAINTIFF A WINDFALL IN A CASE HE CANNOT WIN ON THE MERITS WITH OR WITHOUT THE UNDERLYING DOCUMENTS

Watchtower can resolve this case on the merits without reference to the underlying discovery. As a consequence, Plaintiff's motion for monetary sanctions is a waste of this Court's time and resources. Indeed, any award of sanctions would put Plaintiff in a better position than had Watchtower produced documents without a protective order. (*Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1223 (holding that discovery sanctions "should not put the moving party in a better position than he would otherwise have been had he obtained the requested discovery"); *Wilson v. Jefferson* (2008) 163 Cal.App.3d 952, 958.)

It is well established that the purpose of discovery sanctions "is not to provide a weapon for punishment, forfeiture and the avoidance of a trial on the merits [but] to prevent abuse of the discovery process and correct the problem presented." (*Parker v. Wolters Kluwer United States, Inc.* (2007) 149 Cal.App.4th 285, 301; Cal. Code Civ. Proc. § 2025.480(k) (requiring that sanctions be "just against the disobedient party, or against the party with whom the disobedient deponent is affiliated").) As such, appellate courts have held that "[t]he penalty should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery." (*Parker, supra*, 149 Cal.App.4th at 301.) Put simply, the "punishment must fit the crime," and the award can do no more than necessary to secure compliance with the specific order at issue. (*Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1293; *Newland v. Superior Court* (1995) 40 Cal.App.4th 608, 614 ("undoubtedly has the power to impose a sanction which will accomplish the purpose of discovery, when its order goes beyond that and denies a party any right to defend the action or to present evidence upon issues of fact which are entirely unaffected by the discovery procedure before it, it not only abuses its discretion but deprives the recalcitrant party of due process of law"); cf *Lorenz v. Commercial Acceptance Ins. Co.* (1995) 40 Cal.App.4th 981, 997 ("[t]he policy of the law favors trial on the merits; it does not favor default").)

As explained below, any award of sanctions to Plaintiff would be unjust because Plaintiff's case has no merit and the underlying documents can in no way change this. Consequently, Watchtower should not have to respond to Plaintiff's motion and it should be taken off calendar.

i. This Lawsuit Must Be Dismissed Because Plaintiff's Theories Of Respondeat Superior Liability And Ratification Fail As A Matter Of Law

Stripped of their rhetoric and conclusions, all of Plaintiff's causes of action against Watchtower are based either on the doctrine of respondeat superior or a theory that Watchtower somehow ratified Campos' torts. As explained below, both theories fail as a matter of law and can be disposed of by dispositive motions that do not relate to the underlying documents. (*Lopez, supra,* 246 Cal.App.4th at 606 (discussing "core issues" that are not related to the underlying discovery documents).) Given these circumstances, it would be unjust to allow Plaintiff to exploit the timing of discovery to win monetary sanctions because he is not entitled to anything from Watchtower. (Cal. Civ. Proc. Code § 2019.020 (b)(authorizing courts to "establish the sequence and timing of discovery . . . in the interests of justice"); *Williams, supra,* 167 Cal.App.4th at 1223; *Wilson, supra,* 163 Cal.App.3d at 958.) Thus, there is no point to Plaintiff's motion for monetary sanctions and the Court should take it off calendar.

1. Respondeat Superior Is Not A Basis For Liability Because Plaintiff's Retraxit Concedes That The Linda Vista Spanish Congregation Did Nothing Wrong

Plaintiff's voluntary dismissal of the Linda Vista Spanish Congregation ***with prejudice*** is tantamount to a judgment on the merits against Plaintiff and in favor of the Linda Vista Spanish Congregation. Of course, a judgment in favor of an agent releases the principal of respondeat superior liability. Under California law, a voluntary dismissal with prejudice is a "retraxit," which constitutes a judgment on the merits against the plaintiff. (*Alpha Mech., Heating & Air Conditioning, Inc. v. Travelers Cas. & Sur. Co. of Am.* (2005) 133 Cal.App.4th 1319, 1330-31 (O'Rourke, J.).) A retraxit constitutes a dismissing party's admission that his claims against the dismissed party are "unfounded." (*John Douglas v. Los Angeles Herald-Examiner* (1975) 50 Cal.App.3d 449, 464.)

A retraxit in favor of an employee "redounds to the benefit of the employer, whose sole liability, if any, depends upon *respondeat superior*." (*Louie Queriolo Trucking, Inc. v. Superior*

Court (1967) 252 Cal.App.2d 194, 198, 200.)

Here, Plaintiff voluntarily dismissed the Linda Vista Spanish Congregation with prejudice. (Request for Dismissal, file stamped and signed by Court Clerk on June 26, 2014.) His retraxit constitutes a judgment on the merits against Plaintiff and in favor of the Linda Vista Spanish Congregation. Thus, Plaintiff has admitted that the elders of the Linda Vista Spanish Congregation did nothing wrong. Because Plaintiff alleges that the Linda Vista Spanish Congregation is Watchtower's agent, a judgment in favor of the Linda Vista Spanish Congregation rebounds to Watchtower and is dispositive of Watchtower's purported respondeat superior liability. (First Amended Complaint, ¶ 9.2.) Thus, as a matter of law, Plaintiff cannot pursue a respondeat superior theory of liability against Watchtower because there is a judgment conclusively determining that Watchtower's agent, the Linda Vista Spanish Congregation, did nothing wrong. There are no allegations in this case that Watchtower itself knew of any wrongdoing by Campos before the alleged abuse of Plaintiff.

2. Liability Based On Ratification Would Unconstitutionally Deprive The Jehovah's Witnesses Of Control Over Selection Of Members And Clergy

Plaintiff's ratification theory cannot support liability against Watchtower because it unconstitutionally infringes on the Jehovah's Witnesses' right to independently appoint clergy, decide who is a member of the faith, and how to discipline sinners. These issues are well beyond the subject matter of a civil court and thus cannot support liability based on ratification.

The First Amendment precludes suits related to the selection or retention of spiritual leaders. (*Hosanna-Tabor Evangelical Lutheran Church v. E.E.O.C.* (2012) 132 S.Ct. 694, 704-06; *Serbian Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696, 717-20; see, Cal. Const. art. I, § 4.) "Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers." (*Hosanna-Tabor Evangelical Lutheran* Church, *supra*, 132 S.Ct. at 702.) Likewise, civil courts do not have authority to examine or pass judgment on matters of congregation membership, discipline of congregation members, and appointment or deletion of ecclesiastical positions. (*Id.* at 704; *Watson v. Jones* (1871) 80 U.S. 679, 708-09; *Permanent Committee of Missions v. Pacific Synod of the Presbyterian Church* (1910) 157 Cal. 105, 128.)

Here, Plaintiff's ratification theory is unconstitutional because it seeks to impose liability on Watchtower based on its purported selection of clergy and members of the Jehovah's Witnesses' faith. To be sure, paragraph 9.2 of the First Amended Complaint alleges

> Although Defendant Supervisory Organization was aware through its agents - the Elders of Defendant Linda Vista and La Jolla Spanish Congregation of Jehovah's Witnesses - prior to appointing the Perpetrator as a Ministerial Servant in 1988 and an Elder in 1993, that Perpetrator had sexually molested multiple children, the Perpetrator was retained and promoted to more senior leadership positions as an agent of Defendant Supervisory Organization. By retaining and promoting Perpetrator after learning of his past sexual abuse of children, Defendant Supervisory Organization ratified and authorized Perpetrator's conduct.

These are precisely the types of allegations that are beyond the Court's jurisdiction because the First Amendment bars courts from interfering with the decision of a religious group to hire or fire its clergy or select members of the religion. (*Hosanna-Tabor Evangelical Lutheran* Church, *supra*, 132 S.Ct. at 702.) Indeed, the right to select clergy and members of a religion would be quite hollow if it could serve as a basis for demonstrating ratification because it would allow secular courts to second-guess religious decisions. Neither the First Amendment nor the California Constitution authorizes such intrusions. Therefore, Plaintiff's ratification theory is not cognizable.

Nonetheless, Plaintiff will likely argue that ratification is a question of fact for the jury because Judge Lewis denied Watchtower's motion for summary adjudication regarding ratification in a religious context. This is a red herring because Watchtower may raise the ratification issue in a motion for judgment on the pleadings. (*Donohue v. State of California* (1986) 178 Cal.App.3d 795, 800-802 ("regardless of the existence of triable issues of fact, the motion for judgment on the pleadings was properly granted if the complaint does not state a cause of action for any of the reasons set forth in the motion"); Cal. Code Civ. Proc. § 438(c)(1)(B)(i), (ii).) Thus, Watchtower may properly dispose of Plaintiff's ratification theory by motion for judgment on the pleadings.

ii. Plaintiff Is Judicially Estopped From Asserting Respondeat Superior And Ratification Theories Of Liability Against Watchtower

The Court may grant summary judgment in favor of Watchtower based on the doctrine of judicial estoppel. The equitable doctrine of judicial estoppel precludes a party from taking inconsistent positions in judicial proceedings. The Court of Appeal recognizes that such opportunism

is an "abuse [of] the judicial process," and courts invoke the doctrine of judicial estoppel "to protect against a litigant playing fast and loose with the courts." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181 (internal citations and punctuation omitted).) "The doctrine applies when (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986-987 (punctuation and citation omitted).)

Here, all of the elements of judicial estoppel are easily satisfied. First, Plaintiff has taken two positions in this litigation. For example, Plaintiff alleges that "Elder Munoz recommended that Plaintiff's mother than [sic] Plaintiff should be receiving bible study instruction. Elder Munoz recommended that Plaintiff's mother should approach Defendant Perpetrator because he was very good with children." (First Amended Complaint, ¶ 5.1.) Via his retraxit, Plaintiff admits that there was nothing wrongful about Mr. Munoz's alleged recommendation. Yet, Plaintiff takes the opposite position with respect to Watchtower. Second, these positions were taken in this case, which is a judicial proceeding. (First Amended Complaint; McKim Decl. at ¶ 8, Ex. E, Dismissal with Prejudice, file stamped June 20, 2014.) Third, Plaintiff was successful in asserting the first position because the Court entered a voluntary dismissal of the Congregation with prejudice. (*Ibid.*) Fourth, Plaintiff's positions are completely inconsistent because Mr. Munoz's alleged recommendation was either tortious or not. Fifth, because Plaintiff made the allegations in his operative complaint and because he voluntarily dismissed the Linda Vista Spanish Congregation, Plaintiff cannot argue that he took the first position as a result of ignorance, fraud or mistake. Therefore, the doctrine of judicial estoppel supports summary judgment against Plaintiff.

iii. Plaintiff's Retraxit Collaterally Estops Him From Re-Litigating Issues Conclusively Decided In Favor Of The Congregation

The doctrine of collateral estoppel is dispositive of this case because the issues against the Congregation and Watchtower are identical and have been resolved against Plaintiff and in favor of the Congregation.

"There are three prerequisites which must be shown before the doctrine [of collateral estoppel] will be applied: (1) the issue in the second action must be identical to the issue adjudicated in the first action; (2) the first action must have proceeded to a final judgment on the merits; and (3) the party against whom the collateral estoppel is to be asserted must have been a party, or in privity with a party, to the first action." (*Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813, 824.) Even when these prerequisites are satisfied, the doctrine of collateral estoppel is not "mechanically applied." (*Alpha Mech., Heating & Air Conditioning, Inc., supra*, 133 Cal.App.4th at 1333.) Instead, the Court must apply it when it advances three policies: "(1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide repose by preventing a person from being harassed by vexatious litigation." (*Ibid.* (citations and punctuation omitted).)

Importantly, although collateral estoppel normally involves two separate actions, a final order has a collateral estoppel effect in the same action. (*Columbus Line, Inc. v. Gray Line Sight-Seeing Companies Associated, Inc.* (1981) 120 Cal.App.3d 622, 631 & fn.7; see, *In re Daniel D.* (1994) 24 Cal.App.4th 1823, 1832-1833; see, also, *Estate of Anderson* (1983) 149 Cal.App.3d 336, 346; see, also *Estate of Wemyss* (1975) 49 Cal.App.3d 53, 57-59.) Otherwise, there would be a risk of inconsistent judgments and repetitive litigation. (*Columbus Line, Inc., supra*, 120 Cal.App.3d at 631 & fn.7.)

Here, all of the prerequisites for collateral estoppel are present. First, the issues raised in Plaintiff's claims against the Congregation are identical to the issues raised against Watchtower because they depend on the same core allegations. (Second Amended Complaint, Background Facts Applicable to All Counts and all causes of action.) For example, liability for both the Congregation and Watchtower depends on Plaintiff's allegation that "Elder Munoz recommended to Plaintiff's mother than [sic] Plaintiff should be receiving [B]ible study instruction. Elder Munoz recommended that Plaintiff's mother should approach Defendant Perpetrator because he was very good with children." (First Amended Complaint, ¶ 5.1.) Second, these issues were decided on the merits against Plaintiff because of his retraxit. (McKim Decl. at ¶ 8, Ex. E, Dismissal with Prejudice, file stamped June 20, 2014.) A retraxit is a judgment on the merits with a res judicata and collateral

estoppel effect. (*Alpha Mechanical, Heating & Air, supra*, 133 Cal.App.4th at 1333 ("there *is* a final judgment on the merits via retraxit")(emphasis in original).) Third, Plaintiff, whom the collateral estoppel is asserted against, is a party to this case and voluntarily dismissed the Congregation with prejudice. (Second Amended Complaint, ¶ 5.) Because the dismissal of the Congregation was with prejudice, it is final and conclusive.

Moreover, collateral estoppel advances California's public policies. Plaintiff had a full and fair opportunity to litigate his claims against the Congregation, but instead elected to dismiss the Congregation with prejudice to avoid a trial and to proceed with a default prove up against Watchtower, which would be undefended. Under these circumstances, collateral estoppel protects the integrity of the judicial system because it prevents inconsistent results in the same case. Collateral estoppel also promotes judicial economy and provides repose to Watchtower because it prevents Plaintiff's repetitious litigation on issues already resolved on the merits via retraxit. If Plaintiff were allowed to re-litigate the issues encompassed in the retraxit, there would be no meaning to a dismissal "with prejudice." (See, *Alpha Mech., Heating & Air Conditioning, Inc., supra*, 133 Cal.App.4th at 1333.) Thus, it is proper to grant summary judgment in favor of Watchtower.

iv. Plaintiff's Case Is Time Barred Because He Cannot Satisfy The Notice Element Of The Statute Of Limitations

Plaintiff's case is time barred because he cannot demonstrate that Watchtower was on notice of "unlawful sexual conduct" committed by the Perpetrator. This is dispositive of Plaintiff's case.

Under Code of Civil Procedure § 340.1(a)(2), a victim's lawsuit against a nonperpetrator for childhood sexual abuse is time barred if it is filed after the victim's 26th birthday. If the victim files a lawsuit after his 26th birthday, he must establish, *inter alia*, that the nonperpetrator "[1] knew or had reason to know, or was otherwise on notice, of any unlawful sexual conduct [2] by an employee, volunteer, representative, or agent, and [3] failed to take reasonable steps, and to implement reasonable safeguards, to avoid acts of unlawful sexual conduct in the future by that person." (Cal. Code Civ. Proc. § 340.1(b)(2); *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545, 549.) Imputed notice may satisfy the notice element of Code of Civil Procedure § 340.1(b)(2). (*Santillan v. Roman Catholic Bishop of Fresno* (2008) 163 Cal.App.4th 4, 10; Cal. Civ. Code § 2332.) "So long as the

agent was under a duty to disclose certain information, the principal is bound by the agent's knowledge of that information whether or not the agent communicated it to the principal." (*Santillan, supra*, 163 Cal.App.4th at 10-11.)

In this case, Plaintiff was born in 1978 and filed suit in 2012, well after his 26th birthday. (Second Amended Complaint, ¶ 5; Complaint, file stamped June 29, 2012.) Thus, to avoid the statute of limitations, Plaintiff must establish, *inter alia*, the elements of Code of Civil Procedure § 340.1(b)(2).) To this end, Plaintiff alleges that Congregation's elders learned that the Perpetrator molested a young boy in 1982. (Second Amended Complaint, ¶ 6.1.) Although the Perpetrator allegedly confessed to the Congregation's elders, "[n]o further action was taken by the congregation." (*Ibid.*) Thus, to satisfy the notice element of the statute of limitations, Plaintiff depends on imputed notice. (Second Amended Complaint, ¶ 9.2.) However, there is no evidence that elders were required to report child sexual abuse to Watchtower between 1982, the year of Campos' first purported sexual incident with a minor, and 1986, the year of Campos' alleged sexual incident with Plaintiff. (*Santillan, supra*, 163 Cal.App.4th at 10-11.) Absent such evidence, notice cannot be imputed to Watchtower and summary judgment is proper based on the statute of limitations. (*Id.*)

v. Watchtower Was Not The Proximate Cause Of Plaintiff's Alleged Injuries

Watchtower's relationship to Plaintiff's alleged abuse is too attenuated to impose liability on Watchtower. Plaintiff has no case against Watchtower.

Because "the purported causes of an event may be traced back to the dawn of humanity," the law imposes limits on liability, such as proximate causation. (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1045.) The proximate cause element is "concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct." (*PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 315-316.) Thus, proximate causation is a "policy-based legal filter on 'but for' causation that courts apply to those more or less undefined considerations which limit liability even where the fact of causation is clearly established." (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 464) (internal citations omitted).)

In cases involving child sexual abuse, California courts refuse to impose liability on national

organizations, like Watchtower, where the proximate causation element cannot be met. In *Jeffrey E. v. Central Baptist Church* (1988) 197 Cal.App.3d 718, the court found that public policy considerations did not support a finding of proximate cause because of the attenuated relationship between the abuse and the role of the defendant religious organization. There, the plaintiff sued a church for child sexual abuse by a volunteer Sunday school teacher. With the plaintiff's mother's approval, the Sunday school teacher would spend time alone with the plaintiff engaged in non-church related activities such as yard work or errands. (*Id.* at 720.) It was during these activities that the Sunday school teacher sexually abused the plaintiff. (*Id.* at 721.)

With regard to proximate cause public policy considerations, the court focused on the church's role with regard to the Sunday school teacher's ability to abuse the plaintiff. The court stated that it was "not an abuse of authority which had been established by reason of a special relationship created by" the church because the abuser was a member of the church or a volunteer Sunday school teacher. (*Jeffrey E., supra*, 197 Cal.App.3d at 723.) Rather, the position of trust "flourished through numerous other contacts sanctioned by [the plaintiff's] mother" and the abuse did not occur on church property or during the course of any religious event or activity. (*Id.*) Accordingly, summary judgment was appropriate as a matter of law as the connection between the church and the abuse of the plaintiff was too attenuated to impose liability.

Here, Watchtower's connection to the alleged abuse is too remote to impose liability. At most, Plaintiff alleges that "Elder Munoz recommended that Plaintiff's mother should approach Defendant Perpetrator because he was very good with children" and that "Plaintiff's mother followed Elder Munoz's instructions and spoke with Perpetrator about providing her son with bible study lessons. Defendant Perpetrator began giving Plaintiff bible study instruction." (First Amended Complaint, ¶¶ 5.1, 5.2.) However, there is no allegation that Watchtower created a situation in which Plaintiff and Perpetrator were alone. To the contrary, the First Amended Complaint expressly alleges that Plaintiff's mother organized the bible study lessons, not Watchtower or its agents. (First Amended Complaint, ¶ 5.2.) Moreover, because of his retraxit, Plaintiff readily concedes that there was nothing wrongful about Mr. Munoz's alleged suggestion that Plaintiff study the Bible with the perpetrator. Because of Watchtower's extremely attenuated connection to the alleged abuse, Plaintiff

cannot satisfy the proximate causation element for his case. Because causation is an element of each of Plaintiff's causes of action, his case must be dismissed. (See, e.g., CACI 400; CACI 426; CACI 1306.)

In sum, because Watchtower's defenses address "core" issues that are unrelated to the underlying documents, the Court should take Plaintiff's motion for monetary sanction off calendar.

VI. *EX PARTE* RELIEF IS NECESSARY BECAUSE WATCHTOWER IS IN IMMEDIATE DANGER

Watchtower should not have to oppose a motion for sanctions because it is willing to produce responsive documents. Plaintiff's Request No. 12 seeks all responses Watchtower received to its March 14, 1997, letter to All Bodies of Elders within the U.S. Branch territory. It should be noted by this Court that the March 14, 1997, letter asked for reports "on anyone who is currently serving or who formerly served in a Society appointed position in your congregation who is known to have been guilty of child molestation in the past." (*Lopez, supra*, 246 Cal.App.4th at 577 fn.4.)

As this Court can see, there was no time limit on that 1997 request. Indeed, some of the reports relate to alleged conduct as far back as the 1960s and 1970s. Plaintiff is well aware of this fact because he has already received copies of these reports in other litigation. Watchtower is ready and willing to produce those documents in this case, but has been prevented from doing so by Plaintiff's refusal to enter into a stipulated protective order relating to those documents as he did in the other litigation.

Plaintiff claims that he needs these documents to prove Watchtower's "institutional knowledge" of child abuse. Yet, he is blocking Watchtower's efforts to produce documents. This is all part of Plaintiff's scheme to avoid a hearing of this case on its merits (or lack of merit) ad maneuver this case into an inequitable outcome on a discovery dispute.

Watchtower is ready and willing to produce documents for in camera review by this Court. These documents were never seen by the Court of Appeal when it ruled that they are "potentially relevant." Upon review, Watchtower is confident that this Court will quickly see that they have no relevance and are not reasonably calculated to lead to the discovery of admissible evidence.

Yet, Lopez has refused to take his motion for sanctions off calendar making it impossible for

the Court to hear a motion for protective order before the hearing on Lopez's motion for discovery sanctions. (McKim Decl., ¶ 4, Ex. B.) Therefore, Watchtower and the Court are in immediate danger of having to waste time and resources to respond to a sanctions motion for failure to produce documents when Watchtower is willing to make a document production subject to a protective order.[1] Once again, there will be no need for a hearing or a motion for protective order if counsel will simply agree to sign the same protective order that he has negotiated and signed in other child sexual abuse cases against Watchtower.

VII. IDENTIFICATION OF ATTORNEYS PURSUANT TO RULE 3.1202(a) OF THE CALIFORNIA RULES OF COURT

Pursuant to Rule 3.1202(a) of the California Rules of Court, Watchtower states that Plaintiff's counsel is Irwin M. Zalkin, Esq. and Devin M. Storey, Esq. of the Zalkin Law Firm, P.C., located at 12555 High Bluff Dr., Ste. 301 in San Diego, CA 92130. Their telephone number is 858-259-3011. Mr. Zalkin's email address is lrwin@zalkin.com and Mr. Storey's email address is Dms@zalkin.com.

VIII. CONCLUSION

In conclusion, for the reasons stated above and in the attached declarations, the Court should grant this *ex parte* Application.

Dated: November 23, 2016

MORRIS POLICH & PURDY LLP

By: Ryan C. McKim
Ryan C. McKim
Attorneys for Defendant, Watchtower Bible and Tract Society of New York, Inc.

[1] It is worth noting that Lopez has strategically timed his motion for discovery sanctions so that Watchtower's opposition to the motion is due the first business day after Thanksgiving. This is the third year in a row that Plaintiff has done so. (McKim Decl., ¶ 8.) When Watchtower raised this issue with Devin Storey, counsel for Lopez, Mr. Storey offered to file his motion early and stipulate so that all of the briefing was due before Thanksgiving. (*Ibid.*) However, Mr. Storey's offer was not in good faith because his proposed schedule overlapped with a tight briefing schedule for another case involving one of Mr. Storey's clients and Watchtower's counsel's client. (*Ibid.*) Courts do not condone such "churlishness." (*Pham, supra*, 54 Cal. App. 4th at 17.) "The law should not create an incentive to take the scorched earth, feet-to-the-fire attitude that is all too common in litigation today. Bitterly fought continuance motions are not particularly productive for either the administration of justice generally or the interests of the litigants particularly." (*Id.* & fn.3.)