

1 Steven E. Boehmer, Esq. (#144817)
Amanda R. Abeln-Overs, Esq. (#290309)
2 McDOUGAL LOVE BOEHMER FOLEY
LYON & CANLAS
3 8100 La Mesa Blvd., Suite 200
La Mesa, California 91942
4 Telephone: (619) 440-4444
Facsimile: (619) 440-4907

5 Attorneys for Cross-Defendants,
6 MICHAEL SHAMES and
SDCAN (SAN DIEGO CONSUMERS ACTION NETWORK),
7 an un-incorporated non-profit association

8 Michael Shames, Esq. (#108582)
6975 Camino Amero
9 San Diego, CA 92111-7633
Telephone: (619) 393-2224
10 Email: michael@michaelshames.com

11 Attorney for cross-defendant,
SDCAN (San Diego Consumer Action Network)

12 SUPERIOR COURT OF CALIFORNIA

13 COUNTY OF SAN DIEGO, CENTRAL DIVISION

14 JENNIFER S. BETTS,

15 Plaintiff,

16 vs.

17 EDWARD L. CLARK JR.

18 Defendant.

19
20 EDWARD L. CLARK JR. dba THE
ELECTRICAL EXPERT,

21 Cross-Complainant,

22 vs.

23 JENNIFER S. BETTS, an individual, SDCAN
24 (SAN DIEGO CONSUMER ACTION
NETWORK), an un-incorporated non-profit
25 association, MICHAEL SHAMES, an
individual, AND DOES 1 through)
26 100, Inclusive.

27 ///

28 ///

Case No.: 37-2016-00034128-CU-BC-CTL

**TRIAL BRIEF OF CROSS-DEFENDANTS
MICHAEL SHAMES AND SAN DIEGO
CONSUMERS ACTION NETWORK**

[IMAGED FILE]

Judge: Judge: Joan M. Lewis
Dept.: C-65
Complaint
Filed: September 28, 2016
Trial: April 27, 2018

1 Cross-defendants Michael Shames (“Shames”) and San Diego Consumers Action Network,
2 an unincorporated nonprofit association (“SDCAN”), respectfully submit the following trial brief:

3 **I. STATEMENT OF FACTS**

4 **A. Betts Loans \$100,000 To Clark**

5 On September 23, 2014, plaintiff and cross-defendant Jennifer Betts’ (“Betts”) made a
6 \$100,000 personal loan to defendant and cross-complainant Edward Clark Jr.’s (“Clark”) which
7 Clark was to repay as soon as he was able, but no later than two years from the date of the loan.
8 Clark refused to repay the loan and Betts filed the instant lawsuit for breach of contract. In
9 response, Clark filed a cross-complaint against Betts alleging that the \$100,000 was not a personal
10 loan but a contribution to the development of a screenplay which he had no obligation to repay
11 within two years.

12 **B. The Parties Discuss Retaining Clark As An Expert Witness In The SDG&E Rate**
13 **Case**

14 On September 25, 2015 San Diego Gas and Electric (“SDG&E”) filed an application for
15 authorization to recover costs related to the 2007 Southern California Wildfires recorded in the
16 Wildfire Expense Memorandum Account with the California Public Utilities Commission (the
17 “SDG&E rate case”). Subsequently, SDCAN, along with other consumer watchdog organizations,
18 opposed SDG&E’ application. SDCAN is an unincorporated nonprofit association authorized by
19 its articles of association and bylaws to represent the interests of SDG&E’s residential and small
20 business customers, including advocating on behalf of customers of necessary-services companies
21 at state legislative, regulatory or civil court forums. Shames is the director of SDCAN. Betts is an
22 individual who suffered her own loss during the 2007 wildfires and filed a lawsuit against SDG&E
23 as a result. Shames and Betts, both attorneys, represented SDCAN in the SDG&E rate case.

24 As an initial step in the SDG&E rate case, SDCAN filed a notice of intent to claim
25 intervenor compensation on March 18, 2016. The notice included SDCAN’s estimate for attorney,
26 expert, and advocate fees based on the anticipated duration of the proceeding. Shames and Betts
27 were identified in the notice as well as estimates for unnamed experts.

28 ///

1 Betts, who knew Clark and has previously retained him as an expert witness in her personal
2 case against SDG&E for her own damages resulting from the 2007 wildfires, contacted Clark in
3 July 2016 to inquire about the possibility of retaining him as an expert witness. Clark provided
4 Betts with a copy of his resume and schedule of fees. Clark's retainer amount and fees were higher
5 than Betts anticipated and he was not retained as an expert witness. Over the course of the next
6 couple months, Shames and Betts communicated with Clark to determine whether an agreement
7 could be reached to retain Clark as an expert witness for the SDG&E rate case. During this time,
8 Clark did not provide any expert witness services for SDCAN. By the end of September, the
9 parties were unable to reach an agreement and SDCAN proceeded with opposing SDG&E's
10 application without retaining any experts, including Clark.

11 As part of the SDG&E rate case, Betts submitted written testimony based upon her
12 personal knowledge and experience with SDG&E and the 2007 wildfires. In this testimony, Betts
13 discussed her personal case against SDG&E, including some of her work with Clark, who was
14 Betts' retained expert for her personal case, and positions taken by Clark which are in the public
15 record. Ultimately, however, Betts' testimony was not considered by the California Public Utilities
16 Commission.

17 Clark claims that he should be paid for his expert witness services and work. Specifically,
18 he claims \$18,000 in general damages and seeks \$255,500 for recovery of money allegedly earned
19 by cross-defendants in the SDG&E rate case. Clark has offered up no evidence supporting his
20 claimed \$18,000 in general damages. Clark also offers no evidence that the cross-defendants
21 received \$255,500 for their work in the SDG&E case, nor can he as SDCAN has not received any
22 payment for its work in opposing the SDG&E rate case.

23 **C. Betts Files The Instant Lawsuit**

24 On September 28, 2016 – five days after Clark was to repay the loan Betts made to him –
25 Betts filed this lawsuit. However, Clark did not know about the lawsuit until he was served with
26 the summons and complaint in January 2017. Nevertheless, Clark alleges that Betts, Shames, and
27 SDCAN filed this lawsuit to coerce him into providing expert witness services in the SDG&E rate
28

1 case even though the complaint was filed only by Betts. In February 2017, Clark brought Shames
2 and SDCAN into this lawsuit when he named them as cross-defendants.

3 **II. PLEADINGS**

4 The operative complaint filed on September 28, 2016 by Betts against Clark contains a
5 single cause of action for breach of contract. Clark was served with the complaint in January
6 2017.

7 The operative cross-complaint, the second amended cross-complaint, filed on February 3,
8 2017 by Clark against cross-defendants contains causes of action for (1) declaratory relief
9 against Betts; (2) abuse of civil process; (3) negligent misrepresentation; (4) fraud in the
10 inducement; (5) intentional misrepresentation; (6) alter ego; (7) fraud and deceit; and (8) breach
11 of contract.

12 **III. LIABILITY**

13 Shames and SDCAN are not defendants to Betts' complaint and as a result have no
14 liability for her breach of contract cause of action against Clark.

15 Clark's second amended cross-complaint asserts a declaratory relief cause of action
16 against Betts only and as a result, Shames and SDCAN have no liability under the declaratory
17 relief cause of action.

18 **A. ABUSE OF CIVIL PROCESS**

19 Clark asserts an abuse of civil process cause of action against all cross-defendants on the
20 basis that Betts' complaint was filed to coerce Clark to provide expert witness services.

21 "The common law tort of abuse of process arises when one uses the court's process for a
22 purpose other than that for which the process was designed. [Citations.] It has been 'interpreted
23 broadly to encompass the entire range of "procedures" incident to litigation.' [Citation.] [¶]
24 '[T]he essence of the tort [is] ... misuse of the power of the court; it is an act done in the name of
25 the court and under its authority for the purpose of perpetrating an injustice.' [Citation.] To
26 succeed in an action for abuse of process, a litigant must establish that the defendant (1)
27 contemplated an ulterior motive in using the process, and (2) committed a willful act in the use
28

1 of the process not proper in the regular conduct of the proceedings.” (*Rusheen v. Cohen* (2006)
2 37 Cal.4th 1048, 1056.)

3 “Abuse of process is not just another name for malicious prosecution. *Simply filing or*
4 *maintaining a lawsuit for an improper purpose* (such as might support a malicious prosecution
5 cause of action) *is not abuse of process.*” (*S.A. v. Maiden* (2014) 229 Cal.App.4th 27, 41-42; see
6 also *JSJ Limited Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512, 1523 [“while a
7 defendants’ act of improperly instituting or maintain an action may, in an appropriate case, give
8 rise to a cause of action for malicious prosecution, the mere filing or maintenance of a lawsuit—
9 even for an improper purpose—is not a proper basis for an abuse of process action.”].) Abuse of
10 process “*concerns the misuse of the tools the law affords litigants once they are in a lawsuit*
11 (regardless of whether there was probable cause to commence that lawsuit in the first place.
12 Hence, abuse of process claims typically arise for improper or excessive attachments [citation] or
13 improper use of discovery [citation].” (*Id.* at p. 42.)

14 Merely filing or maintaining a lawsuit – even if for any improper purpose is not a proper
15 basis for an abuse of process cause of action. (*Oren Royal Oaks Venture v. Greenberg,*
16 *Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1169.) “[N]either the initiation of a
17 meritless claim nor the continued prosecution of a claim after it becomes apparent the claim is
18 meritless can support an abuse of process cause of action.” *S.A. v. Maiden, supra*, 229 Cal.4th at
19 p. 42.) “[C]ontinued pursuit of meritless litigation for an improper collateral purpose, although
20 actionable under malicious prosecution principles, is not separately actionable under an abuse of
21 process theory.” (*Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 521.)

22 Here, the evidence will show that Shames and SDCAN have not used a legal procedure
23 for any improper purpose. Shames and SDCAN did not file a lawsuit against Clark. Both
24 Shames and SDCAN were brought into this lawsuit when Clark named them as cross-defendants
25 in Clark’s cross-complaint and have only acted to defend against Clark’s cross-complaint. None
26 of this can serve as a basis for abuse of process.

27 ///

28 ///

1 **B. NEGLIGENT MISREPRESENTATION**

2 Clark asserts a negligent misrepresentation cause of action against all cross-defendants.
3 “The elements of negligent misrepresentation are (1) a misrepresentation of a past or existing
4 material fact, (2) made without reasonable ground for believing it to be true, (3) made with the
5 intent to induce another’s reliance on the fact misrepresented, (4) justifiable reliance on the
6 misrepresentation, and (5) resulting damage.” (*Ragland v. U.S. Bank National Assn.* (2012) 209
7 Cal.App.4th 182, 196.) To be actionable, “the representation need not be made with knowledge
8 of actual falsity, but need only be an ‘assertion, as a fact, of that which is not true, by one who
9 has no reasonable ground for believing it to be true’ and made ‘with intent to induce [the
10 recipient] to alter his position to his injury or his risk. . . .’ The elements of negligent
11 misrepresentation also include justifiable reliance on the representation, and resulting damage.”
12 (*B.L.M. v. Sabo & Deitsch* (1997) 55 Cal.App.4th 823, 834 [internal citations omitted].)

13 Clark alleges two categories of misrepresentations. First, he alleges that Betts made a
14 misrepresentation concerning the nature of the \$100,000 payment from Betts to Clark in 2014.
15 Clark does not allege that Shames made any misrepresentations about the nature of Betts’
16 payment or that Betts was acting as an agent of SDCAN at the time she made the alleged
17 misrepresentation. Accordingly, there is no basis for Shames and SDCAN to be liable.

18 Second, Clark alleges Shames and Betts, acting as agents of SDCAN, made
19 representations that they were going to pay him for expert services in connection with the
20 SDG&E rate case. The evidence will show that the cross-defendants did not make any
21 representations to Clark that he would be paid as an expert witness in connection with the
22 SDG&E rate case but rather that the parties were engaged in discussion and negotiations about
23 retaining Clark as an expert witness as demonstrated by the back and forth communications and
24 alternative proposals presented by the parties. Clark could not have reasonably relied on a
25 proposal from the cross-defendants when he refused to agree to the terms of the proposal. The
26 evidence will show that ultimately, the parties not able to reach an agreement and Clark as never
27 retained as an expert witness in connection with the SDG&E rate case. Moreover, the evidence
28

1 will show that Clark has suffered no damages because he did not perform any expert witness
2 services in connection with the SDG&E rate case.

3 **C. FRAUD IN THE INDUCEMENT, INTENTIONAL**
4 **MISREPRESENTATION, AND FRAUD AND DECEIT**

5 Clark alleges three fraud based causes of action: (1) fraud in the inducement; (2)
6 intentional misrepresentation; and (3) fraud and deceit. These causes of action are duplicative of
7 one another as they are all based upon the same allegations. The elements giving rise to a fraud
8 cause of action are: “(a) misrepresentation (false representation, concealment, or nondisclosure);
9 (b) knowledge of falsity (or ‘scienter’); (c) intent to defraud, i.e., to induce reliance; (d)
10 justifiable reliance; and (e) resulting damage.’ ” (*Engalla v. Permanente Medical Group, Inc.*
11 (1997) 15 Cal.4th 951, 974.) The element of fraudulent intent distinguishes fraud “from
12 actionable negligent misrepresentation and from nonactionable innocent misrepresentation. It is
13 the element of intent which makes fraud actionable . . .” (*City of Atascadero v. Merrill Lynch,*
14 *Pierce, Fenner & Smith* (1998) 68 Cal.App.4th 445, 482.)

15 For the reasons discussed under negligent misrepresentation, Shames and SDCAN have
16 no liability for misrepresentations concerning Betts \$100,000 payment to Clark in 2014 – Clark
17 does not allege that Shames made any misrepresentations about the nature of Betts’ payment or
18 that Betts was acting as an agent of SDCAN at the time she made the alleged misrepresentation.

19 In addition, as discussed under negligent misrepresentation, Shames and SDCAN have no
20 liability for the alleged misrepresentations concerning payment for expert witness services:
21 cross-defendants did not make any representations to Clark that he would be paid as an expert
22 witness in connection with the SDG&E rate case except in connection with negotiations to reach
23 an agreement for expert witness services; Clark could not have reasonably relied on a proposal
24 from the cross-defendants to retain him as an expert witness when he refused to agree to the
25 terms of the proposal; and Clark has suffered no damages because he did not perform any expert
26 witness services in connection with the SDG&E rate case. Further, the evidence will show that
27 cross-defendants did not make any false representation with an intent to deceive Clark.

28 ///

1 **D. BREACH OF CONTRACT**

2 Clark alleges a breach of contract cause of action. However, his allegations mirror his
3 misrepresentation and fraud based causes of action. He alleges that cross-defendants engaged
4 him as an expert witness on May 21, 2014 and September 28, 2015. However, the evidence will
5 show that any alleged discussions concerning his service as an expert witness prior to 2016 were
6 general and limited to whether he would be willing to serve as a witness and go up against utility
7 companies, not an agreement to retain him as an expert, particularly given that SDG&E did not
8 file its application until September 2015 and SDCAN did not appear in the SDG&E rate case
9 until March 2016. Furthermore, the evidence will show that while the parties were in discussion
10 about retaining Clark as an expert witness for SDCAN in connection with the SDG&E rate case,
11 they were unable to reach an agreement and so no contract was ever formed and thus, there can
12 be no breach of contract.

13 **E. ALTER EGO**

14 While alter ego is not a cause of action but a legal theory, Clark states a cause of action
15 for alter ego alleging SDCAN is the alter ego of Shames and that Shames operates SDCAN to
16 avoid personal liability and that they should be treated as the same. SDCAN is an
17 unincorporated nonprofit association registered with the California Secretary of State. While
18 Shames is the director of SDCAN and involved in the operations of SDCAN, the evidence will
19 show that SDCAN is a separate entity and not the alter ego of Shames.

20 **IV. CONCLUSION**

21 Based upon the above, Shames and SDCAN anticipate that the jury will return a verdict
22 in their favor as Clark's claims are without merit.

23 Dated: April 20, 2018

 MCDUGAL LOVE BOEHMER FOLEY
 LYON & CANLAS

25 By: 

 Steven E. Boehmer
 Amanda R. Abeln-Overs
 Attorneys for Cross-Defendants,
 MICHAEL SHAMES and
 SDCAN (SAN DIEGO CONSUMER
 ACTION NETWORK), an un-incorporated
 non-profit association

1 *Jennifer S. Betts v. Ed Clark. et al.*
2 Case No. 37-2016-00034128-CU-BC-CTL

3 **PROOF OF SERVICE**

4 At the time of service I was over 18 years of age and not a party to this action. My business
5 address is 8100 La Mesa Blvd., Suite 200, La Mesa, California, 91942. On April 20, 2018, I served the
6 following document: TRIAL BRIEF OF CROSS-DEFENDANTS MICHAEL SHAMES AND SAN
7 DIEGO CONSUMERS ACTION NETWORK, on the parties listed below:


8 Edward L. Clark Jr.
9 5582 McFadden Avenue
10 Hunting Beach CA 9264
11 (714) 448-7145
12 Email: ed@theelectricalexpert.com
13 Pro Per

Thomas M. Monson
Miller, Monson, Peshel,
Polacek & Hoshaw,
501 West Broadway, Suite 700
San Diego, CA 92101
(619) 239-7777 (telephone)
(619) 696-6163 (facsimile)
Email: (TomMonson@erisa-law.com)
Attorney for Jennifer S. Betts

13 Michael Shames, Esq.
14 6975 Camino Amero
15 San Diego, CA 92111-7633
16 Telephone: (619) 393-2224
17 Email: michael@michaelshames.com

18 ☒ **By e-mail or electronic transmission.** I caused all of the pages of the above-entitled
19 documents to be electronically filed and served on designated recipients through the
20 Electronic Case Filing system for the above-entitled case. The file transmission was
21 reported as successful and a copy of the Electronic Case Filing Receipt will be maintained
22 with the original documents in our office.

23 I declare under penalty of perjury under the laws of the State of California that the above is true
24 and correct and that this proof of service was executed on April 20, 2018, in La Mesa, California.

25 
26 Sally Butterworth
27
28