TENTATIVE RULINGS: CIVIL LAW & MOTION

Friday, October 25, 2024 at **8:30 a.m.**
Courtroom 18 –Hon. Christopher M. Honigsberg
Civil and Family Law Courthouse
3055 Cleveland Avenue
Santa Rosa, California 95403

The Court's Official Court Reporters are "not available" within the meaning of California Rules of Court, Rule 2.956, for court reporting of civil cases.

CourtCall is not permitted for this calendar.

If the tentative ruling does not require appearances, and is accepted, no appearance is necessary.

Any party who wishes to be heard in response or opposition to the Court's tentative ruling **MUST NOTIFY** the Court's Judicial Assistant by telephone at **(707) 521-6723** and **MUST NOTIFY all other parties of their intent to appear, the issue(s) to be addressed or argued and whether the appearance will be in person or by Zoom**. Notifications must be completed no later than 4:00 p.m. on the court (business) day immediately before the day of the hearing.

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Unless notification of an appearance has been given as provided above, the tentative ruling shall become the ruling of the Court the day of the hearing at the beginning of the calendar.

1. 24CV02293, Rasmussen v. Rasmussen

This matter is on calendar for hearing on an Order to Show Cause. On October 21, 2024, Defendant in pro. per. Jennifer Rasmussen filed a declaration indicating that the matter has settled. On October 22, counsel for Plaintiff filed a Notice of Settlement of Entire Case, indicating that the settlement was conditional on close of escrow and that a dismissal would be filed no later than October 22, 2025.

The settlement renders moot the questions of whether Ms. Rasmussen should be disqualified from representing herself, and whether her law firm should be disqualified from representing her. The Court intends to report Ms. Rasmussen's use of mis-cited and nonexistent cases in the demurrer to the State Bar and to take no further action in this matter. If Ms. Rasmussen does not contest this tentative ruling, no appearance is required.

2-3. SCV-265805 Gateway Builders, Inc. v. Di Lillo

Plaintiff's Motion for Attorney's Fees

Plaintiff's motion for attorney and expert fees is **GRANTED.** Fees are awarded to Plaintiff in the amount of $626,848.04. The Court will adopt the proposed order submitted with the moving papers.

I. Background

Ken and Susan Di Lillo's ("Defendants") Santa Rosa home was destroyed by the Tubbs Fire in October 2017. On September 18, 2018, Defendants entered into a Residential Construction Contract ("Contract") with Gateway Builders, Inc. ("Plaintiff") to build a new home on Defendants' property. Multiple and continuing issues arose during construction, and Defendants ultimately brought in a new contractor to complete the home. On January 8, 2020, Plaintiff sued Defendants for money they claimed was due and owing under the Contract. On May 15, 2020, Defendants cross-complained against Plaintiff, claiming damages for, among other things, breach of contract.

The matter went to jury trial on May 3, 2024. On May 29, the jury reached a verdict in favor of Plaintiff. Pursuant to the verdict, the Court awarded Plaintiff $125,753.72 in unpaid construction costs, $131,020.40 in interest on the unpaid construction costs, $116,911 in lost profits, and $66,802.63 in interest on the lost profits.

The Court did not rule on attorney's fees at that time. Plaintiff moved for attorney's fees on August 22, 2024. The matter comes on calendar for hearing on that motion.

II. Governing law

The standard for calculating attorney fee awards under California law "ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate . . . . The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. [Citation.] Such an approach anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount awarded is not arbitrary." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.)

In calculating the lodestar, "The reasonable hourly rate is that prevailing in the community for similar work." (*PLCM Group, supra,* 22 Cal.4th at p. 1095.) "The general rule is '[t]he relevant "community" is that where the court is located,' unless the party claiming fees demonstrates that hiring local counsel was impracticable or local counsel was not available." (*Marshall v. Webster* (2020) 54 Cal.App.5th 275, 285-286; see also *Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 72 ["fee awards generally should be based on reasonable local hourly rates"]; *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 398-399 [different rule where plaintiff demonstrated inability to hire local counsel].)

"[T]he trial court has broad authority to determine the amount of a reasonable fee." (*PLCM Group, supra,* 22 Cal.4th at p. 1095.) "The determination of what constitutes reasonable attorney fees is committed to the discretion of the trial court. [Citation.] The experienced trial judge is the best judge of the value of professional services rendered in his or her court." (*Rey v. Madera Unified School Dist.* (2012) 203 Cal.App.4th 1223, 1240.)

III. Analysis

The Contract provides that "In the event of any dispute, litigation or arbitration arising from or concerning the Contract, the prevailing party shall be entitled to recover all of its attorneys' fees and costs, including but not limited to expert consultant fees, incurred in connection with that litigation." (Contract, ¶ 11.8.) There is no question, and the parties do not dispute, that Plaintiff is the prevailing party and is therefore entitled to attorney's and expert witness fees pursuant to that provision and to Civ. Code § 1717. The only items in dispute are Plaintiff's counsel's billing rate and the amount of the expert witness fees.

A. Time spent

In the declaration accompanying his initial motion, Plaintiff's counsel declares that he did a total of 828.4 hours of work on this case. (Flynn Dec., ¶ 2.) Counsel also declares that "[a]ttached as Exhibit A is a true and correct business record of the time entries describing my work for Gateway in this matter" (*ibid.*), but no exhibit is attached to the declaration. That is not fatal to Plaintiff's claim: "[a]lthough a fee request ordinarily should be documented in great detail, it cannot be said in this particular case that the absence of time records and billing statements deprived the court of substantial evidence to support the award . . . ." (*Weber v. Langholz* (1995) 39 Cal.App.4th 677, 1587.) The same is true here. Defendants do not dispute the 828.4-hour figure, and the Court sees no reason to do so either.

In the declaration accompanying his reply memorandum, counsel declares that he did an additional 26.8 hours of work responding to Defendants' motion for judgment notwithstanding the verdict ("JNOV"). (Flynn Reply Dec., ¶ 3.) The Court considers that time to be reasonable.

Counsel further declares that he did 13.8 hours' work in preparing the instant fee motion, and 4.5 hours on the reply memorandum, for a total of 18.3 hours. (Flynn Dec., ¶ 30; Flynn Reply Dec., ¶ 4.) These times are reasonable. Recoverable fees include fees for time "necessary to establish and defend the fee claim." (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 639.)

Finally, counsel requests an additional three hours' fees for his anticipated time in reviewing the tentative rulings on the instant motion and the one for JNOV, and preparing for and attending oral argument. (Flynn Reply Dec., ¶ 5.) The Court will award one hour's fees for reviewing the tentative rulings, but will not award fees related to oral argument at this time, since there will be none if neither party contests the tentative ruling. If oral argument takes place, the Court will revisit that issue.

Accordingly, fees will be awarded for the following:

- 13.8 hours' work in 2019
- 104.9 hours' work in 2020
- 36.6 hours' work in 2021
- 68.7 hours' work in 2022
- 2 hours' work in 2023
- 648.5 hours' work in 2024 (828.4 + 26.8 + 18.3 + 1)

B. Billing rate

Plaintiff's counsel declares that his billing rates were $400/hour in 2019, $500/hour in 2020 through 2022, $600/hour in 2023, and $650/hour in 2024. (Flynn Dec., ¶ 18.) These figures would be corroborated by Exhibit A to counsel's declaration if it were before the Court, but the Court accepts counsel's declaration as accurate. Counsel freely acknowledges that the $650/hour rate "is higher than the 'standard' or average hourly rate in Sonoma County." (Flynn Dec., ¶ 18.)

Defendants dispute those rates, pointing out that the Court has previously restricted Plaintiff's counsel to $450/hour in the context of fee requests. On May 9, 2024, counsel requested fees for an expert witness deposition at the $650/hour rate. The Court awarded fees for part of the time counsel claimed, but added "I'll give it to you at the – what is more of the going rate in Sonoma County of $450 an hour." (Stevens Dec., Exh. A at pp. 6-7.) Defendants submit that, based on that comment, the Court should award fees at the $450/hour rate. (Oppo at p. 3.)

Several months after May 9, the Court conducted a new survey of attorney billing rates in Sonoma Count and determined that the lodestar figure for 2024 is $600/hour for attorneys with counsel's level of experience engaged in trial work, including trial preparation. The Court persists in its belief that $450/hour was the appropriate figure prior to 2024. Accordingly, fees will be awarded at the rate of $400/hour (counsel's declared rate) for work performed in 2019, $450/hour (previous lodestar) for work in 2020-2023, and $600/hour (current lodestar) for work this year, all of which was close enough to trial to qualify as trial work. Plaintiff is awarded fees in the amounts of $5,520 for 13.8 hours' work in 2019 at $400/hour; $95,490 for 212.2 hours' work in 2020 through 2023 at $450/hour; and $389,100 for 648.5 hours' work in 2024 at $600/hour.

Counsel declares that "[t]he fees recoverable by Gateway should be reduced by $8,010" in order to offset the cost of the re-deposition of defense expert James Gemperline. (Flynn Dec., ¶ 20.) The Court agrees.

Fees are awarded in the total amount of $490,110.

C. Expert witness fees

Plaintiff claims expert witness fees in the total amount of $136,738.04, consisting of $94,695.31 for construction expert Kevin Kearney and $42,042.73 for architectural expert Cecil Spencer. Defendants challenge the expert fees as excessive, arguing that "[t]he lack of documentation for both Mr. Kearney's and Mr. Spencer's work is problematic. For example, attorney Flynn fails to submit any documentation, such as

invoices in support of either the amount of time each expert spent or the expert's hourly rate for the work that he performed." (Oppo at p. 8.)

The expert fees claimed in the instant motion are the same amounts indicated for fees to those experts in Plaintiff's Memorandum of Costs filed on August 22, 2024. (Attachment 16.) Plaintiff argues that Defendants have waived any objection to the expert fees by failing to file a motion to tax costs in response to that memorandum. The Court agrees. Failure to file a timely motion to tax costs waives any challenge to costs set forth in the Memorandum of Costs. (CCP § 685.070(d); see *Briggs v. Elliott* (2023) 92 Cal.App.5th 683, 696-697.) "There are no exceptions to this rule, and the language of subdivision (d) is mandatory." (*Lucky United Properties Investment v. Lee* (2010) 185 al.App.4th 125, 146.)

Moreover, counsel has now provided Mr. Kearney's and Mr. Spencer's invoices and the record of payments to them as attachments to a declaration accompanying his reply memorandum. The invoices reflect that the amounts claimed for their fees are precisely the amounts paid to them. Mr. Kearney's billing rates varied from $250 to $650 per hour, the higher figure for court testimony. Mr. Spencer's rates varied from $350 to $500 per hour, the higher figure for depositions and trial preparation. These rates are reasonable, and the Court is satisfied that Plaintiff paid the invoices in the specified amounts. Even leaving aside the waiver discussed above. There is no basis for disallowing or reducing any of these fees.

Expert witness fees are awarded in the requested amount of $136,738.04.

IV. Conclusion

Attorney and expert witness fees are awarded in the total amount of $626,848.04.

Defendant and Cross Complainants' Motion for Judgment Notwithstanding the Verdict

Plaintiff's objection to Defendants' untimely reply memorandum is **SUSTAINED.** Defendants' motion for judgment notwithstanding the verdict is **DENIED.** Plaintiff's counsel shall prepare a written order consistent with this ruling and compliant with California Rules of Court, rule 3.1312.

I. Background

Ken and Susan Di Lillo's ("Defendants") Santa Rosa home was destroyed by the Tubbs Fire in October 2017. On September 18, 2018, Defendants entered into a Residential Construction Contract ("Contract") with Gateway Builders, Inc. ("Plaintiff") to build a new home on Defendants' property. Multiple and continuing issues arose during construction, and Defendants ultimately brought in a new contractor to complete the home. On January 8, 2020, Plaintiff sued Defendants for money they claimed was due and owing under the Contract. On May 15, 2020, Defendants cross-complained against Plaintiff, claiming damages for, among other things, breach of contract.

The matter went to jury trial on May 3, 2024. On May 29, the jury reached a verdict in favor of Plaintiff. Pursuant to the verdict, the Court awarded Plaintiff $125,753.72 in unpaid construction costs,

$131,020.40 in interest on the unpaid construction costs, $116,911 in lost profits, and $66,802.63 in interest on the lost profits.

This matter comes on calendar for hearing on Defendants' motion for judgment notwithstanding the verdict ("JNOV") on the grounds that the award of lost profits was made without substantial evidentiary support.

II. Defendants' reply memorandum and Plaintiff's objection to it

On October 17, 2024, Defendants filed a memorandum captioned *Reply in Support of Motion for Judgment Notwithstanding the Verdict* ("Reply"). The next day, Plaintiff filed a motion to strike the Reply on the grounds that it was untimely filed.

Plaintiff is correct. For pre-trial motions, the reply memorandum is due five court days before the hearing on the motion. (CCP § 1005(b).) In the case of motions for JNOV, however, the briefing schedule is set by CCP § 629(b), which provides that "[t]he moving, opposing, and reply briefs . . . shall be filed and served within the periods specified by Section 659a." CCP § 659a provides that "[t]he moving party shall have five days after [service of the opposition memorandum] to file any reply brief and accompanying documents." Plaintiff filed its opposition on September 19, and served it on counsel for Defendants by email on the same day. Because it was served by email, the five-day period in which a reply could be filed was extended by two court days. (CCP § 1010.6(a)(3)(B).) Therefore, the last day on which Defendants could file their Reply was September 26. The Reply was filed three weeks late.

The Court deems Plaintiff's motion to strike the Reply as an objection to it. The objection is sustained. The Court will not consider the Reply. However, the Court notes that even if it did consider the Reply, its ruling would be the same.

III. Governing law

"The trial court may grant judgment notwithstanding the verdict only if the verdict is not supported by substantial evidence. The court may not weigh evidence, draw inferences contrary to the verdict, or assess the credibility of witnesses. The court must deny the motion if there is any substantial evidence to support the verdict. [Citations.] This court therefore may uphold the order granting judgment notwithstanding the verdict, and affirm the judgment based thereon only if, reviewing all the evidence in the light most favorable to [the plaintiff], resolving all conflicts, and drawing all inferences in [its] favor, and deferring to the implicit credibility determinations of the trier of fact, there was no substantial evidence to support the jury's verdict in [its] favor." (*Begnal v. Canfield & Associates, Inc.* (2000) 78 Cal.App.4th 66, 72–73.) A court errs by granting JNOV "[i]f the evidence is conflicting or if several reasonable inferences may be drawn." (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 877.)

IV. Analysis

A. The Contract

The Contract between the parties is the type often described as "cost-plus." The "Contract Price" – that is, the entire amount to be paid to Plaintiff – is defined to be the "Costs of Construction" plus the "Contractor's Fee." (Contract, ¶ 3.1.) The Costs of Construction are described in Exhibit C to the Contract. (Contract, ¶ 3.2.) The Contractor's Fee is equal to 21% of the Costs of Construction, divided into 10% allocated to profit and 11% allocated to overhead. (Contract, ¶ 3.3.) The Contract is "cost-plus" in that it does not guarantee what the Costs of Construction will be – nor, therefore, what the Contractor's Fee will be since it is calculated as a percentage of the Costs of Construction. However, the Contract includes a "Schedule of Values" that "allocat[es] the Contract Price among the various components of the Work." (Contract, ¶ 3.4.) "The Schedule of Values are estimates only since the actual Costs of Construction may differ." (*Ibid.*) Since the Schedule of Values allocates the Contract Price, *not* the Construction Costs, among the components, the amount it lists for each component includes both elements of the Contract Price; that is, the cost to Plaintiff of carrying out that component plus the 21% Contractor's Fee attributable to that component. The Schedule of Values is, in other words, the contractor's best estimate of what the entire job will cost, including both the costs and the "plus" that is the contractor's fee.

At trial, Plaintiff's vice president Jeffrey Ledger described the arrangement as follows:

> This is considered a cost-plus contract, which is different from a fixed-price contract. There is – in a contract of this style, the homeowner is responsible for paying the cost of construction whether they come in above what the estimate was or below. And then the plus side of this is basically the fee that the contractor earns for performing the work. And in the case with the Di Lillos, the fee that we all agreed to was 21 percent.

(Wilson Dec., Exh. A at pp. 64-65.)

B. Basis for the lost profits award

The jury awarded Plaintiff "lost profits in the amount of $116,911.00" based, at least in part, on the following testimony Mr. Ledger:

> Q [direct examination]: Can you explain to the jury how you calculated the first line of Exhibit 90 and the amount?
>
> A: Certainly. The total cost of construction for the Di Lillo residence was $1,719,000. And in that cost was the fee I mentioned of 21 percent for Gateway's services. That amount of fee is $298,451.13. So that's right at the start of the project the amount of fee that we would start to earn.
>
> Q: Can you explain the second line?

A: Certainly. The second line represents the amount of the fee that we had collected right up to termination, right up to the time that they fired us. And that figure is $181,540.13.

Q: How did you determine that 181,000-dollar figure?

A: We – inside of our accounting software and in – as cross-checked with the invoices that we sent, we took the amount of the fee across each invoice and added it up.

Q: And then the third line, can you explain to the jury what the third line is?

A: Certainly. The third line is the potential profit – less profit that we had earned, not necessarily been paid. And that figure is $116,911 even.

(Wilson Dec., Exh. A at pp. 106-107.) That is, Plaintiff calculated its lost profits as the "Contractor's Fee" component of the budget for the entire project minus the "Contractor's Fee" component of the payments Plaintiff had already received.

As a preliminary matter, the Court disagrees with Mr. Ledger's arithmetic. His testimony regarding the total cost of construction was close, if not perfectly accurate: the total of all the entries in the Schedule of Values is $1,718,437.22, so the $1,719,000 estimate was reasonable enough. However, according to the definitions in the Contract, the total cost – that is, the Contract Price – consists of 79% Costs of Construction and 21% Contractor's Fee. 21% of $1,718.437.22 is $360,871.82, not $298,451.13. Based on the correct figure, the lost profits under Mr. Ledger's analysis would be that minus the already-paid Contractor's Fee, which is $179,331.69, not $116,911.00.

To approach this a different way, Mr. Ledger testified that the amount of Contractor's Fee already collected prior to the termination of the contract was $181,540.13. That must have been 21% of the total amount Defendants had paid to Plaintiff; therefore, that total amount must have been $864,476.81. Again, based on the Schedule of Values, the entire project was projected to cost $1,718.437.22. The amount remaining unpaid, i.e. the difference between that and the total amount already paid, was therefore $853.960.41. The Contractor's Fee component of that, 21%, amounts to $173,331.69. Again, that is the amount of lost profits based on the computation Mr. Ledger explained in the testimony quoted above.

That said, however, the jury was entitled to rely on Mr. Ledger's testimony and was not required to check his arithmetic. Therefore, the Court will adopt $116,911.00 as the amount of unpaid Contractor's Fee as of the termination of the contract. The primary question presented here is whether "unpaid Contractor's Fee" is the same thing as "lost profit."

C. The meaning of "profit"

Defendants contend that the 21% Contractor's Fee is not the correct measure of profit, but only the measure of "gross revenue." "Because Gateway only introduced evidence of its gross revenues, and not of its

costs," they argue, "it failed to establish lost profits with reasonable certainty." (MPA at p. 4.) Central to Defendants' argument is this testimony by Mr. Ledger:

> Q [cross-examination]: Then why are you saying that the profit would be 21 percent of the remaining –
>
> A: Because it would be.
>
> Q: It wouldn't be overhead and profit?
>
> A: Yeah, it would be overhead and profit.
>
> Q: So overhead and profit is different from profit, correct?
>
> A: It's lost revenue.
>
> Q: Right. But revenue is not equal to profit; right?
>
> A: Revenue is 21 percent. And it's lost because we didn't get to finish the job.
>
> Q: So that number is not actually profit, then. It's revenue; is that correct?
>
> . . . .
>
> [Q]: So going back to what you're asking, the title of the Schedule is "Lost Profits."
>
> [A]: Correct.
>
> [Q]: But you just testified that it's actually lost revenue; correct?
>
> A: I'm saying that, yes, Gateway did not earn 21 percent that they were supposed to earn on the $650,000 remaining construction.
>
> Q: In revenue?
>
> A: In revenue.

(Wilson Dec., Exh. A at pp. 139-140.) Defendants interpret this exchange as a concession that the difference between the Contractor's Fee Plaintiff would have earned had the project been completed and the Contractor's Fee Plaintiff actually received was the amount of *revenue*, as distinct from *profit*, that Plaintiff lost due to Defendant's breach. Therefore, Defendants argue, it is inappropriate to award Plaintiff that amount under the category "lost profit."

There is no question that the Contract could be better drafted with respect to what "profit" means. Paragraph 3.3 provides that of the 21% Contractor's Fee – that is, of the "plus" in this cost-plus Contract – only 10% constitutes profit; the other 11% constitutes overhead. That, presumably, was the point of defense counsel's question "It wouldn't be overhead and profit?" But paragraph 9.3, headed "Termination by Contractor," provides that "if the Project should be stopped . . . for the Owner's failure to make payment," as happened here, the contractor could recover, among other things, "the cost of any lost profits." If "profits" in paragraph 9.3 means the same thing as "profit" in paragraph 3.3, then only the 10% component of the 21% Contractor's Fee would be recoverable.

However, despite the problematic drafting, the Court perceives no ambiguity here. (See *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 847 [initial question of whether ambiguity exists is one of

law].) Significantly, the terms "profit" and "profits" are not capitalized in the Contract, unlike, for example, "Contract Price" and "Contractor's Fee." That strongly suggests that the words do not have "a special or limited meaning." (*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1352.) The Court finds that, despite the fact that "profit" means "10% of the Cost of Construction" in paragraph 3.3, "profits" is used in its ordinary sense of "gain realized from business or investment over and above expenditures" in the section of the Contract that addresses the damages available upon termination due to nonpayment. (Black's Law Dict. (Rev. 4th ed. 1968) p. 1376, col. 1.)

Based on that analysis, Mr. Leger could legitimately have responded to "So overhead and profit is different from profit, correct?" with "No, they're the same amounts of money, it's just that the contract uses the word 'profit' in two different ways." Very likely because it had never occurred to him until that moment to think about what "profit" means, he instead fell back on introducing a different term: "it's lost *revenue*." That is accurate, though slightly misleading. "Revenue" generally means the total gross income produced by a given source. In the case of the Contract at issue here, the Construction Cost, the total amount payable to Plaintiff, was Plaintiff's expected revenue. Plaintiff's expected *profit* was that amount minus its expenditures. So, certainly, Plaintiff's loss of the Contractor's Fee associated with the unfinished work was a loss of revenue, but it was also a loss of the particular component of revenue consisting of income over and above expenses: that is, of profit.

"Contract damages seek to approximate the agreed-upon performance." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 515.) "The goal is to put the plaintiff 'in as good a position as he or she would have occupied' if the defendant had not breached the contract. [Citation.] In other words, the plaintiff is entitled to damages that are equivalent to the benefit of the plaintiff's contractual bargain." (*Lewis Jorge Construction Management v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 967-968, citing 24 Williston on Contracts (4th ed.2002) § 64:1, p. 7.) Plaintiff's expectation under the Contract was that it would receive its Costs of Construction – which are thoroughly defined in Exhibit C to the Contract, both in terms of what they include and what they exclude – plus 21% of that. The division of the 21% into "profit" and "overhead" is immaterial to the analysis. The Court finds that the 21% Contractor's Fee (Contract ¶ 3.3) is the correct measure of profit, and that, therefore, the amount of that fee that Plaintiff expected to be paid, but was not, is the correct measure of *lost* profit.

D. Profit prior to termination

In light of the Court's determination that "profit," for purposes of what is recoverable under the provisions of the "Termination by Contractor" section of the Contract (¶ 9.3), means simply 21% of costs, Defendants' argument that "Gateway failed, without explanation, to produce any accounting statements reflecting the actual profit earned on the Di Lillo project prior to the termination" is unavailing. (MPA at p. 4.)

Mr. Ledger testified that prior to termination, "the amount of the fee" Plaintiff had collected prior to termination was $181,540.13. (Wilson Dec., Exh. A at p. 106.) That *was* Plaintiff's profit prior to termination.

Again, that testimony presumably means that the entire amount Plaintiff had collected prior to termination was $864,476.81, of which 21% was what the Contract describes as "Contractor's Fee" and 79% was "Construction Costs." (Contract, ¶¶ 3.2, 3.3.) That is corroborated by Mr. Ledger's testimony that "Gateway did not earn 21 percent that they were supposed to earn on the $650,000 remaining construction." (Wilson Dec., Exh. A at p. 140.) As noted above, Plaintiff's expectation, based on the figures in the Schedule of Values, was to be paid a total of $1,719.437.22. If they had been paid $864,476.81, their remaining expectation was $853,960.41. The cost component of that, 79% or $674,628.72, is close enough to Mr. Ledger's off-the-cuff estimate of $650,000 to make it clear that that is what he was referring to.

E. Effect of uncompensated work by Plaintiff

Defendants note that "despite remediating the mold in the Di Lillo home at its own cost, Gateway failed to account for these losses when calculating its lost profits." (MPA at p. 4.) That comment is somewhat puzzling. The jury determined that Plaintiff lost $116,911 in profits as the result of Defendants' breach of contract. Defendants point out that Plaintiff did some work for them at no charge, which presumably cost Plaintiff money to perform. Suppose, hypothetically, that the mold remediation work cost Plaintiff $20,000. Defendants seem to suggest that in that case, it would be appropriate to reduce the lost profits award to $96,911. But Plaintiff has *already* effectively reduced its lost profits by spending the hypothetical $20,000 to carry out the mold remediation. Defendants' suggestion would result in Plaintiff paying for the mold remediation twice: once in its immediate costs to do it, and again in the reduction of its lost-profits award by that same amount.

Notably, that analysis does not depend on whether the uncompensated work is completed or executory. If, hypothetically, Defendants had evidence that Plaintiff would have performed certain uncompensated work in the future if they had not terminated the project, that would still not be a basis for reducing Plaintiff's lost profits award by the cost of doing the work, because Plaintiff would have had to actually *do* the work, which would entail expending the money required to do so.

The determination of the lost profits was a factual finding by the jury. Defendants had every opportunity to raise at trial, and argue to the jury, any factors that they believed should be considered in computing Plaintiff's lost profits, including any arguments they wished to make about the effect of Plaintiff's uncompensated work. The jury, for its part, was entitled analyze those arguments similarly to the Court's analysis above. The jury made a finding. The Court sees no reason to disturb it.

V. Conclusion

The Court finds that substantial evidence supported the jury's award of $116,911 in lost profits. Therefore, the motion for JNOV is denied.

4. SCV-273534, Gibson v. Becker

An unrepresented party to a civil action "*may* consent to receive electronic service." (CCP § 1010.6(c)(2), emphasis supplied.) "Express consent to electronic service" may be given by either filing and serving a notice to that effect or by "manifesting affirmative consent through electronic means with the court," but not by merely using the court's electronic filing system. (CCP § 1010.6(c)(3); see Judicial Council Form EFS-005-CV.)

Plaintiff is unrepresented. The proof of service Defendant filed on September 10, 2024 reflects that Plaintiff was served with the moving papers in the instant motion "only by e-mailing the document(s)" to him. Plaintiff has not filed an express consent to electronic service.

Hearing on the motion is **CONTINUED** to December 18, 2024 at 3:00 P.M. in Department 18 in order to afford Defendant the opportunity to serve the moving papers on Plaintiff by postal mail**.**