

S273887

General Docket

United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 21-55517 **Docketed:** 05/19/2021
Nature of Suit: 4367 Torts – Personal Injury **Termed:** 04/01/2022
Michelle Himes, et al v. Somatics, LLC, et al
Appeal From: U.S. District Court for Central California, Los Angeles
Fee Status: Paid

Case Type Information:

- 1) civil
- 2) private
- 3) null

Originating Court Information:

District: 0973-2 : 2:17-cv-06686-RGK-JC

Court Reporter: Sandra MacNeil

Court Reporter: Alberto V. Ortiz, Court Reporter Supervisor

Trial Judge: R. Gary Klausner, District Judge

Date Filed: 09/11/2017

Date Order/Judgment:

05/14/2021

Date Order/Judgment EOD:

05/14/2021

Date NOA Filed:

05/18/2021

Date Rec'd COA:

05/18/2021

Prior Cases:

18-56470 **Date Filed:** 10/31/2018 **Date Disposed:** 04/07/2020 **Disposition:** Reversed, Remanded –
Memorandum

Current Cases:

None

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others similarly situated
Plaintiff – Appellant,

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(see above)

JOSE RIERA
Plaintiff,

DEBORAH CHASE
Plaintiff,

DIANE SCURRAH
Plaintiff,

v.

SOMATICS, LLC
Defendant – Appellee,

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MECTA CORPORATION
Defendant,

MICHELLE HIMES; MARCIA BENJAMIN; DANIEL BENJAMIN, individually, and on behalf of all others similarly situated,

Plaintiffs – Appellants,

and

JOSE RIERA; DEBORAH CHASE; DIANE SCURRAH,

Plaintiffs,

v.

SOMATICS, LLC,

Defendant – Appellee,

and

MECTA CORPORATION,

Defendant.

- 05/19/2021 1 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Appellants Daniel Benjamin, Marcia Benjamin and Michelle Himes Mediation Questionnaire due on 05/26/2021. Transcript ordered by 06/17/2021. Transcript due 07/19/2021. Appellants Daniel Benjamin, Marcia Benjamin and Michelle Himes opening brief due 08/26/2021. Appellee Somatics, LLC answering brief due 09/27/2021. Appellant's optional reply brief is due 21 days after service of the answering brief. [12117604] (RT) [Entered: 05/19/2021 08:54 AM]
- 05/26/2021 2 Filed (ECF) notice of appearance of Jonathan M. Freiman (Wiggin and Dana LLP, One Century Tower, 265 Church Street, New Haven, CT 06510) for Appellee Somatics, LLC. Date of service: 05/26/2021. (Party was previously proceeding with counsel.) [12125210] [21-55517] (Freiman, Jonathan) [Entered: 05/26/2021 11:15 AM]
- 05/26/2021 3 Added Attorney(s) Jonathan Freiman for party(s) Appellee Somatics, LLC, in case 21-55517. [12125242] (RR) [Entered: 05/26/2021 11:30 AM]
- 05/26/2021 4 Filed (ECF) Appellants Daniel Benjamin, Marcia Benjamin and Michelle Himes Correspondence: NOTICE PURSUANT TO NINTH CIRCUIT RULE 10-3.1(a). Date of service: 05/26/2021 [12125244] [21-55517] (Esfandiari, Bijan) [Entered: 05/26/2021 11:31 AM]
- 05/26/2021 5 Filed (ECF) Appellants Daniel Benjamin, Marcia Benjamin and Michelle Himes Mediation Questionnaire. Date of service: 05/26/2021. [12125269] [21-55517] (Esfandiari, Bijan) [Entered: 05/26/2021 11:39 AM]
- 05/26/2021 6 The Mediation Questionnaire for this case was filed on 05/26/2021. To submit pertinent **confidential** information directly to the Circuit Mediators, please use the following **link**. Confidential submissions may include any information relevant to mediation of the case and settlement potential, including, but not limited to, settlement history, ongoing or potential settlement discussions, non-litigated party related issues, other pending actions, and timing considerations that may impact mediation efforts.[12125390]. [21-55517] (AD) [Entered: 05/26/2021 12:44 PM]
- 05/28/2021 7 MEDIATION CONFERENCE SCHEDULED – DIAL-IN Assessment Conference, 06/22/2021, 09:30 a.m. PACIFIC Time. The briefing schedule previously set by the court remains in effect. See order for instructions and details. [12128014] (BLS) [Entered: 05/28/2021 11:49 AM]
- 06/22/2021 8 MEDIATION ORDER FILED: This case is RELEASED from the Mediation Program. Counsel are requested to contact the Circuit Mediator should circumstances develop that warrant settlement discussions while the appeal is pending. [12150508] (BLS) [Entered: 06/22/2021 10:08 AM]
- 08/26/2021 9 Submitted (ECF) Opening Brief for review. Submitted by Appellants Michelle Himes, Marcia Benjamin and Daniel Benjamin. Date of service: 08/26/2021. [12212994] [21-55517]--[COURT UPDATE: Attached corrected PDF of the brief. 08/31/2021 by KWG] (Esfandiari, Bijan) [Entered: 08/26/2021 10:38 PM]
- 08/26/2021 10 Submitted (ECF) excerpts of record. Submitted by Appellants Michelle Himes, Marcia Benjamin and Daniel Benjamin. Date of service: 08/26/2021. [12212995] [21-55517]--[COURT UPDATE: Attached corrected PDF of vols 1-6 and index vol. 08/31/2021 by KWG]--[COURT UPDATE: Attached corrected PDF of Vol 3 (corected cover). 09/02/2021 by LA] (Esfandiari, Bijan) [Entered: 08/26/2021 10:41 PM]
- 08/27/2021 11 Filed (ECF) Streamlined request for extension of time to file Answering Brief by Appellee Somatics, LLC. New requested due date is 10/27/2021. [12213520] [21-55517] (Freiman, Jonathan) [Entered: 08/27/2021 11:31 AM]
- 08/27/2021 12 **Streamlined request [11] by Appellee Somatics, LLC to extend time to file the brief is approved. Amended briefing schedule: Appellee Somatics, LLC answering brief due 10/27/2021. The optional reply brief is due 21 days from the date of service of the answering brief.** [12213680]

(DLM) [Entered: 08/27/2021 12:52 PM]

- 08/31/2021 13 Filed clerk order: The opening brief [9] submitted by appellants is filed. Within 7 days of the filing of this order, filer is ordered to file 6 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: blue. The excerpts of record [10] submitted by appellants are filed. Within 7 days of this order, filer is ordered to file 3 copies of the excerpts in paper format securely bound on the left side, with white covers. The paper copies shall be submitted to the principal office of the Clerk. [12216110] (KWG) [Entered: 08/31/2021 09:05 AM]
- 09/03/2021 14 Received 3 paper copies of excerpts of record [10] in 6 volume(s) and index volume filed by Appellants. [12220219] (KWG) [Entered: 09/03/2021 01:49 PM]
- 09/03/2021 15 Received 6 paper copies of Opening Brief [9] filed by Appellants. [12220505] (SD) [Entered: 09/03/2021 04:06 PM]
- 10/27/2021 16 Filed (ECF) UNDER SEAL Appellee Somatics, LLC motion to file document under seal and submit sealed document. Type of document: brief. Date of service: 10/27/2021. [12270666] [21-55517] (Freiman, Jonathan) [Entered: 10/27/2021 02:16 PM]
- 10/27/2021 17 Submitted (ECF) Answering Brief for review. Submitted by Appellee Somatics, LLC. Date of service: 10/27/2021. [12270732] [21-55517] (Freiman, Jonathan) [Entered: 10/27/2021 02:36 PM]
- 11/15/2021 18 Filed Appellee Somatics, LLC motion to seal. Deficiencies: None. Served on 10/27/2021. (Court-entered filing of motion submitted under seal at [16]) [12288096] (AF) [Entered: 11/15/2021 05:43 PM]
- 11/15/2021 19 Filed order (Appellate Commissioner): Appellee's unopposed motion to seal (Docket Entry No. [16]) is granted. The Clerk will file under seal the unredacted answering brief and Volume 1 of the supplemental excerpts of record (Docket Entry Nos. [16]-2 and [16]-3). The Clerk will file publicly the motion to seal (Docket Entry No. [16]-1) and the redacted answering brief (Docket Entry No. [17]). The existing briefing schedule remains in effect. [12288102] (AF) [Entered: 11/15/2021 05:45 PM]
- 11/15/2021 20 Submitted (ECF) UNDER SEAL unredacted Answering Brief for review. Submitted by Appellee Somatics, LLC. Date of service: 10/27/2021. (Court-entered filing, brief originally submitted in [16].) [12288106] (AF) [Entered: 11/15/2021 05:46 PM]
- 11/15/2021 21 Submitted (ECF) UNDER SEAL supplemental excerpts of record. Submitted by Appellee Somatics, LLC. Date of service: 10/27/2021. (Court-entered filing, excerpts of record originally submitted in [16].) [12288108] (AF) [Entered: 11/15/2021 05:47 PM]
- 11/16/2021 22 Filed clerk order: The answering brief [20] submitted by Somatics, LLC is filed UNDER SEAL. Within 7 days of the filing of this order, filer is ordered to file 6 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: red. The supplemental excerpts of record [21] submitted by Somatics, LLC are filed UNDER SEAL. Within 7 days of this order, filer is ordered to file 3 copies of the excerpts in paper format securely bound on the left side, with white covers. The paper copies shall be submitted to the principal office of the Clerk. [12288404] (LA) [Entered: 11/16/2021 09:12 AM]
- 11/16/2021 23 Filed clerk order: The redacted answering brief [17] submitted by Somatics, LLC is filed. No paper copies of the redacted brief are required at this time. [12288411] (LA) [Entered: 11/16/2021 09:14 AM]
- 11/17/2021 24 Submitted (ECF) Reply Brief for review. Submitted by Appellants Daniel Benjamin, Marcia Benjamin and Michelle Himes. Date of service: 11/17/2021. [12291133] [21-55517] (Esfandiari, Bijan)

[Entered: 11/17/2021 11:57 PM]

- 11/18/2021 25 Filed clerk order: The reply brief [24] submitted by Daniel Benjamin, Marcia Benjamin and Michelle Himes is filed. Within 7 days of the filing of this order, filer is ordered to file 6 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be submitted to the principal office of the Clerk. [12291830] (KWG) [Entered: 11/18/2021 01:05 PM]
- 11/19/2021 26 Received 3 paper copies of supplemental excerpts of record [21] in 1 volume UNDER SEAL filed by Appellee Somatics, LLC. [12293332] (LA) [Entered: 11/19/2021 12:40 PM]
- 11/19/2021 27 Received 6 paper copies of Answering Brief [20] filed UNDER SEAL by Somatics, LLC. [12293445] (SD) [Entered: 11/19/2021 01:38 PM]
- 11/23/2021 28 Received 6 paper copies of Reply Brief [24] filed by Daniel Benjamin, Marcia Benjamin and Michelle Himes. [12296913] (SD) [Entered: 11/23/2021 02:26 PM]
- 11/26/2021 29 This case is being considered for an upcoming oral argument calendar in Pasadena

Please review the Pasadena sitting dates for March 2022 and the 2 subsequent sitting months in that location at http://www.ca9.uscourts.gov/court_sessions. If you have an unavoidable conflict on any of the dates, please file **Form 32 within 3 business days of this notice** using the CM/ECF filing type **Response to Case Being Considered for Oral Argument**. Please follow the form's instructions carefully.

When setting your argument date, the court will try to work around unavoidable conflicts; the court is not able to accommodate mere scheduling preferences. You will receive notice that your case has been assigned to a calendar approximately 10 weeks before the scheduled oral argument date.

If the parties wish to discuss settlement before an argument date is set, they should jointly request referral to the mediation unit by filing a letter **within 3 business days of this notice**, using CM/ECF (**Type of Document:** Correspondence to Court; **Subject:** request for mediation).[12298848]. [21-55517] (KS) [Entered: 11/26/2021 05:01 PM]

- 12/01/2021 30 Filed (ECF) Attorney Mr. Jonathan Freiman, Esquire for Appellee Somatics, LLC response to notice for case being considered for oral argument. Date of service: 12/01/2021. [12302349] [21-55517] (Freiman, Jonathan) [Entered: 12/01/2021 10:59 AM]
- 12/01/2021 31 Filed (ECF) Attorney Bijan Esfandiari for Appellants Daniel Benjamin, Marcia Benjamin and Michelle Himes response to notice for case being considered for oral argument. Date of service: 12/01/2021. [12302456] [21-55517] (Esfandiari, Bijan) [Entered: 12/01/2021 12:03 PM]
- 12/01/2021 32 Filed (ECF) Attorney Mr. Jonathan Freiman, Esquire for Appellee Somatics, LLC response to notice for case being considered for oral argument. Date of service: 12/01/2021. [12302583] [21-55517] (Freiman, Jonathan) [Entered: 12/01/2021 01:18 PM]
- 12/26/2021 33 Notice of Oral Argument on Monday, March 7, 2022 – 09:00 A.M. – Courtroom 2 – Scheduled Location: Pasadena CA.
The hearing time is the local time zone at the scheduled hearing location.

View the Oral Argument Calendar for your case [here](#).

NOTE: Although your case is currently scheduled for oral argument, the panel may decide to submit the case on the briefs instead. *See* Fed. R. App. P. 34. Absent further order of the court, if the court does determine that oral argument is required in this case, you may have the option to appear in person at the Courthouse or remotely by video. Check [here](#) for updates on the status of reopening as the

hearing date approaches. At this time, even when in person hearings resume, an election to appear remotely by video will not require a motion, **and any attorney wishing to appear in person must provide proof of vaccination**. The court expects and supports the fact that some attorneys and some judges will continue to appear remotely. If the panel determines that it will hold oral argument in your case, the Clerk's Office will contact you directly at least two weeks before the set argument date to review any requirements for in person appearance or to make any necessary arrangements for remote appearance.

Please note however that if you do elect to appear remotely, the court **strongly prefers** video over telephone appearance. Therefore, if you wish to appear remotely by telephone you will need to file a motion requesting permission to do so.

Be sure to review the GUIDELINES for important information about your hearing, including when to be available (30 minutes before the hearing time) and when and how to submit additional citations (filing electronically as far in advance of the hearing as possible).

If you are the specific attorney or self-represented party who will be arguing, use the **ACKNOWLEDGMENT OF HEARING NOTICE** filing type in CM/ECF no later than 28 days before Monday, March 7, 2022. No form or other attachment is required. If you will not be arguing, do not file an acknowledgment of hearing notice.[12324564]. [21-55517] (KS) [Entered: 12/26/2021 06:08 AM]

02/07/2022 34

Notice of Oral Argument on Monday, March 7, 2022 – 09:00 A.M. – Courtroom 1 – Scheduled Location: Pasadena CA.

The hearing time is the local time zone at the scheduled hearing location.

View the Oral Argument Calendar for your case [here](#).

NOTE: Although your case is currently scheduled for oral argument, the panel may decide to submit the case on the briefs instead. *See* Fed. R. App. P. 34. Absent further order of the court, if the court does determine that oral argument is required in this case, you may have the option to appear in person at the Courthouse or remotely by video. Check [here](#) for updates on the status of reopening as the hearing date approaches. At this time, even when in person hearings resume, an election to appear remotely by video will not require a motion, **and any attorney wishing to appear in person must provide proof of vaccination**. The court expects and supports the fact that some attorneys and some judges will continue to appear remotely. If the panel determines that it will hold oral argument in your case, the Clerk's Office will contact you directly at least two weeks before the set argument date to review any requirements for in person appearance or to make any necessary arrangements for remote appearance.

Please note however that if you do elect to appear remotely, the court **strongly prefers** video over telephone appearance. Therefore, if you wish to appear remotely by telephone you will need to file a motion requesting permission to do so.

Be sure to review the GUIDELINES for important information about your hearing, including when to be available (30 minutes before the hearing time) and when and how to submit additional citations (filing electronically as far in advance of the hearing as possible).

If you are the specific attorney or self-represented party who will be arguing, use the **ACKNOWLEDGMENT OF HEARING NOTICE** filing type in CM/ECF no later than 28 days before Monday, March 7, 2022. No form or other attachment is required. If you will not be arguing, do not file an acknowledgment of hearing notice.[12362328]. [21-55517] (KS) [Entered: 02/07/2022 11:08 AM]

- 02/07/2022 35 Filed (ECF) Acknowledgment of hearing notice by Attorney Mr. Jonathan Freiman, Esquire for Appellee Somatics, LLC. Hearing in Pasadena on 03/07/2022 at 09:00 A.M. (Courtroom: 1). Filer sharing argument time: No. (Argument minutes: 15) Appearance in person or by video: I wish to appear by video. Special accommodations: NO. Filer admission status: I certify that I am admitted to practice before this Court. Date of service: 02/07/2022. [12362393] [21-55517] (Freiman, Jonathan) [Entered: 02/07/2022 11:18 AM]
- 02/07/2022 36 Filed (ECF) Acknowledgment of hearing notice by Attorney Bijan Esfandiari for Appellants Daniel Benjamin, Marcia Benjamin and Michelle Himes. Hearing in Pasadena on 03/07/2022 at 09:00 A.M. (Courtroom: 1). Filer sharing argument time: No. (Argument minutes: 15) Appearance in person or by video: I wish to appear by video. Special accommodations: NO. Filer admission status: I certify that I am admitted to practice before this Court. Date of service: 02/07/2022. [12363341] [21-55517] (Esfandiari, Bijan) [Entered: 02/07/2022 07:23 PM]
- 03/07/2022 37 ARGUED AND SUBMITTED TO SANDRA S. IKUTA, KENNETH K. LEE and DANIELLE J. FORREST. [12387749] (BG) [Entered: 03/07/2022 11:07 AM]
- 03/08/2022 38 Filed Audio recording of oral argument.
Note: Video recordings of public argument calendars are available on the Court's website, at <http://www.ca9.uscourts.gov/media/>
[12389247] (BG) [Entered: 03/08/2022 12:18 PM]
- 04/01/2022 39 Order filed for PUBLICATION (SANDRA S. IKUTA, KENNETH K. LEE and DANIELLE J. FORREST) We respectfully certify the following question to the California Supreme Court: (SEE ORDER FOR FULL TEXT). The Clerk shall forward an original and ten certified copies of this certification order, under official seal, to the California Supreme Court. Cal. R. Ct. 8.548(d). The Clerk is also ordered to transmit copies of all relevant briefs, as well as any additional record materials requested by the California Supreme Court. Cal. R. Ct. 8.548(c). Submission of this appeal for decision is vacated and deferred pending the California Supreme Court's final response to this certification order. The Clerk is directed to administratively close this docket, pending further order. The parties shall notify the Clerk of this court within fourteen days of the California Supreme Court's acceptance or rejection of certification, and again, if certification is accepted, within fourteen days of the California Supreme Court's issuance of a decision. QUESTION CERTIFIED; PROCEEDINGS STAYED. [12410406] (AKM) [Entered: 04/01/2022 08:20 AM]
- 04/01/2022 40 FILED MEMORANDUM (SANDRA S. IKUTA, KENNETH K. LEE and DANIELLE J. FORREST) AFFIRMED IN PART. [12410408] (AKM) [Entered: 04/01/2022 08:21 AM]