IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

| | |
|---|---|
| TIMOTHY C. ROTE,<br><br>Plaintiff,<br><br>v.<br><br>ANDREW BRANDSNESS,<br>CAROL BERNICK,<br>OREGON STATE BAR PROFESSIONAL LIABILITY FUND,<br>ANTHONY ALBERTAZZI,<br>NENA COOK<br>PAM STENDAHL,<br>MAX ZWEIZIG,<br><br>Defendants. | Case No.: 18CV45257<br><br>RESPONSE IN OPPOSITION TO DEFENDANT BRANDSNESS' MOTION FOR SUMMARY JUDGMENT ("MSJ") AND MOTION TO DISMISS ("MTD").<br><br>PLAINTIFF CROSS-MOTION FOR SUMMARY JUDGMENT.<br><br>ORAL ARGUMENT REQUESTED |

# Table of Contents

**Cases**

**Rules**

## INTRODUCTION

Plaintiff provides herein his Response to Defendant's Consolidated Motion to Dismiss and Motion for Summary Judgment. Plaintiff also files herein his Cross-Motion for Summary Judgment. By agreement between the parties, Plaintiff's Response is due June 14, 2023.

Plaintiff notes for the record that Defendant gave notice of his intent by phone to file a Motion to Dismiss and Summary Judgment but did not identify the reasons for that action having failed to Answer the Third Amended Complaint. The most plausible reason for Defendant filing his ridiculous Motions is because the PLF had informed him that Senior Judge Leslie Roberts would be assigned the Summary Judgment hearing. Based on that information and confirmation of other similar email correspondence, Plaintiff is filing a new Civil Rights Lawsuit against the PLF and Oregon Judicial Department, including Senior Judges VanDyk and Roberts. The manipulation of judicial assignments to use Senior Judges with nothing to lose is designed to punish Plaintiff and is a Constitutional Violation implicating a lack of bias and independence. It is also intended as an attack on Plaintiff for opposing child porn and as support for the decriminalization of child pornography, a position strongly supported by the Oregon Judicial Department.

The Court should deny Defendant's Motion to Dismiss on procedural grounds alone because Defendant's Motion to Dismiss has now been filed more than 21 months after Plaintiff filed his Third Amended Complaint (August 21, 2021). **See Exhibit 1**. Although this case is mired in a confusing procedural history (explored in greater depth below), Defendant Brandsness' Motion to Dismiss was due on or about September 20, 2021. This case was remanded back from Federal Court on June 22, 2021. **See Exhibit 2**. Any allegations in the Plaintiff's complaint not responded to in an answer (that should have been filed after remand and Third Amended Complaint), other than allegations about damages, are therefore deemed

admitted (Or. R. Civ. P. 19(C)).

Defendant has also previously conceded that summary judgment against Plaintiff's claims would be all but impossible because there is a question of fact reserved for a jury. In fact the parties have already completed discovery. **See Exhibit 3**. Nonetheless, while Plaintiff was open to allowing this case go to trial before a jury, the deemed admissions by Defendant implicate a Cross-Motion for Summary Judgment in favor of Plaintiff. The only remaining issue once the Cross-Motion is granted is a hearing or trial on the damages component.

Contrary to what Defendant is alleging, there is no decision by a Federal Court in case 3:15-cv-2401 or the 9th Circuit Court of Appeal that has any legal effect that would render Plaintiff's malpractice claim moot. Just the opposite is true.

Plaintiff moves this Court to deny Brandsness' respective Motions and ***grant*** Plaintiff's Cross-Motion for Summary Judgment.

## BACKGROUND AND FACTUAL HISTORY

Plaintiff engaged Brandsness to provide to represent Plaintiff, to provide professional advice to Plaintiff and a number of corporations controlled by Plaintiff Rote, those corporations also named as Defendants in federal case 3:15-cv-2401. Defendant was engaged in January 2016, as reflected in the contract and agreement signed January 28, 2016. **See Exhibit 4**.

As the Court is aware, then Defendant Rote in that 3:15-cv-2401 case could not represent the corporate defendants as Rote is not an attorney licensed to practice in Oregon. Although Defendant Brandsness denied the existence of a contract between the parties (in his Motion to Dismiss in federal court), there was in fact a written contract between the parties. Denying the existence of the contract or that Brandsness provided professional advice to both Plaintiff and the corporate entities was not only perjury but also violated more than one of the mandates of attorney ethics. **See Exhibit 15, pages 4-5.**

In spite of the Federal Court not retaining jurisdiction over state court claims, the Federal Court nonetheless granted Brandsness Motion to Dismiss based on a narrow interpretation of representation and lack of written contract. **See Exhibit 18**. The 9th Circuit reversed Mosman's Motion to Dismiss Brandsness and the other defendants. See **Exhibit 19.**

The malpractice and other claims arose in that 3:15-cv-2401 federal case over whether Brandsness advised Rote and corporate defendants that they could not timely invoke and compel arbitration under the terms of the employment agreement between the Plaintiff in that case (Max Zweizig) and one or more of the defendants in that case (including Rote). The employment agreement is provided herein. **See Exhibit 5**.

That employment agreement had already survived a challenge by Max Zweizig and the arbitration mandate of that employment agreement was upheld in New Jersey State Court and affirmed by the US District Court of Oregon in two prior cases. This is not disputed. In fact the same parties completed arbitration resulting in award to Max Zweizig against his former employer Northwest Direct Teleservices. Northwest Direct was a named defendant in case 3:15-cv-2401, as it was in the arbitration. **See Exhibit 6**.

Brandsness advised Plaintiff that arbitration could not be invoked by the Defendants in case 3:15-cv-2401. This advice is not disputed and is also admitted. The Defendants in that case and Rote then filed answers to the complaint, both filed on January 28, 2016. **See Exhibit 7.**

Subsequently, Plaintiff Rote subsequently decided that a Motion to Compel arbitration should be filed and he did so on March 1, 2016. **See Exhibit 8, pages 1-27**. Plaintiff ordered Brandsness to then also file a Motion to Compel arbitration in that federal case (**Rote Decl**). Brandsness refused to do so and advised Rote to withdraw the Motion as untimely (**Rote Decl**). Still following that advice Brandsness, Rote then withdrew his Motion to Compel. **See Exhibit 8, pages 28-30**. Rote continued to research this issue and found that a Motion to Compel arbitration may be filed at any time during litigation and that failing to

advise a client of an opportunity to Compel arbitration constitutes professional negligence (**Rote Dec**l). Plaintiff Rote once again ordered Brandsness to file a Motion to Compel arbitration on behalf of the corporate entities. Brandsness refused. Once that malpractice was identified to Brandsness, he (Brandsness) then resigned from representation on or around October 16, 2016.

Defendant Rote then re-filed a Motion to Compel arbitration of the case, dated October 16, 2016. **See Exhibit 8, pages 31-45**. The federal court found that Motion to Compel was untimely (waived) and that Rote as a non-signatory could not invoke the arbitration of the employment agreement and denied the Motion. **See Exhibit 9**. A similar employment claim (under ORS 659A) and noneconomic damages was awarded in the previous arbitration between Max Zweizig and the same defendants (as in case 3:15-cv-2401). The arbitrator awarded only $5,000 in noneconomic damages to Zweizig. **See Exhibit 6.**

In case 3:15-cv-2401 and in front of a highly biased jury in Multnomah County, Zweizig was awarded $1,000,000 in damages against the corporate defendants and Rote. **See Exhibit 10, page 3-5**. The court in that federal case suppressed from the jury the computer forensic evidence, opinions and testimony of three forensic experts (one of which was hored by Zweizig) who found unanimously that Max Zweizig used a business computer assigned to him and from his home in New Jersey, downloaded, possessed and distributed child porn, porn and pirated music and movies. Those same experts found that Zweizig had installed a peer to peer program registered to him to share this body of illegal videos and music to anyone having knowledge of the ip address of Zweizig's computer and 120 gig hard drive he used. The illegal content was housed on a segregated portion of his 120 gig hard drive and had a unique password. Those forensic reports are in this case. **See an example provided herein as Exhibit 11**. The arbitrator did receive that forensic evidence, including opinions and testimony of these same experts, which no doubt had an impact on the noneconomic

damage award to Zweizig.

On information and belief, Defendant Brandsness intentionally lied to Plaintiff Rote on defendants' opportunity to invoke and compel arbitration in case 3:15-cv-2401. The purpose of that lie by Brandsness was to hurt his client (Plaintiff Rote) for Rote opposing the distribution of child porn and to profit from representing the corporate defendants. Unlike in court, arbitration proceedings do not require corporate defendants to be represented by an attorney. A successful Motion to compel arbitration would have saved more than $200,000 in legal fees (**Rote Declaration**).

Defendant Brandsness only recently came out of the closet as bi-sexual and is among some of the members of the LGB community who support decriminalizing child pornography. Plaintiff believes Brandsness lied to Rote about the ability of the defendants to compel arbitration to intentionally subject Rote to a substantially higher award.

## PROCEDURAL HISTORY

The relevant procedural history of this case is as follows:

a. **Exhibit 12** Plaintiff Complaint, dated October 18, 2018, with all current claims against Brandsness;
b. **Exhibit 13** Plaintiff First Amended Complaint, dated December 6, 2018 adding defendants;
c. **Exhibit 14** Removal to Federal Court, dated January 6, 2019, case 319-cv-00082;
d. **Exhibit 15** MTD Dismiss Brandsness in case 3:19-cv-00082, dated January 22, 2019;
e. **Exhibit 16** Response and Declaration in case 3:19-cv-00082, dated February 4, 2019;
f. **Exhibit 17** PLF Coverage denial letters;
g. **Exhibit 18** Opinion and Order of Michael Mosman in case 3:19-cv-00082;

h. **Exhibit 19,** Opinion and Order of the 9th Circuit;

i. **Exhibit 20** Second Amended Complaint dated July 8, 2021; and

j. Third Amended Complaint dated August 2, 2021 (**Exhibit 1**).

Defendant Brandsness did not file a subsequent Motion to Dismiss until the action now filed on May 25, 2023. As the docket history so confirm, Brandsness did not file an Answer to Plaintiff's Complaint, First Amended, Second Amended or Third Amended Complaints. During the pendency of this litigation, Plaintiff and Brandsness engaged in and concluded discovery.

**COMPLAINT**

Defendant Brandsness was hired by Plaintiff to provide professional legal advice to Plaintiff Rote and to defend and represent the corporate defendants in case 3:15-cv-2401 and 3:14-cv-0406. See **COMPL ¶25**.

Defendant Brandsness committed malpractice as described in part in **COMPL ¶28**.

The employment agreement between Max Zweizig and his former employer Northwest Direct was challenged by Zweizig in New Jersey State Court. The arbitration section of that agreement was upheld and Zweizig was compelled to arbitration in 2006 on ORS 659A retaliation claims. Brandsness received a copy of the employment agreement and opined that it would not apply in the new case of 3:15-cv-2401.**COMPL ¶28**. (See **Rote Decl ¶20**).

Plaintiff discovered the erroneous advice by Brandsness on or around October 2016 and ordered him to correct it, but Brandsness refused. See **COMPL ¶29**.

The USDCOR found that Rote as a non-signatory could not compel arbitration as a Third Party to the Contract and also found the Motion to Compel untimely. See **COMPL ¶30**.

Plaintiff alleges that it is well understood in the public space that arbitration awards for non-economic damages are many times lower and that the cost to defend in these cases is

also substantially less than a jury trial. Plaintiff also alleges that empirical evidence available in the public record shows that noneconomic damages awarded by BOLI and through arbitration are approximately 7% of the amounts awarded by a jury. See **COMPL ¶32**. The prior award by William Crow in the 2006-2011 arbitration to Zweizig on noneconomic damages and on a similar ORS 659A.030 complaint was also only $5,000. **See Exhibit 6.**

Plaintiff also alleges Breach of Contract (**COMPL ¶33-36**), Breach of Implied Covenant of Good Faith (**COMPL ¶37-45**), Oregon CIVIL RICO (**COMPL ¶46-54**) and IIED (**COMPL ¶55-57**).

## LEGAL STANDARD

### I. Summary Judgment

Summary Judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See ORCP 47C. Under ORCP 47C, courts determine the existence of a genuine issue of material fact as follows:

> "No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for the summary judgment."

Unless there is a relevant dispute about a material fact, summary judgment shall be rendered. See *Fields v. Jantec, Inc*., 317 OR 431, 437 (1993); *Stevens v. Bispham*, 316 Or 221, 223 (1993). The 1999 Oregon Legislature amended ORCP 47C in response to the decision *Jones v. General Motors Corp*., 325 Or 404 (1997). This amendment provides that the "adverse party has the burden of producing evidence on any issue raised in the summary judgment motion as to which the adverse party would have the burden of persuasion at trial." See ORCP 47C.

## II. Motion To Dismiss

The Oregon Rules of Civil Procedure require a "plain and concise statement of the ultimate facts constituting a claim for relief." ORCP 18 A. In determining the sufficiency of a complaint under ORCP 21 A(8), courts accept as true all well-pleaded factual allegations in the complaint and give the plaintiff the benefit of all favorable inferences that may be reasonably drawn from the well pleaded allegations. *Bailey v. Lewis Farm, Inc*., 343 Or 276, 278 (2007). A complaint must allege facts that would, if true, entitle a plaintiff to relief; merely reciting legal conclusions is not enough. *Fearing v. Bucher*, 328 Or 367, 371 (1999). Courts need not accept as true allegations that are conclusions of law. *Tydeman v. Flaherty*, 126 Or App 180, 182 (1994).

## ARGUMENT

Plaintiff has met his burden on alleging the necessary factual support on the elements of Malpractice (professional negligence), Breach of Contract, Breach of Implied Covenant of Good Faith, RICO, and IIED and has provided some minimum evidence of the amount of economic damages. Noneconomic damages were pled and do not require a separate showing of evidence at this time.

## I. Claims Alleged

### A. Malpractice and Breach Claims

An action for negligence by an attorney is not fundamentally different from other more typical actions for negligence. The elements are duty, breach of duty, causation, and damages, and the plaintiff bears the burden of pleading and proving every fact essential to establish these elements of his case.

Plaintiff has alleged that defendant Brandsness and Plaintiff entered into a contract for professional services, some of which was for the representation of Plaintiff and the corporations controlled by Plaintiff Rote. Some of the advice sought which was for legal advice on how to Answer, Compel Arbitration, Defend, etc. in federal cases 3:15-cv-2401

and 3:14-cv-0406. Brandsness provided advice and representation in both case from January 2016 through October 2016.

Plaintiff would have the Court take note that in the federal action (after this case was removed to Federal Court), Brandsness did file a Motion to Dismiss, but engaged in perjury in representing that there was no agreement between the parties, as follows:

> "Since plaintiff's first amended complaint fails to allege facts establishing the formation of an attorney-client relationship between plaintiff and Brandsness, plaintiff's legal malpractice claim must be dismissed." **Exhibit 15, pg 5, ¶1**.
>
> "In light of plaintiff's failure to plead facts establishing the formation of an enforceable contract between him and Brandsness, his fourth claim for relief premised on breach of contract must be dismissed." **Exhibit 15, pg 5, ¶3**.

These arguments were made by Brandsness during a time when Plaintiff had not yet produced the written agreement between Plaintiff and Defendant. The contract is provided herein as **Exhibit 4** and the Court should note that the contract was filed in federal court as Doc #18-1. Brandsness took advantage of that by claiming in his MTD in the federal case that there was no contract and without that contract no duty of professional care was created in the first place. Judge Mosman granted the MTD even when the contract was provided to the Court. The 9th Circuit reversed because the Federal Court had no jurisdiction to decide the State claims, as Plaintiff Rote had argued.

Plaintiff would have the Court take due notice that an attorney hired by the PLF to represent Brandsness took this tactic on the nonexistence of a contract to provide professional advice by conflating the use of the word "representation" to attempt to avoid the Malpractice, Breach of Contract and Breach of Implied Duty claims in this case. Even that

attempt to dupe the court (or engage the bias of the court) was also an attempt to take advantage of a pro se defendant and an act that is a discredit to the profession.

Defendant's claim of not representing Plaintiff, in spite of the contract, fails under Oregon Law. The Oregon Court of Appeals addressed this issue of whether a lawyer-client relationship exists when the lawyer was also hired to provide advice to a separate entity. In *O'KAIN v. Landre*ss, 450 P. 3d 508 - Or: Court of Appeals 2019, the Court of Appeals found a lawyer-client did exist even in the absence of a written agreement. The relevant portions are quoted as follows:

> "The trial court's second basis for granting defendants' motion for summary judgment was its determination that the individual plaintiffs were not defendants' clients. In reaching that conclusion, the court mentioned that both individual plaintiffs are lawyers and that the retainer agreements named only the LLC Plaintiffs as clients and addressed services that would be applicable only to the LLCs. In their first assignment of error on appeal, plaintiffs contend that there is evidence in the record on summary judgment from which a trier of fact could find that the individual plaintiffs were clients as well. In their second assignment, plaintiffs contend that the evidence in the record on summary judgment requires the conclusion that plaintiffs were defendants' clients as a matter of law. Defendants respond that the only lawyer-client relationship was that formed by defendants' retainer agreement with the LLCs, that the only advice given by defendants was Landress's letter of September 30, directed to the LLCs, and that there is no evidence in this record that defendants gave advice to the individual plaintiffs. In light of the retainer agreement, defendants contend that there is no "objective evidence" that would support plaintiffs' subjective belief that defendants represented the individual plaintiffs personally." Id, @515.

> "We recently addressed the issue of when a lawyer-client relationship arises in *Jensen v. Hillsboro Law Group*, 287 Or. App. 697, 403 P.3d 455 (2017), a legal malpractice case, and in *Lahn v. Vaisbort*, 276 Or. App. 468, 470, 369 P.3d 85 (2016), also a legal malpractice case. In *Lahn*, 276 Or. App. at 477, 369 P.3d 85, citing *In re Wyllie*, 331 Or. 606, 615, 19 P.3d 338 (2001), we said that a lawyer-client relationship need not arise from an explicit contract, but may be inferred from the circumstances and the conduct of the parties. Contrary to defendants' assumption, the existence of the retainer agreement with the LLC Plaintiffs does not preclude, and is not inconsistent with, a determination that the individual plaintiffs were also defendants' clients. Citing *In re Weidner*, 310 Or. 757, 768, 801 P.2d 828 (1990), we said in *Lahn* that a lawyer client relationship may exist when an attorney has performed services of the kind that are traditionally performed by lawyers, or where a putative client has intended that the relationship be created. *Lahn*, 276 Or. App. at 477, 369 P.3d 85. @ 515

Ultimately the Oregon Court of Appeals reversed Clackamas County Court on the existence of a lawyer-client client relationship, "Contrary to defendants' contention, although the retainer agreements do indeed establish defendants' lawyer-client relationship with the LLCs, they do not preclude the existence of a lawyer-client relationship with the individual plaintiffs as well, through conduct and plaintiffs' reasonable expectations. See *Lahn*, 276 Or. App. at 477, 369 P.3d 85 (a lawyer-client relationship may arise through conduct in performing services that are traditionally performed by lawyers or through the intentions of the putative client." @516.

Plaintiff having both alleged and established that there was a contract to provide professional representation and advice (and provided billing statements showing that professional advice was given) to Plaintiff Rote, and that there would exist only a question of

fact on what advice Brandsness gave to Plaintiff that lead Plaintiff Rote and Corporate defendants into filing Answers in case 3:15-cv-2401 as opposed to filing separate or combined Motions to Invoke and Compel Arbitration (**Exhibit 7**). Understand that the corporate defendants spent $60,000 in legal fees in 2004-2005 to validate the employment contract and arbitration agreement in New Jersey Court. Brandsness insisted however that the defendants in case 3:15cv-2401 could not Compel arbitration in an employment action brought by Max Zweizig under the terms of the contract with Zweizig (**Exhibit 5**). Brandsness had the benefit of reviewing the employment agreement and prior Arbitration Award (**Exhibit 6**) when rendering that advice.

Subsequently, then Defendant Rote filed two Motions to Compel Arbitration (**Exhibit 8**). The Federal Court found that the Motion to Compel was untimely or waived (**Exhibit 9, page 5).** Alternatively the Court found that a non-signatory could not compel arbitration, but did not find that Rote would have been independently denied arbitration if Northwest Direct would have filed a Motion to Compel. Northwest Direct was the former employer of Zweizig. Although Brandsness was ordered to file a Motion to Compel arbitration, he refused to do so and if this refusal is a question in dispute then a jury should make that decision.

There are of course many different examples of professional negligence that include a conflict of interest; ***failure to provide full disclosure***, having a personal relationship with a member of the opposing party (client or attorney), ***intentional professional misconduct of any kind***, representing two parties on the same side of a dispute that have conflicting interests between themselves, working for a percentage of a client's business transactions instead of a regular professional fee, and so on.

Further, in the relationship between client and attorney, the clients outline their objectives while the attorneys put together a strategy that they believe will allow these objectives to be reached. However, ***the attorney cannot proceed with his or her strategy if the client does not consent to it***. Any time an attorney acts legally without the expressed

written or verbal consent of a client, that attorney opens himself or herself up to a potential legal malpractice claim.

Similar to taking legal action without the consent of a client, ***lawyers can also be accused of legal malpractice if they refuse to follow instructions given by their clients***. At the end of the day, the client is paying the attorney for legal representation and the attorney is obligated to follow instructions. If the attorney believes that it would not be beneficial to carry out these wishes, they may say so, but they cannot refuse to follow instructions if the client has made up his or her mind and instructed them which course of legal action they would like to take.

Obviously, lawyers are expected to have a working understanding of all pertinent areas of law in which they are practicing and the know-how to apply the law correctly. ***If the attorney doesn't apply a law correctly, misunderstands it, or fails to keep up with changes that have been made to laws within his or her jurisdiction***, a legal malpractice claim could be on its way.

Plaintiff alleges that Defendant Brandsness failure and refusal to file a Motion to Compel arbitration caused damage in the amount of more than 90% of the judgment. Plaintiff provided sufficient evidence that arbitration awards are far lower than jury awards in employment cases. The PLF refused to cover the damage or provide counsel for repair (**Exhibit 17**), but did represent Zweizig in multiple cases and did refuse to provide the contract of representation of Zweizig when it was subpoenaed by Plaintiff in this case.

The PLF did in refusing to repair publish a number of admissions that implicate a portion of the advice provided by Brandsness, which was that employer Northwest Direct could invoke arbitration and file a Motion to Compel, but that the other named corporate defendants and Rote could not. **See Exhibit 17**. Even that advice is inaccurate.

As noted previously, Zweizig was ordered to arbitration by a New Jersey State Court finding the employment contract applicable to ORS 659A employment claims, the very

contract between Zweizig and his employer that Brandsness reviewed before rendering his advice. **See Exhibit 10, pages 144-152**. The Motion to Compel filed in New Jersey State Court is provided herein as **Exhibit 27**.

### B. Oregon Civil Racketeering

To establish ORICO claim, plaintiff must allege and prove that plaintiff was injured by defendant's use or investment of income derived from racketeering, rather than predicate acts of racketeering. *Beckett v. Computer Career Institute, Inc*., 120 Or App 143, 852 P2d 840 (1993). Plaintiff alleged in his complaint that the defendants committed and aided and abetted in a long list of crimes including bribery, perjury, subornation of perjury, unsworn falsification, obstruction, soliciting official misconduct, tax evasion, fraudulent billing, computer crimes, displaying obscene material to a minor, use of threats and intimidation to extort, public investment fraud, money laundering, identity theft, mail and wire fraud. **Complaint P. 47-54**. Appellant further alleged that the predicate acts were directed at the plaintiff and are the proximate cause of the Plaintiff's damages.

The Oregon State Bar Professional Liability Fund ("PLF") is a tax –exempt organization organized under the umbrella of the Oregon Judicial Department. According to the PLF's website, "For over forty years, the Oregon State Bar Professional Liability Fund (PLF) has provided malpractice coverage to lawyers in private practice in the state of Oregon. The PLF is a unique organization within the United States. The Oregon State Bar Board of Governors created the PLF in 1977 pursuant to state statute (ORS 9.080) and with approval of the OSB membership. The PLF began operation on July 1, 1978, and has been the mandatory provider of primary malpractice coverage for Oregon lawyers since that date." And "Though a handful of other states in the U.S. require malpractice coverage for lawyers, Oregon is the only state that provides that coverage through a mandatory bar-related program. The mission and purpose of the PLF is to serve the lawyers of Oregon. The

existence of the PLF also provides a benefit to the public because lawyers have malpractice coverage."

The PLF does however do a great deal more. It is undisputed that the PLF provided free legal representation services to Max Zweizig in Clackamas cases 19cv14552, 19cv01547 and in this case. It is undisputed that Zweizig did not solicit that representation. **See Exhibit 22, pages 33-34**. The PLF then resisted the subpoena of Zweizig's contract with the PLF, that subpoena provided herein as **Exhibit 23**. The PLF public statement about who they are and what they do is provided herein as **Exhibit 24**. I am not alone in my critiques of the PLF's unlawful use of a state agency's resources to engage in criminal conduct. **See Exhibit 25. Based on my review there is no legal justification for the PLF to be providing free legal resources to child predator Max Zweizig.**

Let this point be clear, that the PLF is representing Defendant Brandsness in this case, has represented Zweizig free of charge without request for repair and is prepared to represent Max Zweizig in this case (or tamper with his testimony) regardless of the lack of legal support for the PLF providing that representation. As such, Plaintiff asserts that he is harmed emotionally and financially by the income earned by the PLF enterprise that is then used to promote the predicate acts defined herein, including perjury such as identified to Brandsness when denying the existence of the contract and professional relationship, to promote strategic malpractice in this case and to support itself in criminal conduct and the criminal enterprise of Max Zweizig (a child predator under investigation by three branches of law enforcement for downloading, possessing and distributing child porn). Plaintiff has also been targeted and harmed by the PLF's unlawful use of its tax-exempt income. Plaintiff has been able to confirm that the PLF did not report the free legal services to Zweizig and committed tax fraud not only in that act but in covering that up and inducing Zweizig to not report that taxable income.

Perjury, fraudulent billing, false swearing, unsworn falsification, solicitation of the abuse of a civil office and wire fraud are examples of criminal activities and Oregon RICO predicate acts. The State of Oregon recognizes that Oregon and Federal Civil RICO statutes differ. That's why the State sought more than $2 Billion in damages against Oracle alleging therein violations of Oregon RICO statutes for and through a pattern of racketeering activity by committing or attempting to commit the crimes of unsworn falsification, ORS 162.085, and fraudulently obtaining a signature, ORS 165.042, obtaining execution of documents by deception, ORS 165.102, and wire fraud, 18 U.S.C. § 1343.

In *State of Oregon v. Oracle America, Inc.*, No. 14C 20043 (Cir. Ct. Oregon, Aug. 22, 2014) the State alleged Oregon predicate crimes and claims under ORS 166.720(3) (the counterpart to section 1962(c)) of ―unsworn falsification, and fraudulently obtaining a signature, and obtaining execution of documents by deception. Generally, these state ―predicates as a whole and individually do not approach the predicates in the Federal RICO statute in terms of seriousness.

The Oregon Racketeering Influenced and Corrupt Organizations Act ("ORICO") claims under ORS 166.715 to 166.735 are against all defendants. ORICO makes it unlawful to knowingly use or invest proceeds derived from a pattern of racketeering in an enterprise, to acquire or maintain an interest in an enterprise through a pattern of racketeering, to participate in an enterprise through a pattern of racketeering, or to conspire to do any of those things. ORS 166.720. Under ORS 166.715 (6), by reference ORS 161.515, defines ―Racketeering activity includes conduct of a person committed both before and after the person attains the age of 18 years, and means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce or intimidate another person to commit a crime.

Plaintiff adequately alleged that the PLF was the enterprise, managed by Carol Bernick, that the enterprise instructed and rewarded the criminal acts so described in the complaint and that the enterprise and members profited from the racketeering. In fact the

PLF„s annual net profit is $6 Million and its tax free. The vendor panel bills approximately $10 Million a year to the PLF. The PLF pays out only $2 Million annually in damage claims. Plaintiff further alleged that there was a pattern of racketeering. ―Pattern of racketeering activity‖ means engaging in at least two incidents of racketeering activity that have the same or similar intents, results, accomplices, victims or methods of commission or otherwise are interrelated by distinguishing characteristics, including a nexus to the same enterprise, and are not isolated incidents, provided at least one of such incidents occurred after November 1, 1981, and that the last of such incidents occurred within five years after a prior incident of racketeering activity.

If the plaintiff's claims were in any way deficiently pled, the Court should give that specific instruction to Plaintiff. Defendant has not raised any argument timely, that is not fact dependent, and that can be used to defeat the Plaintiff's claims at this stage of the litigation.

Brandsness admits to the factual allegations in the Complaint, and then accepted as true, in failing to file an Answer to this Third Amended Complaint.

Plaintiff does seek leave to amend for conspiracy, Count 3, under ORICO.

### C. Intentional Infliction of Emotional Distress

Whether the conduct alleged is sufficiently extreme or outrageous to be actionable is a fact-specific inquiry, one to be made on a case-by-case basis considering the totality of the circumstances. *Lathrope-Olson v. Dept. of Transportation*, 128 Or.App. 405, 408, 876 P.2d 345 (1994). factors include whether the conduct was undertaken for an ulterior purpose or to take advantage of an unusually vulnerable individual. See *Checkley v. Boyd*, 170 Or.App. 721, 14 P.3d 81 (2000). The setting in which the allegedly outrageous conduct occurs-for example, in a public venue or within the employment context-also can bear on the degree of offensiveness of the conduct. See, e.g., *Hall*, 292 Or. [131,] 137[, 637 P.2d 126 (1981); *Trout v. Umatilla Co. School Dist*., 77 Or.App. 95, 102, 712 P.2d 814 (1985). Plaintiff has adequately alleged that Brandsness did not tender the malpractice for coverage, that Rote did

so and that the PLF denied coverage in retaliation for filing for Plaintiff exposing the PLFs criminal conduct alleging the PLF conspired to conceal evidence. Brandsness is a co-conspirator.

Moreover both Brandsness and the attorneys, who represented him in the Federal case, alleged the lack of written contract and then lack of professional relationship. We can presume that Brandsness approved of this strategy, even when having an ethical duty to disclose the truth to the Court. And the truth is that Brandsness provided professional legal services and advice to Plaintiff, advice that was inaccurate as to the invoking arbitration and the right to Compel Arbitration under the contract.

The setting in Motion then applies to the claims in this case. Under that theory, Brandsness' bad advice and action to not Compel arbitration was first faulty, which interfered with Plaintiff's opportunity to successfully Compel arbitration. Then when it was challenged double downed on that faulty advice that would subject Plaintiff to a jury without the experience to evaluate the claims. And when he was confronted refused to file the Motion to Compel on behalf of the corporate defendants and then withdrew from representation. Most importantly, Brandsness took that action because the poor advice was intentional, that he knew it was false and he provided that false advice because as a matter of first impression he felt Plaintiff's blog was critical of Zweizig's gay porn. Plaintiff is critical of any of his employees who would use a business computer to create a unique and password protected hard drive partition to house child porn, porn and pirated music and video's. Almost all employers would object to that behavior. On information and belief, Brandsness intentionally committed this act of malpractice to cause emotional damage to Plaintiff and his family.

While Plaintiff supports the LGB community, he does not support the downloading, possession and distribution of child porn. He does not support conflating support for the LGB community with child predation. Both the Defendant and PLF do support the decriminalization of child porn, which has led to these egregious acts by Defendant.

## II. Defendant's Motion to Dismiss

Defendant files a late Motion to Dismiss, without leave from the Court, on Plaintiff's Breach of Contract, Breach of Implied Covenant of Good Faith, Oregon Civil Rico ("ORICO") and IIED claims. To the extent Plaintiff, as *a pro se* litigant, has failed to allege adequately the elements of these claims, Plaintiff then seeks leave from the Court to filed an amended Complaint to cure and clarify.

### A. Breach of Contract

Defendant appears to claim that Plaintiff's claim fails because Brandsness was not hired to accomplish some goal that was more specific.

Defendant did not address that this Motion is both untimely and raises new challenges not heretofore addressed in Defendant's Motions to Dismiss in Federal Court. While in Federal Court, Defendant alleged "Plaintiff's breach of contract claim against Brandsness founders on his failure to plead the formation of a contract between himself and Brandsness in the first place". **See Exhibit 15, page 5, section 2**. During that same period of time, Defendant intimated that there was no written contract between the parties on representation or providing professional advice.

The Defendant's effort appeared to be based on conflating representation with providing professional advice.

Defendant was hired with a specific purpose in mind, which was to Compel arbitration of Zweizig's claims in case 3:15-cv-2401. While in Federal Court the corporate defendants had to be represented by an attorney (**Rote Declaration**). Defendant was also hired to remove the non-employer corporate defendants in that case. Zweizig's employer was Northwest Direct Teleservices and was not the corporate parent of any of the entities also sued. Moreover, the corporate defendants were out of business and inactive (**Rote Declaration**). In arbitration, Plaintiff Rote could represent the corporate defendants as he did in the 2006-2011 arbitration. The cost of legal representation through Trial would have been

more than $200,000, which out of necessity would have been funded by Plaintiff. See **Rote Declaration**.

While in federal court Michael Mosman dismissed this malpractice claim, stating "Without a contract, Rote cannot argue breach. Amendment will not allow Rote to plead a breach where no contract exists. Therefore, I GRANT Brandsness's Motion to Dismiss [4] as to Claim Three and dismiss the claim with prejudice". It is particularly troubling that the PLF would hire an attorney to make this false claim knowing a Federal Judge would adopt that argument. Since reversed by the 9th, no such claim of lack of contract has been argued.

Under ORCP 15A, "the defendant must appear and defend within 30 days of the date of first publication. A reply to a counterclaim, a reply to assert affirmative allegations in avoidance of defenses alleged in an answer, or a motion responsive to either of those pleadings must be filed within 30 days from the date of service of the counterclaim or answer". Defendant's Motion is untimely and must be denied.

Any allegations in the Plaintiff's complaint not responded to in an answer (that should have been filed after remand and Third Amended Complaint), other than allegations about damages, are therefore deemed admitted (Or. R. Civ. P. 19(C)). The Third Amended Complaint was filed on August 1, 2021. Defendant has therefore admitted to the allegation in Plaintiff's Complaint, which under Oregon law need not be extensive to capture the intent of a *pro se* litigant.

Even if the Court was open to allowing Brandsness to file a late Motion to Dismiss, prior denials of the existence of a written contract (Plaintiff Exhibit 4) and agreement by Brandsness to provide professional advice to Plaintiff is contemptible and contrary to public policy, citing among others and **section 8.4 of Oregon's rules on professional conduct,** which Defendant violated when denying the existence of a professional relationship.

Even if the Court ignored all of this bad behavior by Brandsness, Plaintiff was still a putative client. See *Lahn*, 276 Or. App. at 477, 369 P.3d 85 (a lawyer-client relationship may

arise through conduct in performing services that are traditionally performed by lawyers or through the intentions of the putative client." @516.

It is accurate the Plaintiff also alleges he has rights to coverage from the Oregon State Bar Professional Liability Fund, which provides malpractice coverage.

Defendant's Motion to Dismiss should be denied.

### B. Breach of Implied Covenant of Good Faith

Defendant alleges that "there is no implied covenant of good faith in a contract that does not exist." See **Def. MTD, page 12, line 5.** Defendant reaches this argument only be reference to a conclusion Defendant asserts that there were no specific promises Brandsness made in his contract between Plaintiff and Defendant. Defendant further peels the onion and claims that there were no specific agreement between the parties that could distinguish this claim from a professional negligence claim.

Again, Plaintiff asserts this claim is untimely.

Plaintiff further asserts that bare minimum necessities of a viable Complaint do not paint the story of a contract or agreement between the parties. Plaintiff hired Defendant to accomplish specific goals heretofore outlined. Defendant asserted that he was covered by errors and admissions insurance from the PLF (**Rote Declaration**). Defendant had a duty to submit to the PLF any errors and to assist Plaintiff in repairing the damage done by Defendant in case 3:15-cv-2401 wherein Max Zweizig was the Plaintiff. Instead Defendant assisted the PLF in hiring an attorney to represent Zweizig and out of some woke support for child predation and a new interpretation of professional negligence and breach of contract.

A promise to refund and cover damage for failing to perform under a contract is inherent in the contract itself. Defendant is making a circular argument, first arguing that the inherent duties of reimbursement and damages never exist in contracts and therefore a contract did not exist. And second since a contract did not exist the implied covenants of a contract do not exist.

The Oregon Rules of Civil Procedure require only that a complaint contain a "plain and concise statement of the ultimate facts constituting a claim for relief." ORCP 18 A. A claim will survive a motion to dismiss if the complaint contains even vague allegations of all material facts." *Slover*, 144 Or. App. at 571, 927 P.2d 1098 (internal quotation marks omitted).

Plaintiff also cites *Hale v. Groce*, 304 Or. 281, 283-84, 744 P.2d 1289 (1987). In Hale, the Oregon Supreme Court considered whether a plaintiff, an intended beneficiary of a will and trust, could bring a claim against a lawyer when the lawyer allegedly failed to follow his client's direction to include a bequest of a specific sum, $300,000, to the plaintiff in the client's testamentary instruments. Id. at 283, 288, 744 P.2d 1289. Were the general rule to apply, the plaintiff could not state a claim against the lawyer, because the plaintiff was not a client of and was essentially a stranger to the lawyer. Id. at 283-84, 744 P.2d 1289. The court, however, recognized an exception where the stranger is a "classic `intended' third-party beneficiary of the lawyer's promise to his client." Id. at 286, 744 P.2d 1289.

In this particular case, Plaintiff alleges that he source of the funds necessary for Brandsness to file a Motion to Compel arbitration so that Plaintiff Rote could represent the Defendant corporations.

Out of Brandsness' self-interests in the amount of money he could have made in representing the corporate defendants, Defendant intentionally mislead Plaintiff into not filing a Motion to Compel and once that damage was done refused to cover the damage and tender insurance coverage for the damage.

Defendant breached the implied covenants of the contract and this claim should not be dismissed.

### C. Oregon RICO

Plaintiff alleges ORICO against the PLF enterprise and those members of the enterprise who engage in criminal conduct to support the financial interests of that enterprise.

The PLF generates $25 Million a year in gross premium revenue, $5 Million a year in investment income and nets approximately $6 million a year in profit. Since the PLF is organized under the Oregon Judicial Department that income is tax-exempt.

Plaintiff does allege herein that Defendant denied the existence of a written contract between the Plaintiff and Dependent (**Exhibit 4)** on the record in Federal Court (**Rote Declaration**) and that an attorney hired by the PLF filed a Motion to Dismiss based on the joint knowledge that such an assertion was perjury. Plaintiff asserts that Brandsness is a member of the enterprise.

The Motion to Dismiss is untimely.

Perjury is a predicate act under Oregon RICO, as is unsworn falsification. *State of Oregon v. Oracle America, Inc.*, No. 14C 20043 (Cir. Ct. Oregon, Aug. 22, 2014). The Motion to Dismiss the Oregon RICO claims should be denied.

### D. Oregon RICO

Plaintiff alleges that Brandsness intentionally mislead Plaintiff on the ability to file a Motion to Compel to enhance Defendant's profit and out of misplaced support for the LGB community, to which the Defendant now subscribes.

An IIED claim requires plaintiff to prove three elements: (1) that defendant intended to cause plaintiff severe emotional distress or knew with substantial certainty that its conduct would cause such distress; (2) that defendant engaged in outrageous conduct, i.e., conduct extraordinarily beyond the bounds of socially tolerable behavior; and (3) that defendant's conduct in fact caused plaintiff severe emotional distress. *House v. Hicks,* 218 Or App 348, 357-58, 179 P3d 730, rev den, 345 Or 381 (2008). To find liability on an IIED claim, the defendant's conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id. at 358* (citing Restatement (Second) of Torts § 46 comment d (1965)). A special relationship, such as an attorney and a client, is the most

important factor in classifying conduct as extreme and outrageous. *Id. at 360*. However, whether conduct is extreme and outrageous is a fact-specific inquiry that we must consider on a case-by-case basis. *Id. at 358*.

It should be up to a jury to decide if Brandsness intentional acts, wanting to be woke in his support of the LGB community for his own self-interests (**Rote Declaration**) or out of pure profit (**Rote Declaration**) are sufficiently protected to not result in an IIED claim.

Susan Phillips, a former Regional Manager of Starbucks, sued Starbucks for reverse discrimination, claiming her termination was racially discriminatory and prompted by the arrest of two black men at a Philadelphia store where Phillips was the Regional manager. A jury on June 13, 2023 awarded Phillips $25.6 Million in damages. The version of this lawsuit in this case is economic, noneconomic and punitive damages for the intentional acts by Brandsness and the other defendants in this case.

The Supreme Court upheld a father's claim for emotional damages against a lawyer who delivered a passport to the mother that resulted in the mother leaving the country with the couple's child. See *McEvoy v. Helikson*, 277 Or 781 (1977). In doing so, the lawyer violated a court order to keep the passport until the father had custody of the child. The Court determined that when the judge issued that order, it was foreseeable that the mother might take the child with her back to Switzerland and that the primary purpose of the order was to protect plaintiff against the happening of that very danger.

The damage Defendant Brandsness intended to cause was foreseeable.

Defendant did not file his MTD timely and it should be denied.

Even if the Court was inclined to give Brandsness leave, the allegations against him that he intended to cause damage survives and must be adjudicated before a jury. A claim of noneconomic damages is sufficient when asserted.

Defendant's Motion to Dismiss this claim should be denied.

## III. Defendant's Motion for Summary Judgment

Plaintiff agrees with the elements of an attorney malpractice claim. The elements of a claim for attorney malpractice are: "(1) a duty that runs from the defendant to the plaintiff; (2) a breach of that duty; (3) a resulting harm to the plaintiff measurable in damages; and (4) causation, i.e., a causal link between the breach of duty and the harm." *Stevens v. Bispham*, 316 Or 221, 227 (1993) (emphasis omitted).

### A. Defendant's Malpractice

The Federal Court denied Rote's Motion to Compel in case 3:15-cv-2401 finding Rote (1) was not a signatory to the employment agreement (**Exhibit 5**) and (2) waived his right to arbitrate when filing an Answer, a portion of which is as follows:

> "Even if Defendant could show that the Agreement applies to the claims against him, Defendant's attempt to dismiss this case due to the Agreement's arbitration provision fails because he waived his right to compel arbitration. See *Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 758 (9th Cir. 1988) (finding waiver of right to arbitration); Antuna v. Am. W. Homes, Inc., 232 F. App'x 679 (9th Cir. 2007) (unpublished) (same)." **See Exhibit 9, page 5.**

Judge Hernandez's opinion and conclusion of law implicates the very malpractice raised in this Complaint, that Brandsness negligently represented to Rote that arbitration could not be invoked and compelled in this 3:15-cv-2401 case.

Hernandez did not conclude that the ORS 659A claim in the 3:15-cv-2401 case was any different than the ORS 659A claim arbitrated between the parties from 2006-2011. Brandsness committed malpractice in January 2016, misleading to Rote, NDT and the other corporate defendants into filing Answer instead of a Motion to Compel.

Brandsness failed to advise Plaintiff that non-signatories could under Oregon law file a Motion to Compel arbitration.

Now in this case Brandsness believed that because Zweizig named other corporate defendants besides his former employer that this precluded the corporate employer and Rote from filing a Motion to Compel. That too is incorrect advice under Oregon law. More importantly however that was just a ruse perpetrated on a client.

In *Livingston v. Metropolitan Pediatrics, LLC,* 227 P. 3d 796, 234 Or. App. 137- Or: Court of Appeals, 2010, the Oregon Court of Appeals found "that under Oregon Law a non-signatory can compel arbitration. Generally, a third party's right to enforce a contractual promise in its favor depends on the intentions of the parties to the contract. *Sisters of St. Joseph v. Russell*, 318 Or. 370, 374, 867 P.2d 1377 (1994). Courts have relied on a number of rationales for permitting non-signatory defendants to invoke arbitration clauses in claims against them by signatories to a contract. Once again, the terms of the arbitration clause are at the center of the inquiry, because it is the text of the arbitration clause that will determine whether the parties to the agreement intended that third parties could enforce its provisions. We conclude, as explained below, that the arbitration clause is broad enough to plausibly encompass plaintiff's claims against the individual defendants and to afford them the same right to request arbitration as MP." *Id,* @805. *Brandsness did not provide this advice*.

A non-signatory right to compel arbitration independently would only have been necessary if the party to the contract, namely Northwest Direct Teleservices ("NDT", former employer of Zweizig), had not filed a Motion to Compel arbitration. *Brandsness did not provide this advice*.

The PLF weighed in on this issue. In a statement of denying Plaintiff Rote's claim against Brandsness, the PLF argued:

> "Whether to seek to enforce the arbitration clause was something that you, as NDT's representative, and Mr. Brandsness discussed. You spent an afternoon in Mr. Brandsness' office assisting while he drafted the Answer that was filed on behalf of the corporate defendants. He discussed with you that even if the

> 2001 Employment Agreement applied to the types of claims being asserted, it did not apply to any of the defendants other than Mr. Zweizig's employer, NDT. As such, if he had tried to compel arbitration, it likely would have applied to only one of the several defendants and resulted in litigation ongoing in two forums instead of one. This would increase the complexity and cost of the pending litigation. Mr. Brandsness recommended that the corporate defendants file an Answer and defend a single lawsuit in federal court. Mr. Brandsness used his professional judgment in making this strategic decision, and you agreed." **See Exhibit 17, page 2**.

Contrary to Brandsness representation to the PLF, above, Plaintiff did not agree to be subject to the whims of a jury in a County that finds against employers 90% of the time. Rather, Plaintiff contends that Brandsness advice was that he and the corporate defendants could not Compel arbitration because the other corporate defendants were named. Naming other corporate defendants is a tactic used against *pro se* litigants into believing that they cannot compel arbitration on behalf of all parties. *Brandsness did not provide this advice*.

Recently, in *Gist v. ZoAn Management*, 370 Or 27 (2022) the Oregon Supreme Court affirmed the decisions of the trial court and court of appeals, granting the defendants' motion to compel arbitration. The court concluded that because nothing in the arbitration agreement prohibited the plaintiff from being awarded any relief he might be entitled to under Oregon's wage and hour statutes, the arbitration provision was not unconscionable and therefore enforceable. Plaintiff Rote had already prevailed in New Jersey Court on this very issue.

The employment agreement between Zweizig and Northwest Direct Teleservices, Inc. specifically addresses governing law. Section 6.5 of the agreement specifically provides that the laws of the state of Oregon shall govern. Brandsness had the employment agreement at the time he was engaged in January 2016 and allowed that agreement to be circumvented. *Brandsness did not provide this advice*.

Zweizig's former employer did not write the blog post that initiated Zweizig's 3:15-cv-2401 case. In fact NDT was out of business at that time. Nonetheless Zweizig made an employment ORS 659A claim against NDT and Rote as former CEO of NDT. There is every reason to believe that had Brandsness filed the Motion to Compel, the Federal Court would not have challenged the Motion to Compel on the Rooker-Feldman Doctrine alone. Rote was alleged to be aiding and abetting NDT. *Brandsness did not provide this advice*.

As noted, the arguments available to Compel arbitration in 2015 in case 3:15-CV-2401 are THAT same arguments made on December 1, 2005 in New Jersey Court to Stay Proceedings and Compel Arbitration. See **Exhibit 27**. Defendant Brandsness had access to this document from January 2016 forward. The argument made in the Motion to Compel by NDT and Rote, both defendants in that case, is that the ORS 659A and NJ claims filed by Zweizig were the type contemplated in the employment agreement. **See Exhibit 27, page 15.** And as indicated the allegations against Rote and NDT were intertwined, as they were in case 3:15-cv-2401. *Brandsness did not provide this advice*.

The court also does not decide waiver under Oregon law. In *Industra/Matrix Joint Venture v. Pope & Talbot*, 200 Or.App. 248, 260-61, 113 P.3d 961 (2005), aff'd, 341 Or. 321, 142 P.3d 1044 (2006), the court held that the defendant's waiver defense to arbitrability was a precondition to arbitrability that the arbitrator should decide. Although that case was decided under the FAA and not the UAA, the court's reasoning there — that a waiver of arbitrability, like estoppel, presents a condition precedent to arbitrability that grows out of the dispute and bears on its final disposition, 200 Or.App. at 261, 113 P.3d 961 (citing Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83-85, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002)) — is persuasive. "Plaintiff's waiver argument, like estoppel, is a procedural rather than a substantive defense to arbitrability that grows out of the controversy itself, see RUAA § 6 comment 2, and…for that reason that, under ORS 36.620(3), the issue of waiver of arbitrability involves a condition precedent to be decided by the arbitrator, rather than the

court." However, even if the court could decide waiver the court's decision was clearly erroneous. *Brandsness did not provide this advice*.

The 9th Circuit acknowledges that "waiver of a contractual right to arbitration is not favored," and therefore, "any party arguing waiver of arbitration bears a heavy burden of proof." *Fisher v. A.G. Becker Paribas Inc*., 791 F.2d 691, 694 (9th Cir. 1986). Specifically, "[a] party seeking to prove waiver of a right to arbitration must demonstrate: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." *Id*. *Brandsness did not provide this advice*.

A recent Opinion by the 9th Circuit Court reaffirmed two material issues on whether a non-signatory defendant could invoke equitable estoppel to compel arbitration against a signatory plaintiff. The first of these issues is that this Court found that the 9th Circuit Court is bound by State law on equitable estoppel. The second is the application of equitable estoppel by a non-signatory is evaluated in substantial part on the intertwined doctrine. See *Franklin V. Cmty. Reg'l Med. Ctr*., 19-17570 (May 2021). Franklin addressed these issues specifically and in favor of Appellant's interpretation of the law, particularly as the binding effect of State law on equitable estoppel. Oregon law under *Livingston v. Metropolitan Pediatrics, LLC*, 227 P. 3d 796 - Or: Court of Appeals 2010, is the leading equitable estoppel case in the employment context and opines a non-signatory may compel arbitration of post-employment retaliation claims brought by Plaintiff. The opinion in Franklin confirmed Appellant's position that the court is bound by *Livingston*. *Brandsness did not provide this advice and Livingston was decided in 2010*.

Defendant Brandsness provided none of this advice, not on waiver and not on non-signatory rights and it's not conceivable that Brandsness made this simple error. But it's worse than just making a simple error. Brandsness then chose to double down on the error by convincing Rote to withdraw his Motion to Compel of March 2016, withdrawn in June

2016. And then sought to withdraw in October 2016 when Rote fully discovered the malpractice and ordered Brandsness to file a Motion to Compel on behalf of all parties. No, this was not a simple act of unintentional negligence. This was an intentional act to damage Plaintiff for, inter alia, Rote opposing the distribution and decriminalization of child pornography. Brandsness supports the decriminalization of child porn.

This Court should not believe that an attorney with 40 years of experience committed simple negligence, when Defendant was given a timely opportunity to correct and chose not to do so. On January 28, 2016 Brandsness filed an Answer on behalf of the corporate defendants in case 3:15-cv-2401. On March 1, 2016 Rote filed a Motion to Compel and Brandsness was asked to do the same on behalf of the corporate defendants. He instead convinced Rote to withdraw the Motion to Compel, which Rote did in June 2016. A jury would not believe that Brandsness malpractice was unintentional.

Ultimately the Federal Court decided Rote could not Compel without NDT also seeking to Compel. Brandsness refused to file that Motion to Compel through his withdrawal in October 2016. The federal court opined the Motion to Compel was not timely and could not correct waiver. That also could not be corrected at Summary Judgment, Hernandez adopting the same argument of waiver made in his Opinion of January 2017 on Rote's Motion to Compel.

**B. Issue Preclusion**

The only prior litigation on the Claims against Brandsness was when Mosman moved the case to Federal Court and in an act of retaliation dismissed all of the state claims against all of the defendants (**Exhibit 18**). Mosman did not have jurisdiction to do so and he was reversed by the 9th Circuit, which ordered that the state claims be remanded back to Clackamas County (**Exhibit 19**).

Contrary to the Defendant's argument, this is not an opportunity to invoke issue preclusion, although Plaintiff appreciates the novel argument albeit offensive. The only

issues decided by Hernandez that is relevant to this discussion is that both waiver and non-signatory were used by Federal Court to not Compel arbitration and that Brandsness is at fault for refusing to file a Motion to Compel from January 2016 to the time of his withdrawal.

Defendant is guilty of attempting to mislead this court into conflating issues subject to arbitration with the findings by Hernandez of waiver and non-signatory rights to Compel arbitration. For points of clarity, Brandsness failure to advise and file a Motion to Compel led to the Court having the opportunity to assign waiver and to exploit non-signatory rights. As a former pro-bone attorney for farm workers, Judge Hernandez is not a fan of arbitration agreements, even though the Federal Court had determined the Zweizig employment agreement was subject to mandatory arbitration under both Oregon Law and the Federal Arbitration Act. And it's for this reason that Plaintiff argues that the ruling by Hernandez denying Rote's Motion to Compel arbitration implicates and defines the Brandsness malpractice.

Defendant also does not take issue with any of the elements of the Plaintiff's Complaint. And as already explained, Defendant admits the allegations against him. Any allegations in the Plaintiff's complaint not responded to in an answer (that should have been filed after remand and Third Amended Complaint), other than allegations about damages, are therefore deemed admitted (Or. R. Civ. P. 19(C)).

Counsel representing Brandsness may have realized that failing to Answer the Third Amended Complaint is itself a malpractice event that matures when this case goes to trial and is herein desperately trying to move this court even under a falsified argument. That is a action implicating the amount of power the PLF has with the state courts. And make no mistake, the PLF is the Oregon Judicial Department.

Defendant's argument on issue preclusion is nothing more than an attempt to take advantage of Plaintiff's *pro se* status.

This Court should deny Defendant's Motion for Summary Judgment.

**C. Attorney Fees**

Oregon follows the "American rule," which is that each side pays its own attorney fees, unlike a "loser pays" rule. There are many exceptions to the American rule, in which the prevailing party can make the losing party pay the reasonably attorney fees it incurred - typically claims based on statutes like employment discrimination claims, for example. However, legal malpractice claims are not among these. Neither are attorney fees for breach of contract, breach of implied covenant and IIED claims.

Moreover, there is nothing unreasonable about Plaintiff's claims in this case.

## IV. Plaintiff's Motion for Summary Judgment

Plaintiff references the arguments and facts outlined heretofore and will pass on reiterating these admitted allegations and that facts offered herein by Plaintiff.

Defendant admits to a written contractual relationship with Plaintiff to provide advice and representation in federal case 3:15-cv-2401, i.e., that a duty was formed that runs from the defendant to the plaintiff.

Defendant admits to a breach of that duty and does not attempt to argue he did not breach that duty.

Defendant admits a resulting harm to the Plaintiff measurable in damages and does not attempt to deny that Plaintiff was not damaged by his professional negligence.

Defendant admits to causation, i.e., a causal link between the breach of duty and the harm and does not attempt to break that causal connection.

Defendant argues that arbitration, State settlement and BOLI noneconomic damage awards are far lower than those awarded by juries. It goes without saying that this is why Max Zweizig continued to try to get in front of a jury instead of arbitrating his claims. Plaintiff believes there is enough evidence in the public space to support this incremental damage caused by Defendant Brandsness.

For example, recent sexual harassment lawsuit settled by the state in favor of some legislator assistants resulted in $1.1 million in noneconomic damages spread over eight aggrieved parties. Seven of those parties split an average noneconomic damage award of only $85,717 ($600,000/7). **See Exhibit 28**. That is born out by empirical evidence of arbitration of employment claims on a national scale, where the median damages are $36,500. **See Exhibit 29 and table 1, below.**

TABLE 1

## Comparison of outcomes of employment arbitration and litigation

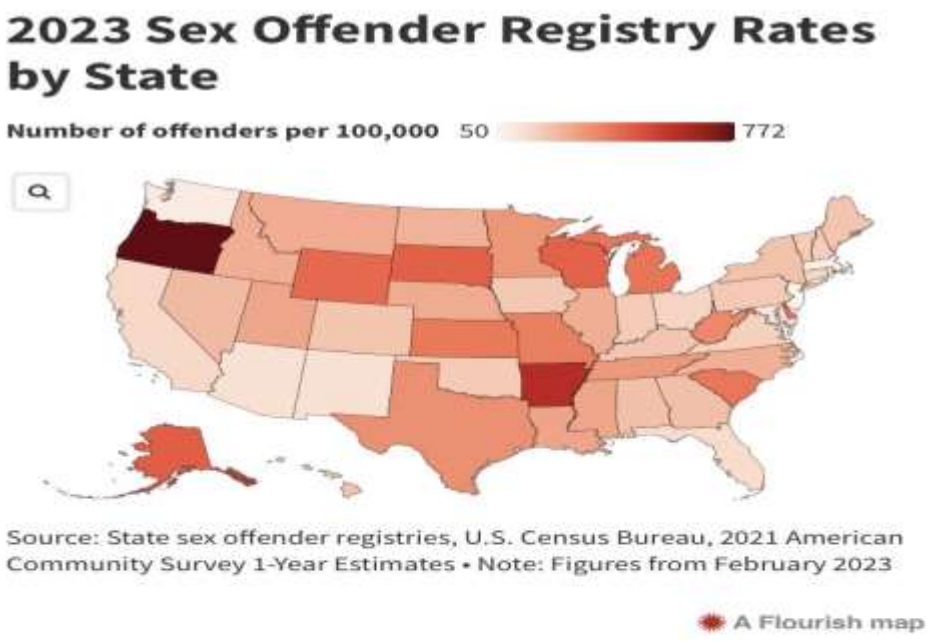
| | Mandatory employment arbitration (Colvin) | Federal court employment discrimination (Eisenberg and Hill) | State court non-civil rights (Eisenberg and Hill) |
|---|---|---|---|
| Mean time to trial (days) | 361.5 | 709 | 723 |
| Employee trial win rate | 21.40% (n=1,213) | 36.40% (n=1430) | 57% (n=145) |
| Median damages | $36,500 | $176,426 | $85,560 |
| Mean damages | $109,858 | $394,223 | $575,453 |
| Mean including zeros | $23,548 | $143,497 | $328,008 |

**Note:** All damage amounts are converted to 2005 dollar amounts to facilitate comparison.

Plaintiff argues that it is abundantly clear that economic damages are provable in front of a jury; however in the absence of that trial, Plaintiff alleges economic damages of at least $900,000, plus non-economic damages of $10,000,000 and punitive damages of $50,000,000 for Brandsness intentionally skewering Plaintiff's opportunity to Compel arbitration in case 3:15-cv-2401.

Oregon ranks the highest of all 50 states for the number of registered sex offenders per capita. Oregon ranks the highest for the number of practicing attorneys who support

decriminalizing child porn. And perhaps that is why PLF money is used to support the criminal activities of child predators. This is getting a lot of public attention and it is not lost on this Plaintiff that this defendant's stance on the malpractice and other claims against him is disguised support for child predation. See following:




| States with the most registered sex offenders | | States with the most registered sex offenders per 100,000 residents | |
|---|---|---|---|
| Texas | 100,989 | Oregon | 772 |
| California | 61,764 | Arkansas | 606 |
| New York | 42,871 | Alaska | 454 |
| Michigan | 40,176 | South Dakota | 448 |
| Illinois | 33,269 | Wisconsin | 447 |
| Oregon | 32,715 | Wyoming | 429 |
| Florida | 32,136 | Delaware | 418 |
| North Carolina | 27,684 | Michigan | 400 |

## CONCLUSION

For the reasons outlined above, Plaintiff moves this Court to deny Defendant Brandsness' Motion to Dismiss and Motion for Summary Judgment and to grant Plaintiff's Motion for Summary Judgment.

DATED: June 14, 2023

*/s/ Timothy C. Rote*

Timothy C. Rote
Plaintiff *Pro Se*
7427 SW Coho Ct. #200
Tualatin, OR 97062
(503) 272-6264

**CERTIFICATE OF SERVICE**

I hereby certify that I served the above on:

FD FIRM
Bernard S. Moore
2592 E Barnett Rd.
Medford, OR 97504
541.779.2333
moore@fdfirm.com
Counsel for Andrew Brandsness

Mr. Matthew J. Yuim
FOSTER GARVEY PC
121 SW Morrison Street, 11th Floor
Portland, OR 97294
Matthew.yium@foster.com
Of Attorneys for Defendants Carol Bernick; Professional Liability Fund; Pam Stendahl; and Nena Cook

Mr. Nathan G. Steele
THE STEELE LAW FIRM
125 NW Greeley
Bend, OR 97703
ngs@steelefirm.com
Of Attorneys for Defendant Anthony Albertazzi

FBI Headquarters
Child Exploitation and Human Trafficking Division (CEHTTFs)
935 Pennsylvania Avenue, NW
Washington, D.C. 20535-0001

[X] Via First Class Mail

[X] Via Email

[X] Via OECF Notification

DATED: June 14, 2023

*/s/ Timothy C. Rote*
Timothy C. Rote
Plaintiff *Pro se*