TENTATIVE RULINGS
LAW & MOTION CALENDAR
Wednesday, February 1, 2023, 3:00 p.m.
Courtroom 17 –Hon. Bradford DeMeo
3035 Cleveland Avenue, Santa Rosa

PLEASE NOTE: Masks need not be worn in the courthouse if you are fully vaccinated.

Persons are considered vaccinated two weeks after the final dose in a primary series of vaccinations.

All unvaccinated persons entering any Sonoma County Superior Courthouse, including any remote jury selection location, shall wear a face covering at all times compliant with all California State Health Orders and CAL/OSHA standards which must completely cover both the nose and mouth.

CourtCall is not permitted for this calendar.

If the tentative ruling is accepted, no appearance is necessary via Zoom unless otherwise indicated.

TO JOIN ZOOM ONLINE:

D17 – Law & Motion
Meeting ID: 895 5887 8508
Passcode: 062178
https://us02web.zoom.us/j/89558878508?pwd=L2MySDFXWEtMa1JsdGUxUDFDOVNyZz09

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By Phone (same meeting ID and password as listed for each calendar):
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The following tentative rulings will become the ruling of the Court unless a party desires to be heard. If you desire to appear and present oral argument as to any motion, YOU MUST notify Judge DeMeo's Judicial Assistant by telephone at **(707) 521-6725**, and all other opposing parties of your intent to appear ***by 4:00 p.m. on Tuesday, January 31***. Parties in small claims cases and motions for claims of exemption are exempt from this requirement.

1. SCV-262831, Lower Austin-Kidd Creek Conservancy v California Dept. of Forestry

Motion for Attorney's Fees GRANTED in part as detailed below. The court awards Petitioner recovery for all attorneys' fees claimed minus those for the appeals and minus a 20% reduction of the Merits Lodestar for the Law Offices of Thomas N. Lippe, APC for the partial failure, and it reduces the hourly rates for the attorneys by 20% across the board. It applies a positive enhancement modifier to the "Merits Lodestar" fees as requested but a modifier of 1.4. The court will make a final determination as to the exact amount of fees once it has clarified and determined the amount to be subtracted from the total for the work on the appeals.

Facts and History

Petitioner seeks a writ of mandate setting aside the approval by Respondent California Department of Forestry and Fire Protection ("Respondent," "CDF" or "CalFire") of Non-Industrial Timber Management Plan 1-15NTMP-007 SON (Kid Creek) ("the NTMP"), submitted by Real Parties in Interest ("RPIs") Lytton Rancheria ("the Tribe") and James Beyers ("Beyers").

Prior to the final merits hearing, this action saw significant litigation, including discovery, motions to quash for lack of personal jurisdiction, and a demurrer. In September 2020, after a hearing on August 26, 2020, this court denied the motions to quash and overruled the demurrer.

Respondent filed a brief in opposition to Petitioner's opening brief on the merits of the writ but RPIs did not. Prior to the final merits hearing, this court issued a tentative ruling indicating that it would grant the petition and issue the writ. Neither Respondent nor RPIs contested the tentative ruling or requested a hearing. The court then entered its final order granting the petition and issuing the writ.

On November 17, 2021, Respondent filed a return to the writ demonstrating that it had vacated and set aside its approval of the NTMP and that no applicant had sought a new approval of the NTMP.

RPIs filed an appeal based on this court's order denying the motions to quash. As the Court of Appeal explained, RPIs' appeal did not directly challenge the ruling on the merits of the writ, the decisions to comply with the judgment and vacate the approval, or the trial court's order overruling the demurrer and finding the Tribe not to be an indispensable party. Instead, the appeal was based on the trial court's order denying RPIs' motions to quash and dismiss them. Petitioner moved to dismiss the appeal as moot and the Court of Appeal granted the motion to dismiss. The Court of Appeal found the appeal to be moot because neither appellant contested the merits of the writ at after the trial court denied their motions to quash and neither contested the matter at the final hearing n the merits.

Motion

Petitioner now seeks attorney's fees of $1,137,465.06 against Respondent, pursuant to Code of Civil Procedure ("CCP") section 1021.5.

Respondent opposes the motion, arguing that Petitioner is not entitled to any fees because it failed to demonstrate conferral of a significant benefit on the public, and that the fees and multiplier sought are unreasonable and lack support.

Petitioner has filed reply papers.

Right to Fees and Costs Under CCP section 1021.5

Courts have held that environmental concerns are generally important public rights and enforcing them in accord with CEQA will generally support an award under CCP section 1021.5, but not every such lawsuit automatically qualifies under section 1021.5. *Rich v. City of Benicia* (1979) 98 Cal.App.3d 428, 436-437; *Schwartz v. City of Rosemead* (1984) 155 Cal.App.3d 547, 558.

CCP section 1021.5 allows a party to seek attorneys' fees upon a motion if successful in an action which,

> resulted in the enforcement of an important right affecting public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement... are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.

In other words, it applies if the action enforces an important right affecting the public; it confers benefits on a large group; and the necessity of the action and the financial burden make the award appropriate. See *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311. As the court explained in *Healdsburg Citizens for Sustainable Solutions v. City of Healdsburg* (2012) 206 Cal.App.4th 988, at 992,

> " 'The doctrine rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible. [Citations.]' [Citation.] Entitlement to fees under section 1021.5 requires a showing that the litigation: '(1) served to vindicate an important public right; (2) conferred a significant benefit on the general public or a large class of persons; and (3) [was necessary and] imposed a financial burden on plaintiffs which was out of proportion to their individual stake in the matter.' [Citation.]" [Citation.] In short, section 1021.5 acts as an incentive for the pursuit of public interest-related litigation that might otherwise have been too costly to bring.' [Citation.] [¶] 'It is well settled that the private attorney general theory applies to an action to enforce provisions of CEQA.' [Citations.]" [Citation.]

The award is generally in the sound discretion of the trial court, and the decision will not be overturned unless clearly wrong. *Gregory v. State Bd. Of Control* (1999) 73 Cal.App.4th 584, 598; *San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 754.

As explained in *Concerned Citizens of La Habra v. City of La Habra* (2005) 131 Cal.App.4th 329, at 334

> Section 1021.52 "codifies the 'private attorney general' doctrine of attorney fees articulated in Serrano v. Priest (1977) 20 Cal.3d 25... and other judicial decisions. [Citation.]" [Citation.] The statute gives the trial court discretion to award fees to a successful party if (1) its action has resulted in the enforcement of an important public right, (2) the general public or a large class of persons has received a significant benefit, (3) the burden of private enforcement is disproportionate to the litigant's personal interest, and (4) it is unfair to make a successful plaintiff pay the fees out of any recovery. [Citations.]
>
> The award of fees under section 1021.5 is an equitable function, and the trial court must realistically and pragmatically evaluate the impact of the litigation to determine if the statutory requirements have been met. [Citation.] This determination is "best decided by the trial court, and the trial court's judgment on this issue must not be disturbed on appeal 'unless the appellate court is convinced that it is clearly wrong and constitutes an abuse of discretion.' [Citations.]" [Citation.]

"Important" Rights

Courts have some discretion in determining what rights are "important" under section 1021.5. *Woodland Hills Residents Assn., Inc. v. City Council of Los Angeles* (1979) 23 Cal.3d 917, 935. Logically, courts have held that environmental concerns are generally important public rights and enforcing them will generally support an award under section 1021.5, but not every such lawsuit automatically qualifies under section 1021.5. *Rich v. City of Benicia* (1979) 98 Cal.App.3d 428, 436-437.

Benefit to a Large Class or the General Public

Whether the lawsuit conferred a benefit on the general public or a large class is a slightly different issue, but it logically requires similar analysis. *California Common Cause v. Duffy* (1987) 200 Cal.App.3d 730, 749; *Woodland Hills, supra*, 23 Cal.3d, 939-941. A lawsuit enforcing the EIR requirement and thus promoting public participation by allowing people to voice concerns in the EIR process was held to confer a benefit on the public at large, or a large class. *Schwartz v. City of Rosemead* (1984) 155 Cal.App.3d 547, 558. Where a CEQA lawsuit does not lead to public participation, however, the result may be found not to benefit a large class, as in *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Call.App.3d 892.

Even when a petitioner prevails on a petition for writ of mandate enforcing CEQA, if the benefit conferred is minimal, a trial court may in its discretion properly deny any award of fees under section 1021.5. *Concerned Citizens of La Habra v. City of La Habra* (2005) 131 Cal.App.4th 329, 334. In *Concerned Citizens*, the appellate court affirmed the trial court's determination that the petitioner, though prevailing, had achieved only a "miniscule" success that did not warrant any fee award, explaining, with emphasis added,

> Having heard the evidence in support of CCLH's challenges to the MND, *it rejected all of the claimed defects except one*. The trial court agreed the MND did not adequately support the conclusion that the effects of cut-through traffic were mitigated, but *it felt the inadequacy was a "minute blemish" that could be repaired*. Unlike the plaintiffs in

Baggett, CCLH did not establish a precedent that applied statewide; rather, it successfully asserted *a defect in CEQA's process*, the correction of which was *not likely to change the project*.

Similarly, in *Christward Ministry v. County of San Diego* (4th Dist.1993) 13 Cal.App.4th 31, the petitioner was successful on two points, requiring the agency to amend a mitigation monitoring plan to name the enforcement agency and requiring the agency to revise the water analysis for the EIR, prepared for a landfill expansion. The appellate court ruled that it was appropriate to deny an recovery of fees because the first issue was not significant and was a minor procedural point, while the latter, though a substantive issue, achieved nothing since the agency was already under order from the Regional Water Quality Control Board to revise the water analysis and thus the "victory" merely confirmed an inadequacy determination which another agency had already made.

Ultimately, the court must also keep in mind that the ultimate mandate of CEQA is "to provide public agencies and the public in general with detailed information about the effect [of] a proposed project" and to minimize those effects and choose possible alternatives. PRC 21061. After all, the public and public participation hold a "privileged position" in the CEQA process based on fundamental "notions of democratic decision-making." *Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Association* (1986) 42 Cal.3d 929, 936.

Financial Burden of Enforcement: Necessity of Involvement

The court must also consider the financial burden of the enforcement, or "a comparison of the litigant's private interests with the anticipated costs of suit." *California Licensed Foresters Assoc. v. State Board of Forestry* (1994) 30 Cal.App.4th 562, 570. The element is met when the financial burden, therefore, "transcends" the petitioner's pecuniary interest. *Serrano v. Priest* (1977) 20 Cal.3d 25, 41. Another way of phrasing it is that this element is met when the *necessity* for the lawsuit outweighs burdens. *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43; *Ciani v. San Diego Trust & Savings Bank* (1994) 25 Cal.App.4th 563.

Conclusion: Right to Fees

Petitioner prevailed on the CEQA petition. This court directed Respondent to set aside and vacate the NTMP. Respondent did so, filing a return demonstrating that the NTMP had been vacated and had not been pursued further at that time. Moreover, Petitioner prevailed the analysis regarding the effects on salmonids, Foothill Yellow Legged Frogs ("FYLFs"), and noise impacts. Petitioner also specifically prevailed not only in challenging the sufficiency of the NTNMP analysis of these impacts but also with respect to the sufficiency of the responses to public comments and mitigation measures.

At the same time, Petitioner did not prevail on all issues raised. The court rejected Petitioner's argument that the NTMP was defective in its analysis of the impacts on Northern Spotted Owls ("NSOs") or greenhouse gas emissions ("GHGs").

Petitioner is entitled to recover attorney's fees. Petitioner prevailed on most of the issues raised and with respect to the ultimate determination that the approval of the NTMP violated the mandates of CEQA, and not in merely technical or limited ways. The NTMP failed to address

properly the project's potential impacts on three environmental issues, failing to present substantial evidence or reasoned analysis, failing to provide meaningful responses to public comments, and failing to demonstrate the sufficiency of mitigations measures. Ensuring that an agency comports with the fundamental policies in CEQA or promoting good government and informed, democratic, decision making is an important public benefit. It also benefitted the general public and not just a small class, promoting the protection of environmental resources while at the same time enforcing the public's right to informed, good government and public decision making. Petitioner also is correct that private enforcement was necessary since the agency responsible for enforcing the mandates of CEQA in this instance was Respondent itself, the very agency found to have violated CEQA, and no action was taken when Petitioner notified the office of the Attorney General about the bases for the petition and plans to seek a writ of mandate. Petition, ¶9; Lippe Dec.,¶2, Ex.4. RPIs, as noted above, did not challenge the petition on its merit while no party sought a hearing to challenge this court's tentative ruling granting the petition and issuing the writ.

Respondent asserts that Petitioner fails to show that it conferred a significant benefit because it Petitioner has not demonstrated any 'positive "on the ground" effects,' claiming that Petitioner's victory is actually harmful to the environment. Opposition 11-12. The argument that Petitioner's victory is detrimental is based on the claims that the Tribe will simply manage its land without Respondent's involvement and that, even if it doesn't and decided not to harvest timber, the decision not to harvest will be harmful. This, however, is based on information, facts, and assumptions which are not before this court and there is simply no way for the court in this context to make any such findings. It also is not this court's role under CEQA to institute its own judgments as to what is better for the environment or whether one project or land use is preferable to another, something which this court is, in fact, expressly forbidden from doing. Instead the court's role is to determine compliance with CEQA. Given that this limitation on the court's role in making a substantive decision on the merits of the writ, it is even more inappropriate and impossible for the court to make such independent value judgments about the wisdom or superiority of any given project when deciding the right to attorneys' fees. The court must instead limit its decision to the context of this litigation and the impacts on the face of the outcome.

It is undeniable that Petitioner prevailed and thus vindicated state policy enshrined in CEQA, policy promoting not only environmental concerns but informed self-government and public participation. On the face of this litigation and the outcome, Petitioner prevailed with respect to substantive defects in the NTMP with respect to impacts on biological resources and noise. This also involved ensuring that Respondent has properly complied with the mandate in CEQA to reach a decision based only on substantial evidence with a clear analytic route, and while ensuring that the public is adequately informed and involved as required. These benefits are significant.

Finally, Petitioner notes that it has no pecuniary interest in this litigation. This is, as Petitioner argues, a factor to consider and generally provides additional support for an award of fees.

Petitioner is entitled to recover attorney's fees pursuant to CCP section 1021.5.

Amount of Fees – Lodestar Approach

The award should *fully compensate* the claimant for all hours *reasonably* spent. *Serrano v. Unruh* (1982) 32 Cal.3d 621, 639 (*Serrano IV*); *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133. This includes the time spent solely on seeking the fees. *Serrano IV,* 639; *Ketchum,* 1133. Otherwise, as noted above, the award is generally in the sound discretion of the trial court, and the decision will not be overturned unless clearly wrong. *Gregory v. State Bd. Of Control* (1999) 73 Cal.App.4th 584, 598; *San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 754. Citing *Serrano IV*, the Supreme Court explained in *Ketchum, supra*, at 1133, "absent circumstances rendering the award unjust, an attorney fee award should ordinarily include compensation for all the hours *reasonably spent*, including those relating solely to the fee. [Citation.]" Emphasis original.

Where a petitioner partly prevails on its claims, the court may award part of the fees requested, reduced to reflect the partial nature of the victory. *Bowman v. City of Berkeley* (2005) 131 Cal.App.4th 173, 177-178. As the court recognized in *Bowman*, failure to achieve a complete victory does not necessarily bar recovery of fees and should not necessarily control whether fees are recoverable, but may be factored into determining the *amount* of fees awarded. The court should consider if the successful and unsuccessful claims were related, in which case the petitioner may recover the reasonable fees, or if they were unrelated so that the court should reduce the fees by an amount commensurate with the unsuccessful claims. *EPIC v. Cal. Dept. of Forestry & Fire Protection* (2010) 190 Cal.App.4th 217, 238. Claims may be unrelated if they involve different claims for relief, legal theories, and facts. *EPIC, supra*, 239.

In figuring the amount of fees under section 1021.5, courts generally use the "lodestar" approach, basing the decision on the number of hours reasonably expended multiplied by the reasonable hourly rate in the community for similar work. *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1136; see also *Serrano v. Priest* (1977) 20 Cal.3d 25, 28 (*Serrano III*). The court should consider a wide variety of factors, including the nature of the litigation, the difficulty, the amount involved, the skill, the success, the attorneys' experience, the importance of the litigation, and the time consumed. *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 638-639; *Stokus v. Marsh* (1990) 217 Cal.App.3d 647, 656-657.

A multiplier in such circumstances may be appropriate. As the Supreme Court noted in *Ketchum, supra,* at 1133, ' "A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases." [Citation.]'

As the Supreme Court further explained in *Ketchum*, at 1138, "the purpose of a fee enhancement is primarily to compensate the attorney for the prevailing party at a rate reflecting the risk of nonpayment in contingency cases as a class. To the extent a trial court is concerned that a particular award is excessive, it has broad discretion to adjust the fee downward or deny an unreasonable fee altogether." It also noted at 1138 that the trial court is not required to include a fee enhancement for contingent risk, exceptional skill, or other factors, although it retains discretion to do so as appropriate case. The court also pointed out that the party seeking a fee

enhancement bears the burden of proof while the trial court should consider the extent to which the attorney and client were able to mitigate the risk of nonpayment, such as where the client has agreed to pay some portion of the lodestar amount regardless of outcome. The court explained that a multiplier will not necessarily result in a windfall or doubling, but that the trial court should take this possibility into account depending on the circumstances and various factors, noting that the trial court "should also consider the degree to which the relevant market compensates for contingency risk, extraordinary skill, or other factors…. We emphasize that when determining the appropriate enhancement, a trial court should not consider these factors to the extent they are already encompassed within the lodestar. The factor of extraordinary skill, in particular, appears susceptible to improper double counting; for the most part, the difficulty of a legal question and the quality of representation are already encompassed in the lodestar." *Ketchum*, 1138.

In some cases, it is also appropriate to apply a negative multiplier. *San Diego Police Officers Assn. v. San Diego Police Department* (1999) 76 Cal.App.4th 19, 24 (affirming application of a negative modifier of .20 based on the consideration of the factors).

Lodestar Amount

Petitioner seeks recovery of fees for its attorney of record, Thomas Lippe ("Lippe") and for Greenfire Law ("Greenfire"), hired as consultants on issues related to tribal sovereignty. Lippe Dec., ¶¶31-42, Ex.1; Doughty Dec. The total lodestar amount includes fees for Petitioner's attorney, Lippe, of $501,700 for substantive work on the writ, what Petitioner calls the "Merits Lodestar," and $33,700 for work on the instant fees motion. Lippe Dec., ¶¶31-42, Ex.1. Petitioner seeks fees of $39,232 for Greenfire's work on the substantive merits of the petition along with another $4,685 for Greenfire's work on this motion for attorneys' fees. Lippe Dec., ¶¶31-42, Ex.1; Doughty Dec. Lippe claims fees on the substantive merits of this action for 450 hours of attorney time at $850 an hour and 398 hours of paralegal time at $150 an hour, for $501,700. Lippe Dec., Ex.1. He also seeks $33,700 for work on this fees motion, consisting of 34 hours at $850 an hour and 32 at $150 an hour. Ibid. Greenfire claims fees for five attorneys, each at a different rate: $765, $840, $860, $650, and $508. Greenfire's requested fees include fees for 3.6 hours and $860, 3.2 hours at $840, and 54.2 hours at $650 on the merits of the petition, plus 4 hours at $765 and 3.2 hours at $508 on the fees motion.

Number of Hours Claimed

The number of hours claimed is very high but this is overall reasonable and supportable in this case. Regarding the substantive merits of this action, the action involved unusually complicated and lengthy litigation prior to the briefing and hearing on the merits. This included complicated legal and factual issues of tribal sovereign immunity which both of the RPIs raised, issues which were not straightforward even legally and which also necessitated significant discovery. Petitioner's declarations describe the bases for this work and further support a finding of reasonableness. Lippe Dec., ¶¶24-30, Ex.2; Doughty Dec., ¶¶20-28, Ex.4. However, even without the attorneys' explanations, the record of this case itself and the complicated litigation on its face indicates that the number of hours would reasonably be high.

Petitioner was also not the party who put these matters into issue; instead RPIs and Respondent raised these matters. The latter parties drove lengthy and drawn-out litigation over

these issues, requiring Petitioner to engage in discovery in order to determine the bases for RPIs' claims that the Tribe never waived immunity and that Beyers was not actually a project proponent or proper real party in interest. Respondent notes this but argues that Petitioner must bear this expense because Petitioner "pursued costly litigation concerning tribal sovereign immunity," without considering that Petitioner did not raise these issues and instead engaged in the litigation out of necessity only in response to the arguments of RPIs and Respondent itself. None of the complicated, "costly litigation" in which Petitioner engaged in this regard was instigated by Petitioner. Petitioner was forced to combat the arguments of RPIs and Respondent in order to move forward with the writ. This included both discovery into the Tribe's claim that it was immune and Beyers's claim that he should not be named as a real party, as well as Respondent's demurrer based on the argument that Petitioner could not proceed against it without the RPIs on the basis that they were immune or not proper RPIs. Moreover, none of Petitioner's litigation on these points was gratuitous or lacked merit. Notably, in this court Petitioner prevailed on the litigation over those issues, obtaining leave to conduct limited discovery and ultimately prevailing on the motions to quash and the demurrer. Respondent also couches this litigation as limited to the arguments and motions of RPIs, forgetting that Respondent based its demurrer on these very issues which the RPIs had raised.

The court finds the number of hours claimed to be reasonable and potentially recoverable, depending on other factors discussed below.

Apportionment of Fees Among Respondent and RPIs under CCP section 1021.5

For reasons which are unclear to the court, Petitioner seeks only a recovery from Respondent and has not sought to recover any fees from RPIS or asked the court to apportion the fees among Respondent and RPIs. This is despite well-established authority clearly indicating that under CCP section 1021.5 the court may apportion fees among the real party and the respondent agency. *San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738, at 756. The *San Bernardino* court expressly held that where a private real party in interest in a CEQA action promotes a project, shares in the CEQA review, has the most to benefit, and actively litigates the defense of the CEQA petition, it is appropriate for the real pay to pay for half of the fees and costs. The court explained,

> [Real party] contends that the trial court erred in requiring it, as real party in interest, to share in paying the attorney's fees awarded to Audubon. Gold Mountain argues that the County is the entity which was found to have acted improperly; no action of Gold Mountain was at issue. Accordingly, such an award would have a chilling effect on individuals or business entities seeking to develop their property for fear of becoming financially liable because of a governmental agency's error.
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> However, Code of Civil Procedure section 1021.5 expressly states a court may 'award attorneys' fees to a successful party against one or more opposing parties ' (italics added). Further, California courts have viewed Code of Civil Procedure section 1021.5 as an affirmation of the private attorney general awards of fees formerly recognized in the federal realm, and thus have recognized federal authority, although no longer viable in the federal realm, to be reliable in interpreting this section. (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 934….)

> As noted in *Wilderness Society v. Morton* (D.C.Cir. 1974) 495 F.2d 1026, fees granted under the private attorney general theory are not intended to punish those who violate the law but rather to ensure that those who have acted to protect public interest will not be forced to shoulder the cost of litigation. In this case, Gold Mountain was a major party, actively litigating from the inception of the action in order to protect its interests. As the real party in interest, it had the most to gain. When a private party is a real party in interest and actively participates in litigation along with the governmental agency, it is fair for that party to bear half the fees. (*Id*., at p. 1036.)

Respondent raises this issue, arguing that a portion of the fees is unrelated to Respondent's involvement and instead is specific to litigation on the RPIs' motions to quash as well as RPIs' failed appeals. It contends, therefore, that the court should not hold Respondent liable for the fees related to that part of the litigation, citing *Washburn v. City of Berkeley* (1987) 195 Cal.App.3d 578, at 593, to support the that "[w]hen a party seeking fees omits an opposing party from its fee motion, it runs the risk that the court will only award a proportion of the requested fees."

Respondent has a potentially valid point but it is ultimately only partly persuasive here. Although, as noted above, a significant amount of the litigation in this action, and of the complicated litigation unusual in a CEQA proceeding, was derived from the RPIs' motions to quash, Respondent was in fact involved in those issues. As this court has pointed out, Respondent brought a demurrer based on the very issues which the RPIs raised in their motions to quash, and accordingly was fundamentally relying on the same arguments, factual issues, and analysis. Petitioner's work on these issues therefore directly involved Respondent. Finally, subsequent to the failed motions to quash of the RPIs and failed demurrer of Respondent, Respondent was the only party who actively opposed Petitioner in this court, and the only party to continue to oppose the petition on the merits, so it was clearly involved in driving the litigation in the later stages of the proceedings, without RPIs being actively involved at all. On the other hand, Respondent is correct that it was not involved in the appeals and instead it fairly promptly filed a return to the writ showing that it had complied with the writ and set aside its approvals. Some portion of the fees claimed are listed as for the appeals. See Lippe Dec., Ex.2, e.g., entries for 11/22/21, 11/30/21, 04/19/22, 04/20/22, and others. Petitioners have no valid basis for recovering these fees against Respondent.

The court finds that Petitioner may recover fees for all claimed hours against Respondent with the exception of the fees related to the appeals. The court therefore denies the motion as to any fees for the appeals. However, neither party has made clear exactly what number of hours or amount of fees are for the appeals and while the court is able to discern some, it is incapable of making sure that any number the court decided without specific input from the parties will be correct. Respondent has highlighted items which it claims to be non-recoverable fees for appeal work, which is a step in the right direction on that point, but it has also highlighted all of the other fees which it claims Petitioner should not recover. It is therefore, still insufficiently clear. Moreover, Respondent still did not set forth the total amount of fees for appeal work which it claims is not recoverable.

The court therefore invites the parties to reach a stipulation specifically regarding the amount of fees apportioned to the appeals and the amount for work in the trial court, without regard to any other issues, or to address this issue at the hearing. Failing either method for making this determination, the court directs Petitioner to present a short declaration, of no more than 5 pages, specifying the amount of fees, of those already set forth, for work on the appeals and the total amount of fees not including the appeals. Respondent may file a response of up to 5 pages if it has any dispute about the amount of fees apportioned for the work at trial court or appeal. In the court's view, Petitioner should have made this clear from the start and thus may not recover additional fees for this additional work. The court intends to make its decision in light of the briefing and will not conduct a further hearing on this issue unless it finds it necessary to do so, in which case it will provide notice to the parties.

Reduction of Fees Due to Partial Failure

The court finds some basis for reducing the recoverable fees based on the partial failure of Petitioner's claims. Petitioner failed on two of five issues raised as alleged defects in the NTMP, and, contrary to Petitioner's argument, these were largely distinct. They all were similar types of issues, an alleged failure to address a specific effect, and they all were in the context of the substantial-evidence standard of review. However, factually they were entirely unrelated. Each issue which Petitioner raised in this action, lack of substantial evidence supporting the findings and conclusions regarding the effects on salmonids, FYLFS, noise, NSOs, and GHGs, involved different facts and evidence in the record, and each was addressed in a different section of the NTMP. The court also found that for the two issues on which Petitioner failed, NSOs and GHGs, Petitioner's arguments were not merely unpersuasive but failed to address or apply the proper standards. Regarding NSOs, for example, the court found that Petitioner did not address the correct standard, which was clear and well-established: whether substantial evidence supported the conclusions regarding effects on NSOs. Petitioner instead tried to argue that the NTMP failed to include required information, which the NTMP clearly included, and also tried to attack the methodology employed by relying on evidence which indicated that the methodology might be defective. Petitioner therefore was not addressing the correct standard of review, which was well-established and, in the court's mind, clear.

At the same time, Petitioner did prevail on the bulk of the claims and achieved what is, at least on face of the court record, a complete victory setting aside the NTMP. Moreover, the issues on which Petitioner prevailed were of the same magnitude and substantive nature as those on which Petitioner lost, and they involved the same basic level of CQEA violation. Petitioner, therefore, did not only prevail on relatively minor, discrete issues in comparison to those on which it lost.

Without any way to determine how much time and effort could actually have ben devoted to each issue, the court will reduce the fees based on the ratio of issues which Petitioner won or lost, but not strictly on such a ratio given the ultimate success. This also will not affect the recovery of fees for Greenfire, whose involvement was for the immunity issues on which Petitioner prevailed. Strictly by ratio of issues won or lost, Petitioner prevailed on essentially three fifths, or 60%, of the claims, and lost on 40%. Factoring in the overall nature of the victory, the court finds it to be appropriate to reduce the fees of the Merits Lodestar for Lippe's firm by about 20% to reflect the partial failure.

Recovery of Fees for Discovery-Related Work

Respondent argues that the court should not shift the fees for discovery disputes between Petitioner and the RPIs, when Petitioner could have recovered these fees as discovery sanctions from RPIs, the parties engaged in those disputes. Respondent is not persuasive, however. As noted above, while it was not directly involved in the discovery disputes, it did base its demurrer on the issues for which that discovery was sought. Moreover, the standard, and the basis, for recovering fees as discovery sanctions is different form the standard and basis for recovery of fees here. Recovering fees as discovery sanctions would have been based on a finding that RPIs had engaged in misuse or abuse of the discovery procedures, and that their positions lacked substantial justification. That standard is very different from the standard for recovering fees now, which is based on Petitioner's success as prevailing party and the other policies enshrined in CCP section 1021.5. The court also cannot now determine whether Petitioner would have prevailed on such an argument.

Hourly Rate

Petitioner's claimed hourly rates are high and Respondent in part objects to these, or specifically, objects to justifying these rates for work with which he was unfamiliar while also claiming similarly high rates for expertise of additional attorneys regarding the immunity issues. It contends that the court should reduce Lippe's rate by about on third on this basis.

The court finds these rates extremely high for this community, even before considering the specific arguments which Respondent presents. The claimed hourly rates are far higher than any rates of which this court is aware in awards for attorney's fees in CEQA actions in this county, including those for attorneys from out of the county. Even if the rates are commensurate with those for the community in which Petitioner's attorneys are located, they are not in line with the rates in this community.

The court also finds that Respondent's arguments regarding the high rates to be somewhat persuasive. The court finds it unreasonable to claim such high rates for issues on which Lippe lacked expertise while also claiming similarly high rates for the work of an additional law firm on those issues. This reduction will not apply to the paralegal fees, which the court finds reasonable, if on the high side. As noted above, Lippe seeks fees at $850 an hour while Greenfire claims fees for five attorneys, each at a different rate: $860 for Levitan, $840 for Birkelund, $765 for Doughty, $650 for Tomaselli, and $508 for Bucey. Based on the above considerations, the court finds it appropriate to reduce the hourly rates for all attorneys by 20%, which still results in fees notably higher than those charged in the community. Accordingly, Lippe will receive fees at $680 an hour, while the Greenfire attorneys' fees will be at the following rates: $688 for Levitan, $672 for Birkelund, $612 for Doughty, $520 for Tomaselli, and $406.40 for Bucey.

Multiplier

Petitioner requests a multiplier of 2.00, or a 100% enhancement, applying it to the fees of both Lippe and Greenfire for work on the merits of the case but not the fees for this motion.

Respondent argues that the court should apply no multiplier based on the lack of novelty or complexity regarding the CEQA issues, skill, the results achieved, importance of the case, and the fact that some of the issues such as the skill contingent nature of the work are already factored in to the high rates. Respondent also notes that a negative multiplier may, as noted above, be appropriate in certain circumstances.

The court partly agrees with both sides. It is true that Petitioner's attorney took this matter on a contingent basis with significant exposure and risk, while without a recovery of fees there would be no recovery of damages or other monetary remedy. This is also public-policy work and addresses significant public policies as discussed above. On the other hand, Respondent is correct that the other factors weigh against an enhancement multiplier. Success was partial, not complete, and Petitioner failed on two issues where in the court's mind its arguments were clearly contrary to the well-established standard of review. The high fees already take into account the supposed skill and experience. Moreover, although this case presented unusual issues for a CEQA action, specifically those regarding immunity and whether RPIs were necessary and indispensable parties, ultimately the court finds little basis for enhancing the award due to this added complexity. Petitioner's attorney, Lippe, engaged Greenfire, with expertise in those very issues, to help address them so the issues were not novel or complex for Greenfire, and Greenfire is to be compensated at rates already reflecting its skill in those issues. The actual CEQA issues in this case were, moreover, simple and straightforward, and within well-established authority. Nothing was new or novel or particularly unclear. They did not even involve potentially more complicated and multifaceted issues such as the sufficiency of mitigation measures or the analysis of alternatives.

In the end, the court finds it appropriate to apply a positive enhancement modifier of 1.4, well within a reasonable range and balancing the different aspects of the various factors to consider here. The court notes that it is partly adopting this modifier to reflect the fact that it has chosen to reduce the fees based on partial failure and to reduce hourly fees, and therefore the court is adjusting all of these with the awareness that they are intertwined. For example, had the court not reduced the hourly rates, it may have decided to deny an enhancement or apply a smaller one. Similarly, had it reduced rates further, then it may have found a larger multiplier to be appropriate. It would also have reduced the multiplier had it not reduced the recoverable fees for the partial failure.

Fees for This Motion

Petitioner is entitled to recover fees for this motion.

Costs

Respondent also argues that Petitioner is improperly trying to recover $17,215.46 in costs not allowed under CCP section 1033.5, addressing the expenses mentioned at Lippe Dec., ¶42, which states that Lippe added expenses not recoverable under CCP section 332, as set forth in Ex. 1. These are $9,140.46 for "Non-Statutory Non-Consultant Expenses" and $8,075 for "Consultant Expenses" but the exhibit does not further explain. It is also not clear what Lippe means by stating that the expenses are not recoverable under CCP section 332. Presumably, he means CCP section 1033.5, the provision which Respondent cites and which does govern recoverable costs. The court can see no basis for Petitioner recovering such costs without any further explanation, especially given that Lippe himself refers to them as "not recoverable."

In any case, the court notes that in the reply, Lippe has stated that he is withdrawing the claim for these costs, along with $150 of staff time for the memorandum of costs. Supp. Lippe Dec., ¶3. This renders this issue moot.

Conclusion

The court GRANTS the motion in part as detailed above. It awards Petitioner recovery for all attorneys' fees claimed minus those for the appeals and minus a 20% reduction of the Merits Lodestar for Lippe's firm for the partial failure, and it reduces the hourly rates for the attorneys by 20% across the board. It applies a positive enhancement modifier as requested but a modifier of 1.4 which is substantial but also significantly reduced from that which Petitioner seeks. The court will make a final determination as to the exact amount of fees once it has clarified and determined the amount to be subtracted from the total for the work on the appeals.

The prevailing party shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. Opposing counsel shall inform the preparing counsel of objections as to form, if any, or whether the form of order is approved, within five days of receipt of the proposed order. The preparing party shall submit the proposed order and any objections to the court in accordance with California Rules of Court, Rule 3.1312.

2. SCV-265522, Stokes v USI Advantage- Stipulation submitted by counsel, motion dropped from calendar 1/31

~~**Motion for Summary Judgment or, in the Alternative, Summary Adjudication DENIED**. As explained below, Defendants have failed to demonstrate as a matter of law that there is no present, justiciable controversy regarding the post-termination restrictive, non-competition provisions.~~

~~**Facts and History**~~

~~Plaintiffs Mark Stokes ("Stokes"), Larissa May Torkelson Smith ("Torkelson"), and John Fradelizio ("Fradelizio") (collectively, Stokes, Torkelson, and Fradelizio are the "Individual Plaintiffs"), and their current employer, Plaintiff ABD Insurance and Financial Services, Inc. ("ABD"), seek declaratory relief regarding their ability to compete with Defendants. The Individual Plaintiffs are allegedly former employees of Defendant USI Insurance Services LLC ("USILLC"), which is allegedly owned by Defendant USI Advantage Corp. ("USIAC"). Both USI and ABD allegedly are in the business or brokering insurance. Plaintiffs allege that the Individual Plaintiffs' employment agreements ("the Employment Agreements") with USILLC contain provisions purporting to restrict the ability to compete with USILLC once they had left USILLC's employ, and also require the Individual Plaintiffs to protect USILLC's confidential and proprietary information. They also allege that they were provided equity agreements by which they would obtain options to purchase USIAC's stock as part of their compensation, and that they were required to sign additional non-competition agreements in order to obtain these. However, they contend, Defendants induced them to enter into the agreements by a combination of assurances that these provisions would be "difficult to enforce" in California as well as pressure.~~

Defendants filed a cross-complaint and first amended cross-complaint ("FACC") against Plaintiffs as well as Kenneth A. Keeney ("Keeney") for breach of the duty of loyalty, and fiduciary duty, intentional interference with economic relationships, intentional interference with prospective economic relationships, unfair competition, and conspiracy. They allege that the Individual Plaintiffs began using their positions at USI, when still employed by USI, to further the interests of ABD and impair USI in preparation for the move to ABD, then left USI to work for ABD while taking advantage of their knowledge to divert business from USI to ABD.

Motion

Defendants move for summary judgment or, alternatively, summary adjudication as to Plaintiffs' claims. For summary adjudication, they present two issues: 1) there is no actual or justiciable controversy as to Plaintiffs' claims for declaratory relied because the post-termination restrictive or non-competition provisions in the contracts (referred to as the "Contract Provisions") have already expired by their own terms, rendering the claims moot; and 2) there is no actual or justiciable controversy regarding any of Plaintiffs' claims for declaratory relief because USI has not taken any steps to enforce any of the Contract Provisions against the Individual Plaintiffs and has confirmed that it will not take any such action in any forum.

Plaintiffs oppose the motion, arguing that Defendants have failed to show that they both have decided not to enforce, or pursue an action on, the Contract Provisions and that evidence shows that Defendant in fact have at least considered pursing a claim based on them.

Authority Governing Motions for Summary Judgment or Summary Adjudication

Any party may move for summary judgment or adjudication. Code of Civil Procedure ("CCP") section 437c(a), (f). A party is entitled to summary judgment if demonstrating "that the action has no merit or that there is no defense to the action or proceeding." CCP section 437c(a). For summary adjudication, the "party" may seek adjudication of one or more causes of action, affirmative defenses, claims for damages, or issues of duty if the party contends that the cause of action has no merit or that there is no defense to the cause of action, or that an affirmative defense has no merit, or that there is no merit to a claim for damages "as specified in" CC section 3294, or that a party did or did not owe a duty. CCP section 437c(f)(1).

For summary adjudication, each issue must entirely dispose of one or more 1) causes of action, 2) claims for punitive damages, 3) affirmative defenses, or 4) issues of duty. CCP section 437c(f)(1). However, there is a split on whether a court may summarily adjudicate an issue of damages or duty that does not dispose of an entire cause of action. Such an issue could not be summarily adjudicated under some courts' interpretation that a court can grant summary adjudication on an issue of damages or duty *only* if it completely disposes of an entire cause of action. See, e.g., *Regan Roofing Co. v. Sup.Ct.* (1994) 24 Cal.App.4th 425. However, other courts disagree. See, e.g., *Linden Partners v. Wilshire Linden Associates* (1998) 62 Cal.App.4th 508. The language of the statute also does not seem to comport with the *Regan Roofing* approach.

When a defendant moves for summary judgment, it has the burden of first making a prima facie showing that plaintiffs *cannot establish* at least one element of any cause of action for summary judgment, or there is a *complete defense* to every cause of action. CCP §437c; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850. For summary adjudication, the

moving party has the burden of demonstrating that plaintiff cannot establish at least one elements of each cause of action at issue, each claim for punitive damages, an affirmative defense, or each issue of duty addressed in the motion, or there is a complete defense to each cause of action addressed. CCP §437c(f)(1), (o); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850. The moving party thus has the burden of "persuading" the court that there is no triable material issue of fact and that it is entitled to judgment in its favor as a matter of law. *Ibid.*
A defendant can show that an element cannot be established only if its undisputed facts negate plaintiff's allegations *as a matter of law* and would make it impossible for plaintiff to show a *prima facie* case. *Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1597.

Once the moving party has met its burden, the party opposing summary judgment or summary adjudication has the burden of demonstrating that there is a triable material issue of fact. CCP section 437c; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850. The opposing party must merely make a prima facie showing that there is such a triable issue. *Ibid.*

Reliance on own Pleadings

The court finds it necessary to clarify the role of pleadings on a motion for summary judgment or summary adjudication because the court applies following standards in considering the pleadings. A party may not simply rely on its own pleadings as evidence in order to establish facts asserted in those pleadings on a motion for summary judgment or summary adjudication. *College Hospital, Inc. v. Sup.Ct.*(1994) 8 Cal.4th 704, 720, fn.7; *Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040, 1054. At the same time, the pleadings necessarily frame the issues. See *Keniston v. American Nat'l Ins. Co.* (1973) 31 Cal.App.3d 803, 812; *Zavala v. Arce* (1997) 58 Cal.App.4th 915, 926; *Kelly v. Astri Corp.* (1999) 72 Cal.App.4th 462, 470.

Plaintiffs in part do refer to, and rely on, the allegations in their own complaint to support and establish facts. However, they do so for clarification of what the pleadings show when Defendants cite or rely on Plaintiffs' complaint and its exhibits. See, e.g., Plaintiffs' response to Defendants' Facts 1, 3. Although they may not simply cite their own pleadings as evidence, citing their own pleadings in this manner is appropriate.

Separate Statements and Facts

Defendants' Issue 1

Defendants establish their facts in issue 1 and, except for the few details noted below, Plaintiffs do not directly dispute those facts, admitting they are mostly or while undisputed.

Defendants demonstrate in fact 1 that the Individual Plaintiffs each signed an employment agreement ("Employment Agreement") for employment on behalf of USI containing the following provisions:

> During the Term and for two (2) years after Executive is no longer employed hereunder, for any reason, Executive shall not, directly or indirectly, on behalf of Executive or any third party in any capacity, interfere with the Company's business by soliciting, influencing, inducing, recruiting or causing any employee, consultant, independent contractor, licensee, or other third party of the Company to terminate his/her employment with the Company for the purpose of joining, associating or becoming employed

with any business wherever located for which Executive is or anticipates becoming an employee, owner, partner, investor, member, agent, director, consultant, independent contractor or otherwise associated in any way whatsoever. ("Noninterference Provision")

Executive may terminate Executive's employment hereunder by giving at least sixty (60) days written notice to the Company. The termination of employment shall be effective on the date specified in such notice' provided, however, at any time following receipt of such notice, the Company may: (a) accept Executive's termination of employment hereunder effective on such earlier date specific by the Company; and/or (b) require Executive to cease performing any services hereunder until the termination of employment. ("Termination Notice Provision")

Plaintiffs in response admit that the Employment Agreement contains this language. USI also asserts, but fails to establish, that the Individual Plaintiffs entered into the Employment Agreement "with" USI, as Plaintiffs note in their disputing portion of this fact, for the evidence clearly shows that the Individual Plaintiffs entered into the agreement with Wells Fargo Insurance Services USA, Inc. ("Wells Fargo"). See, e.g., Nestor Dec., Ex.C, page 1 (page 30 of exhibits). However, as the Individual Plaintiffs also note and admit, the evidence also clearly shows that they entered into this Employment Agreement with Wells Fargo on behalf of, for the benefit of, to provide services for, and to owe duties to, USI. See, e.g., Nestor Dec., Ex.C, Recitals, ¶¶1(h), (o), (p);2.2; 2.3; 3.2, 6, 7.2.

In fact 2, USI shows that the option agreement ("Stokes Option Agreement") which Stokes signed includes the following provisions:

This Agreement shall be governed by and construed in accordance with the laws of the state of Delaware without regard to conflicts of laws; provided, that, notwithstanding the foregoing, section 11 and Appendix A shall be governed by the laws of the state of New York. All disputes relating to this Agreement must be submitted to a state or federal court in the county of Westchester, in the State of New York, and participant submits to the exclusive jurisdiction of such court. ("Choice of Law Provision")

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If, at any time prior to the exercise of the Option in its entirety, the Optionee engaged in any of the activities prohibited by Appendix A during the applicable period specified therein ("Restricted Activities"), then all of the Optionee's rights with respect to the portion of the Option that has not been exercised shall immediately terminate. In the event the Optionee engaged in any Restricted Activities following the exercise of all or any portion of the Option, the payment or delivery of the Option Shares by the Company upon such exercise may be rescinded by the Company at any time during the applicable restricted period, and the Optionee shall pay to the Company the amount of any gain realized or payment received as a result of any exercise of the Option. Such repayment by the Optionee shall be in such manner and on such terms and conditions as may be required by the Company, and the Company shall be entitled to set off against the amount of any such gain any amount owed to the Participate by the Company. For purposes hereof, gain realized or payment received as a result of any exercise of the Option shall be defined as the dollar amount of the excess of (x) the aggregate Fair Market Value of

~~the Option Shares with respect to which the Option was exercised on the date of such exercise, over (y) the aggregate Exercise Price of the Option with respect to such Option Shares. If any provision of this Section 13 or Appendix A is or becomes or is deemed to be invalid, illegal, or unenforceable in any jurisdiction, such provision shall be construed or deemed amended to the extent necessary in such jurisdiction to confirm to the applicable laws, or if it cannot be construed or deemed amended without, in the determination of the committee, materially altering the intent of the Plan of the Option, such provision shall be stricken and the remainder of the Plan and the Option shall remain in full force and effect. For the avoidance of doubt, the Company agrees that the provisions of Appendix A are not intended to and do not replace, amend, modify or supersede any similar covenants contained in the Optionee's employment agreement, if any, with the Company or its subsidiaries. ("Restrictive Covenant Provision")~~
~~***~~

~~Except in the normal course of business on behalf of the Company or any of its Affiliates, the Optionee will not, directly or indirectly, (x) solicit, sell, provide or accept any request to provide, or induce the termination, cancellation or nonrenewal of, any USI Business from or by any person, corporation, firm or other entity whose account constituted a Client Account of a USI Company, at any time within the 24 months preceding the earlier of the date of such act or the date of termination of the Optionee's employment or service with the Company and its subsidiaries, or (y) solicit, offer, negotiate or otherwise seek to acquire any interest in any Active Prospective Acquisition of a USI Company, determined as of the earlier of the date of such act or the effective date of termination of the Optionee's employment or service with the Company and its subsidiaries. The restrictions contained in this Paragraph (a) shall apply throughout the Optionee's employment or service with the Company and its subsidiaries and thereafter during the Post Termination Restricted Period ("Non-Solicitation Provision").~~
~~***~~

~~The Optionee will refrain from carrying on any business, directly or indirectly, which provides any USI Business, except in the normal course of business on behalf of any USI Company. The term "carrying on any business" shall mean to act as a sole proprietor, partner, member of a limited liability company stockholder, officer, director, employee, manager, trustee, agent, advisor, joint venturer, or consultant of, with or to, any business, or otherwise to own, manage, operate, control or participate in the ownership, management, operation or control of, or engage in, any business. It is expressly agreed that the foregoing is not intended to restrict or prohibit the ownership by the Optionee of stock or other securities of a publicly held corporation in which the Optionee does not (x) possess beneficial ownership of more than 5% of the voting capital stock of such corporation or (y) participate in any management or advisory capacity. In addition, it is also agreed that the foregoing shall not prohibit the Optionee from serving as a director pursuant to the terms of an employment agreement between the Optionee and the Company or any of its subsidiaries. The restrictions contained in this Paragraph (b) shall apply during the Optionee's employment or service with the Company and its Affiliates and thereafter during the Post Termination Restricted Period ("Non-Competition Provision").~~
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> "The Optionee will not, directly or indirectly, solicit the employment, consulting or other services of any other employee or independent producer of any USI Company or otherwise induce any of such employees to leave any USI Company's employment or to breach an employment or independent producer agreement therewith. The restrictions contained in this Paragraph (c) shall apply during the Optionee's employment or service with the Company and its subsidiaries and thereafter during the Post- Termination Restricted Period." ("No Hire Provision")
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> 'Post-Termination Restricted Period' shall mean the period of time during which the Optionee is subject to covenants of non-solicitation, no hire, non- competition or other similar covenants as ser forth in the Optionee's employment agreement, if any, with the Company or its subsidiaries, or if no such employment agreement exists or no such applicable covenant is contained therein, the term "Post Termination Restricted Period" shall mean 6 months from the date of the Optionee's termination. ("Post Termination Restricted Period")

Again, Plaintiffs do not dispute that the Stokes Option Agreement contains this very language. However, Defendants simply state in fact 2 that Stokes entered into this agreement with "USI," which Defendants define in the memorandum of points authorities at 1:2, to be both Defendants. As Plaintiffs point out, the Option Agreement at Nestor Dec., Ex.D states that it is with USIAC, i.e., USI Advantage Corporation, only. Otherwise, Plaintiffs admit this fact.

In fact 3, Defendants similarly demonstrate that Torkelson entered into a stock option agreement ("Torkelson Option Agreement") contain language similar to, but slightly different from, that in the Stokes Option Agreement. Plaintiffs admit again that this agreement contains the following language which Defendants set forth:

> The Restricted Stock Agreement Plaintiff Torkelson signed with USI includes the following provisions: This Agreement shall be governed by and construed in accordance with the laws of the state of Delaware without regard to conflicts of laws; provided, that, notwithstanding the foregoing, section 11 and Appendix A shall be governed by the laws of the state of New York. All disputes relating to this Agreement must be submitted to a state or federal court in the county of Westchester, in the State of New York, and participant submits to the exclusive jurisdiction of such court." ("Choice of Law Provision")
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> ***
>
> If, at any time prior to the exercise of the Restricted Shares, the Participant engages in any of the activities prohibited by Appendix A during the applicable period specified therein ("Restricted Activities"), then all of the Participant's rights with respect to any of the Restricted Shares that have not then vested shall immediately terminate. In the event the Participant engages in any Restricted Activities following the vesting of the Restricted Shares, the delivery of the Shares by the Company upon such exercise may be rescinded by the Company at any time during the applicable restricted period, and the Participant shall pay
> to the Company the amount of any gain realized or payment received as

a result of any vesting of the Restricted Shares. Such repayment by the Participant shall be in such manner and on such terms and conditions as may be required by the Company, and the Company shall be entitled to set off against the amount of any such gain any amount owed to the Participate by the Company. For purposes hereof, gain realized or payment received as a result of any vesting shall be defined as the aggregate Fair Market Value (within the meaning of the Stockholders Agreement) of the Restricted Shares on the date such Restricted Shares vested. If any provision of this Section 11 or Appendix A is or becomes or is deemed to be invalid, illegal, or unenforceable in any jurisdiction, such provision shall be construed or deemed amended to the extent necessary in such jurisdiction to confirm to the applicable laws, or if it cannot be construed or deemed amended without, in the determination of the Committee, materially altering the intent of the Restricted Stock Award, shall be stricken and the remainder of the Restricted Stock Award shall remain in full force and effect. For the avoidance of doubt, the Company agrees that the provisions of Appendix A are not intended to and do not replace, amend, modify or supersede any similar covenants contained in the Participant's employment agreement, if any, with the Company or its subsidiaries. ("Restrictive Covenant Provision")

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Except in the normal course of business on behalf of the Company or any of its Affiliates, the Participant will not, directly or indirectly, (x) solicit, sell, provide or accept any request to provide, or induce the termination, cancellation, or non-renewal of, any USI Business from or by any person, corporation, Client Account or a USI Company, at any time within the 24 months preceding the earlier of the date of such act or the date of termination of the Participant's employment with the Company and its subsidiaries, or (y) solicit, offer, negotiate or otherwise seek to acquire any interest in any Active Prospective Acquisition of a USI Company, determined as of the earlier of the date of such act or the effective date of termination of the Participant's employment or service with the Company and its subsidiaries. The restrictions contained in this Paragraph (a) shall apply throughout the Participant's employment with the Company and its subsidiaries and thereafter until two years after the effective date on which the Participant's employment with the Company and its subsidiaries, or their respective successors in interest, terminates ("No Solicitation Provision")

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The Participant will not, directly or indirectly, solicit the employment, consulting, or other services of any other employee or independent producer of any USI Company or otherwise induce any of such employees to leave any USI Company's employment or to breach an employment or independent producer agreement therewith. The restrictions contained in this Paragraph (c) shall apply during the Participant's employment with the Company any its subsidiaries and thereafter until two (2) years following the date on which the Participant's employment with the Company and its subsidiaries, or their respective successors in interest, terminates." ("No Hire Provision")

Again, Plaintiffs do not dispute that the Torkelson Option Agreement contains this very language. However, Defendants simply state in fact 3 that Torkelson entered into this agreement

with "USI," which Defendants define in the memorandum of points authorities at 1:2, to be both Defendants. As Plaintiffs point out, the Torkelson Option Agreement at Nestor Dec., Ex.E, as is the case with the Stokes Option Agreement, states that it is with USIAC, i.e., USI Advantage Corporation, only. Otherwise, Plaintiffs admit this fact.

Plaintiffs state that they do not dispute Defendants' fact 4, which states that the Individual Plaintiffs resigned their USI employment on November 11, 2019.

Plaintiffs likewise do not dispute Defendants' fact 5, which states that any restrictions in the Non-Interference Provision imposed on the Individual Plaintiffs expired within two years of the termination of their USI employment, November 11, 2021.

In fact 6, Defendants show that the non-competition provision in the Stokes Option Agreement Appendix A, at exhibits page 179, states at (b) that it applies during employment and "thereafter during the Post-Termination Restricted Period," defined in Appendix (h)(5), at exhibits page 181, as the period in the employee's employment agreement or, if no such provision exists, 6 months from the date of termination. This shows that, as Defendants claim in the fact, the provision expired by its own terms at 6 months from termination, which would have been May 11, 2020. Plaintiffs do not dispute this language but do dispute that the Stokes Option Agreement had no provision lasting beyond this date, citing to a provision, with no expiration date of its own, invalidating the equity award to Stokes, and requiring him to pay USI profits or gains, in the event that he violates the Non-Competition Provision. This provision to which Plaintiffs cite is at Stokes Option Agreement section (13), part of the Ex.5 to the Stokes Deposition ("Stokes Depo"), exhibits page 178. It states that the optionee, Stokes, will lose all such rights in the option and must repay funds specified. However, it expressly states that this only applies where the optionee "engages in any of the activities prohibited by Appendix A during the applicable period specified therein…." Underscoring original.

In fact 7, defendants establish that the Stokes Option Agreement, again at Appendix A but in section (a), includes a Non-Solicitation Provision which states that it applies for the same Post-Termination Period, or 6 months, which expired on May 11, 2020. Plaintiffs again do not dispute this language but raise the same argument that there is no expiration date in the above provision invalidating equity and requiring compensation in the event of a breach of the Non-Solicitation Provision, but it expressly states that this only applies to "any of the activities prohibited by Appendix A during the applicable period specified therein…." Underscoring original.

In fact 8, Defendants show that the restrictions in the Non-Solicitation Provision in the Torkelson agreement expired within 2 yeas of her termination, November 11, 2021. Plaintiffs yet again do not dispute this but raise the same argument that there is no expiration date in the provision invalidating equity and requiring compensation in the event of a breach. However, as with the Stokes Option Agreement, this expressly states that this only applies where the "Participant engages in any of the activities prohibited by Appendix A during the applicable period specified therein…." Underscoring original.

In fact 9, Defendants demonstrate that restrictions in the Restrictive Covenants Provision imposed on Stokes and Torkelson expired also within two years, on November 11, 2021. Plaintiffs once more do not dispute this language but raise the same argument that there is no expiration date in the provision invalidating equity and requiring compensation in the event of a breach. Again, these state that they only apply to "any of the activities prohibited by Appendix A during the applicable period specified therein…." Underscoring original.

In fact 10, defendants establish that the No-Hire Provision imposed on Stokes states that it applies for the same Post-Termination Period, or 6 months, which expired on May 11, 2020. Plaintiffs again do not dispute this language but raise the same argument that there is no expiration date in the above provision invalidating equity and requiring compensation in the event of a breach of the Non-Solicitation Provision, but it expressly states that this only applies to "any of the activities prohibited by Appendix A during the applicable period specified therein…." Underscoring original.

In fact 11, Defendants show that the No-Hire Provision imposed on Torkelson agreement expired within 2 yeas of her termination, November 11, 2021. Plaintiffs yet again do not dispute this but raise the same argument that there is no expiration date in the provision invalidating equity and requiring compensation in the event of a breach. However, as with the Stokes Option Agreement, this expressly states that this only applies where the "Participant engages in any of the activities prohibited by Appendix A during the applicable period specified therein…." Underscoring original.

Plaintiffs do not dispute Defendants' fact 12, which states that ABD's claim for declaratory relief is derived from the Individual Plaintiffs' claims.

Defendants' Issue 2

For issue 2, facts 13-15 are identical to facts 1-3 above, respectively. These repeat the various contract provisions.

In fact 16, Defendants claim that they have taken no action to enforce any of the Contract Provisions at issue against any Individual Plaintiff in any court or forum. The evidence shows that only USILLC has taken no such action. It provides no evidence regarding USIAC. Plaintiffs also attempt dispute this by pointing out that Defendant have in their cross-complaint alleged that the Individual Plaintiffs have breached their fiduciary duty and duties of loyalty. However, the allegations in the amended cross-complaint on their face are limited to breach of fiduciary duty and duties of loyalty for conduct which took place while the Individual Plaintiffs were still employed with USI. No allegations in the cross-complaint refer to conduct taking place after Individual Plaintiffs left their employment, refer to the various non-competition provisions applying after employment ended, and make no reference to, or claim, breach of contract regarding these provisions in any way. In addition, in their own evidence, Plaintiffs show that their own attorney states that in the original "Cross-Complaint did not assert any claims based on the Contract Provisions." Banks Dec., ¶14. Significantly, the original cross-complaint asserts the same basic causes of action and factual allegations against Individual Plaintiffs as asserted in the operative amended cross-complaint, with the notable difference that the current version makes it more expressly clear that the cross-complaint is for conduct occurring when the Individual Plaintiffs were still employed with USI. Plaintiffs also point to

discovery regarding the Individual Plaintiffs' resignations but again this has nothing specifically to do with the non-competition Contract Provisions. Thus, Plaintiffs fail to raise a dispute on this point, but Defendants fail to establish that no Defendant has taken any action to enforce the Contract Provisions.

In fact, 17, Defendants establish that none of the claims in their cross-complaint alleges breach of these non-competition Contract Provisions. Plaintiffs attempt to dispute this but fail for the reasons stated above.

Defendants in fact 18 show that they offered to stipulate with Plaintiffs confirming that they would not attempt to enforce any of the Contract Provisions in the future in any court or forum. Plaintiffs show only that Defendants refused to stipulate to not pursuing the causes of action asserted against Individual Plaintiffs or ABD.

In fact 19, Defendants show that USILLC will take no action to enforce the Contract Provisions but they again fail to show that USIAC has agreed to this position.

Plaintiffs' Separate Statement of Additional Facts

Plaintiffs also present additional facts in their own separate statement, with the facts also specific to each issue presented for summary adjudication.

Issue 1

Plaintiffs in their fact 1 demonstrate again that that Defendant have in their cross-complaint alleged that the Individual Plaintiffs have breached their fiduciary duty and duties of loyalty. However, the allegations in the amended cross-complaint on their face are limited to breach of fiduciary duty and duties of loyalty for conduct which took place while the Individual Plaintiffs were still employed with USI. No allegations in the cross-complaint refer to conduct taking place after Individual Plaintiffs left their employment, refer to the various non-competition provisions applying after employment ended, and make no reference to, or claim, breach of contract regarding these provisions in any way. Plaintiffs also point to discovery regarding the Individual Plaintiffs' resignations but again this has nothing specifically to do with the non-competition Contract Provisions.

In their fact 2, Plaintiffs notes that the Contract Provisions in UISAC's agreements with Stokes and Torkelson have a disgorgement provision which itself has no expiration date. This is the same provision which they present in response to Defendants' separate statement, discussed above, and which is limited to "any of the activities prohibited by Appendix A during the applicable period specified therein…." Underscoring original.

In fact 3, Plaintiffs claim that Defendants' motion "offers no evidence that" USAIC will not seek to enforce the Contract Provisions or that either Defendant will refrain from pursuing claims based on the Contract Provisions. They are correct with respect to USIAC, as already noted above, but they are incorrect as to USILLC, as also noted above.

Plaintiffs in fact 4 show that Defendants' Tim Pritchard ("Pritchard") told employees at USI I Petaluma that USI intended to sue the Individual Plaintiffs (called "Defendants" in the fact), for breaching their obligation to give 60 days' notice to quit.

In fact 5, Plaintiffs demonstrate that one former USI employee testified that he had been told that Defendant CEO Mike Sicard ("Sicard") told remaining USI employees in Petaluma that it intended to use a "scorched-earth policy" of legal action against the Individual Plaintiffs and ABD because of the departures, or words to that effect, although the deponent did not actually hear such statements himself and was unsure of the exact language used.

Fact 6 shows that attorney Banks states that after Defendants filed their cross-complaint, he reached out to see if Defendants intended to enforce the Contract Provisions against Plaintiffs but Defendants at that time, late 2019, declined.

In fact 7, Plaintiffs show that the parties attempted to negotiate a stipulation by which Defendants would stipulate that they would not attempt to enforce any of the Contract Provisions in the future in any court or forum but Defendants refused to stipulate to not pursuing the causes of action asserted against Individual Plaintiffs or ABD.

Plaintiffs in fact 8 show that Defendants attorney in the negotiations refused to release or waive claims based on the Contract Provisions out of concern about how broadly it would be interpreted but although Plaintiffs replied that they were willing to narrow the release to only claims base don the Contract Provisions, although this statement is somewhat unclear in its exact meaning.

Plaintiffs show in fact 9 that on January 15, 2023, Banks sent Defendants' attorney, Nestor, another proposed stipulation but Plaintiffs had received no formal response aside from Nestor saying that he was reviewing it with the clients.

Issue 2

In fact 10, Plaintiffs admit that USI has asserted no cause of action for breach of, or interference with, contract but repeat that Defendants have brought the claims for breach of fiduciary and loyalty duties discussed above. It also repeats the assertion that Defendants have engaged in discovery, and made assertions, regarding the resignations without notice.

In facts 11-14, Plaintiffs repeat facts and evidence already discussed above provided in response to Defendants' facts for the issue.

Plaintiffs in fact 15 show that after Defendants filed the original cross-complaint without a claim for breach of contract, Defendants declined their suggestion of an agreement that would allow them to dismiss their complaint.

Plaintiffs in fact 16 repeat the discussion about the failed stipulation attempts and Defendants' refusal to agree as noted above.

Facts 17-18 merely repeat their facts 8-9, and the evidence, from issue 1.

Analysis

In order for a party to seek declaratory relief, there must be 1) an actual controversy about justiciable questions regarding the rights or obligations of a party which 2) involves a proper subject of declaratory relief. CCP section 1060; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 80; *Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1716, 1722; see also See 5 Witkin, Cal.Proc. (6th Ed.20218, March 2022 Update) Pleading, section 849.

As explained in *Alameda County*, *supra*, 38 Cal.App.4th, at 1722,

"Before a controversy is ripe for adjudication it ' "must be definite and concrete, touching the legal relations of parties having adverse legal interests. [Citation.] It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."' (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 171... quoting *Aetna Life Ins. Co. v. Haworth* (1937) 300 U.S. 227, 240-241....)"

Significantly, according to CCP section 1061, "[t]he court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." See 5 Witkin, Cal.Proc. (6th Ed.20218, March 2022 Update) Pleading, section 845, 864. In general, a court should not refuse to give a declaratory judgment merely because the plaintiff's position appears to be wrong and the plaintiff is not entitled to a favorable declaration. See *Maguire v. Hibernia Savings & Loan Soc.* (1944) 23 Cal.2d 719, 729; *Bennett v. Hibernia Bank* (1956) 47 Cal.2d 540, 549.

The "actual controversy" requires a present controversy which is not conjectural, hypothetical, simply anticipated to occur in the future, or moot. *Auberry Union School Dist. v. Rafferty* (1964) 226 Cal.App.2d 599, 602–603; *Lee v. Silveira* (2016) 6 Cal.App. 5th 527, 546. Declaratory relief is not proper, therefore, where the claim essentially seeks an advisory opinion. *Lee*, *supra*; *Brownfield v. Daniel Freeman Marina Hospital* (1989) 208 Cal.App.3d 405, 410. As the Supreme Court explained in *Pacific Legal Foundation v. California Coastal Com*. (1982) 33 Cal.3d 158, at 171, " 'The principle that [the court] will not entertain an action which is not founded on an actual controversy is a tenet of common law jurisprudence, the precise content of which is difficult to define and hard to apply.... A controversy is "ripe" when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made.' " See also *BKHN, Inc. v. Department of Health Services* (1992) 3 Cal.App.4th 301, at 308 (quoting and relying on *Pacific Legal Foundation*); and *Osseous Technologies of Am., Inc. v. Discovery Ortho Partners LLC* (2010) 191 Cal.App.4th 357, 364-365 (quoting and relying on *BKHN's* reliance on *Pacific Legal Foundation*).

The purpose of a declaratory relief judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation; another purpose is to liquidate doubts with respect to uncertainties or controversies which might otherwise result in subsequent litigation. *Osseous Technologies of Am., Inc. v. Discovery Ortho Partners LLC* (2010) 191 Cal.App.4th 357, 364-365. Declaratory relief has frequently been used as a means of settling controversies between parties to a contract regarding the nature of their contractual rights and obligations. *Osseous Technologies* at 365.

~~Defendants here base their argument on the proposition that the controversy set forth in Plaintiffs' complaint has passed and no longer exists. They note that Plaintiffs seek declaratory relief regarding the enforceability of the non-competition clauses governing Plaintiffs' ability to engage or compete in the industry following termination of their employment with USI, referred to here as the Contract Provisions, and referred to in Plaintiffs' complaint as "post-termination, restrictive covenants." Comp., ¶2. They also demonstrate in their facts as set forth above that those provisions have expired by their own terms and they have not enforced them in any way. However, they fail to demonstrate that they have both decided or agreed not to take any action regarding, or pursue any claim based on, the Contract Provisions because their evidence, as set forth above in the facts, demonstrates only that USILLC has taken such a position. Defendants' Facts 16, 19. The cited evidence refers only to USILLC, not USIAC.~~

~~Plaintiffs, for their part, fail to raise any triable material issues in dispute. As explained above, nothing they cite indicates that any Defendant actually has decided, or plans, to take any action based on the Contract Provisions. The evidence shows only that Defendants have asserted causes of action in their cross-complaint based on conduct taking place during the Individual Plaintiffs' employment, not after, and have engaged in discovery regarding the circumstances of the Individual Plaintiffs' resignations and lack of notice, non of which relates to the post-termination Contract Provisions. Plaintiffs' reliance on the lack of termination date in the disgorgement provisions also is immaterial because it is based on conduct which took place within the periods for the post-termination restrictive non-competition Contract Provisions, and those deadlines have expired. At the most, they show only that the parties failed to reach a stipulation clearly covering these issue or showing that Defendants have actually stipulated not to enforce the Contract Provisions. This is alone insufficient to demonstrate the type of actual, present justiciable controversy required to support a cause of action for declaratory relief.~~

~~Defendants ultimately fail to meet their burden because they fail to demonstrate that USIAC has decided not to, and will not, enforce, or pursue any claim or cause of action on, the Contract Provisions. Although the evidence and pleadings in this case demonstrate on their face that Defendants have not taken such action, it is not clear that USIAC will not or has not made the decision to do so. Although the Contract Provisions have in fact expired, there remains the possibility that they could pursue some cause of action based on violation of those provisions. The court is cognizant of the fact that a merely possible, hypothetical, anticipated controversy is insufficient to support a cause of action for declaratory relief, but in this instance the burden is on Defendants as the moving parties to demonstrate that there is no such controversy. The evidence is insufficient to establish as a matter of law that there is no present, justiciable controversy on these issues.~~

~~The court DENIES the motion on this basis.~~

~~Conclusion~~

~~The court DENIES the motion in full.~~ ~~The prevailing party shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. Opposing counsel shall inform the preparing counsel of objections as to form, if any, or whether the form of order is approved, within five days of receipt of the proposed order.~~

~~The preparing party shall submit the proposed order and any objections to the court in accordance with California Rules of Court, Rule 3.1312.~~

3. SCV-267877, Norton v Wait

Motion for Leave to File First Amended Cross-Complaint GRANTED.

Facts and History

This action involves disputes over a possible easement an property uses. Plaintiff/Cross-Defendant ("Plaintiff") seeks a determination, among others, that Defendants are not entitled to use a roadway without his permission. Defendants/Cross-Complainants ("Defendants") filed a cross-complaint against Plaintiff to quiet title to the easement.

Plaintiff moved the court to impose sanctions on Defendants/Cross-Complainants pursuant to Code of Civil Procedure section 128.7, consisting of striking causes of action 1-5 in the cross-complaint and imposing monetary sanctions on the grounds that the causes of action lack merit and are objectively unreasonable and frivolous. This court denied the motion and also denied Defendants' request for sanctions.

Motion

Defendants move the court for leave to file a first amended cross-complaint ("FACC"). They wish to add a cause of action for quiet title under the theory of an equitable easement. They also ask that the proposed amended cross-complaint attached as Exhibit A be deemed the First Amended Cross-Complaint, and filed and served as of the date the court grants the application. Defendants include a copy of the proposed FACC as well as an additional copy showing the changes described.

Plaintiff opposes the motion on the grounds that Defendants have unreasonably delayed and the motion will prejudice him.

Defendants have filed a reply asserting that they have not delayed and that granting the leave requested will not cause any prejudice. They assert that they promptly filed this motion upon discovering that their property is not landlocked. They note that they had always understood that the geography meant that in all likelihood it would be impossible to construct a new road to access their property and that only in depositions of August 2022 did they receive expert testimony indicating that it would likely be possible to build such a road.

Request for Judicial Notice

Plaintiff requests judicial notice of pleadings and other documents in the court's file on this case. These are judicially noticeable but the court may not judicially notice the truth of assertions made in the documents. The court grants the request with this limitation.

Substantive Analysis

Under Code of Civil Procedure ("CCP") section 473(a)(1), amendments are left to the sound discretion of the trial court. CCP section 473(a)(1) states, in pertinent part, "The court may..., in its discretion, after notice to the adverse party, allow, upon any terms as may be just,

an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code." Judicial policy favors amendment to allow resolution of all potential claims and disputes between parties, so such motions are examined liberally. *Nestlé v. Santa Monica* (1972) 6 Cal.3d 920, 939. As long as the motion is "timely" and will not prejudice a party, it is normally an abuse of discretion to refuse to allow amendment if the denial will deprive a party of a meritorious claim or defense. *Morgan v. Sup.Ct.* (1959) 172 Cal.App.2d 527, 530; *Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 596.

Normally, delay alone is not a sufficient reason to deny amendment, unless the delay has resulted in prejudice to another party. *Hirsa v. Sup.Ct. (Vickers)* (1981) 118 Cal.App.3d 486, 490. Prejudice exists where the amendment would require delaying trial so as to cause a loss of critical evidence, added costs of preparation, increased discovery burdens, and similar problems. *Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 486-488. There is in fact a strong policy in favor of granting leave to amend. *Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939. CCP section 576 expressly states that the court may allow a party to amend a pleading "at any time before or after commencement of trial." The policy of liberally allowing parties to amend pleadings therefore applies to allowing them to amend at any time up to and after the start of trial, absent prejudice. *Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 761.

The moving parties explain that in discovery taking place in August 2022, they discovered that their claim for an easement by necessity was weaker than they had at first thought and that instead they may be able to assert a claim for equitable easement. This included deposition testimony indicating that it would in fact likely be possible to construct an access road, despite previous belief that geography made it likely impossible. Miller Dec; Miller Reply Dec., Exs.A-B. They discussed with Plaintiff the desire to dismiss the original claim and assert the one, offering to stipulate, but Plaintiff refused. They demonstrate a reasonable basis for not seeking the amendment earlier and the notice to Plaintiff combined with the fact that the new claim is still based on the same basic issues as already raised in this case indicate that there is no threat of prejudice.

Plaintiff claims that they had prior notice that the property was not landlocked but the evidence is not clear that this was taking into account the physical possibilities of building a road. The evidence supports Defendants' position that they only discovered in August 2022 that it would likely be possible to build an access road.

Plaintiff also contends that he will suffer prejudice but nothing supports this. He contends that he has not prepared to address the new theory but this is not persuasive because the basic facts, evidence, and issues remain the same, with limited differences in the elements under the applicable law and trial is still several months away. Moreover, he was on notice of these issues since August 2022.

Conclusion

The court GRANTS the motion. The prevailing party shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. Opposing counsel shall inform the preparing counsel of objections as to form, if any, or whether the form of order is approved, within five days of receipt of the proposed order. The

preparing party shall submit the proposed order and any objections to the court in accordance with California Rules of Court, Rule 3.1312.

4. SCV-269797, Johnson v Israni

Motion to Compel Depositions with Requests for Sanctions GRANTED but the request for sanctions is DENIED, as explained below.

Facts

Plaintiffs complain that Phyllis Johnson ("Decedent"), an elder, died as a result of the negligence and neglect when she was in the care of Defendants. They allege that after leg surgery, she was admitted to Defendant Summerfield Healthcare Center ("SHC") for recovery but Defendants' conduct resulted in her developing a Stage III pressure ulcer. Decedent was then transferred to Defendant Healdsburg Senior Living Community ("HSLC") where Defendants allowed the wound to worsen, resulting ultimately in her death.

As of January 10, 2023, only Defendant Pacifica SL Grove Street LP dba Healdsburg Senior Living Community ("Pacifica") has been served with the summons and complaint or appeared in this action.

Deposition

On August 8, 2022, Plaintiffs served Defendants with the notice for the deposition of Defendant Deepak Israni ("Deepak"), who is also an officer of Defendant Pacifica. Horowitz Dec.¶2; Pick Dec.,¶2, Ex.F. Defendants' attorney, Kevin Smith ("Smith") informed Plaintiffs on August 18, 2022 that they would serve objections the following day but, after delays, Defendants served objections only August 31, 2022. Horowitz Dec., ¶¶3-6; Pick Dec., ¶¶3-6, Ex.F. Defendants refused to produce Deepak on the basis that he is an apex deponent at the highest level of office for the facility and that Plaintiffs have no evidence that he was involved in the day-to-day business at the facility. Plaintiffs in vain attempted to contact Defendants in order to resolve the matter informally. Horowitz Dec., ¶¶4-9; Pick Dec., ¶¶4-9.

Motion

Plaintiffs move the court to compel Defendant Deepak to appear for deposition. They point out that Deepak is not merely a witness, but a named Defendant against whom they have made specific allegations, and thus Deepak is also being deposed on that basis. They also contend that Deepak and Defendants Ashok Israni ("Ashok") and Sushil Asrani ("Sushil") (collectively, Deepak, Ashok, and Sushil are referred to as "the Isranis") together run the Defendant business together as a family while there is evidence that Deepak had personal involvement in, and knowledge of, staffing and licensing issues at HSCL and operation of the facility.

Defendants oppose the motion.

Evidentiary Objections

Defendants object to Exhibits A and B on the grounds that they are inadmissible hearsay. These documents are news articles about Defendants and their facility. In this instance, these are

not inadmissible hearsay because they are offered not to prove the truth of the matters asserted therein but to demonstrate that Plaintiffs have some basis for believing Deepak to be involved in the daily operations and events at issue. At this point, Plaintiffs are not attempting to provide the fault or involvement of Deepak or any other Defendant, or to provide the truth of the statements made in the articles; they instead are simply furnishing what available information they have to justify conducting the discovery requested. In any case, as noted below, these articles have no impact on the outcome of this motion. The objections are OVERRULED.

Procedural Objections

Pacific has also filed procedural objections to the motion on the grounds that Pacifica is the only Defendant so far to have appeared in the action but the notice of motion mentions all of the Defendants, and that one Plaintiff named in the notice of motion filed a request for dismissal. The court notes these facts and the court considers and rules on the motion in light of these facts. These do not, however, affect the validity of the motion or prevent the court from granting it. As noted above, thus far, the only proof of service which Plaintiffs have filed shows service of the summons and complaint on only Defendant Pacifica, which is the only Defendant to have appeared. This necessarily affects Plaintiffs' right to depose Deepak as a Defendant. However, it is not a procedural bar to the motion and the court considers this issue in addressing the substance of the motion. Moreover, the failure to serve Deepak as a Defendant has no bearing on Plaintiffs' ability to depose him as an officer of Defendant Pacifica. Finally, the failure of Deepak to answer or otherwise appear has no bearing on Plaintiffs' right to depose him. These objections are OVERRULED.

Code of Civil Procedure ("CCP") § 2025.450 states that if a party fails to attend a deposition and produce documents without serving valid objections, the party seeking the deposition may request a court order compelling attendance. This applies where a party, "without having served a valid objection under subdivision (g), fails to appear for examination, or to proceed with it, or to produce... any document or tangible thing described in the deposition notice...." Id. The party moving to compel deposition attendance need only inquire as to what happened, not attempt to meet and confer. CCP §2025.450.

A party may notice the deposition of employees of a party. CCP sections 2025.010, 2025.230. Such witnesses also have an obligation to obtain any requested information and documents "reasonably available," which includes making "an inquiry of everyone who might" possess it. *Maldonado v. Sup.Ct.* (2002) 94 Cal.App.4th 1390, 1398.

A party must provide same additional basis for deposing an "apex" employee of a defendant entity. The court in *Liberty Mutual Ins. Co. v. Superior Court* (1992) 10 Cal.App.4th 1282, at 1287-1289, ruled that it is "an abuse of discretion to withhold a protective order when a [party] seeks to depose a corporate president, or corporate officer at the apex of the corporate hierarchy, absent a reasonable indication of the officer's personal knowledge of the case and absent exhaustion of less intrusive discovery methods." A party thus may refuse to produce for deposition an "apex" employee "who lacks knowledge or involvement in the litigation," at least at the very start of discovery and before trying less intrusive measures first. However, there is no ban on deposing such individual and parties clearly may depose such employees who may have knowledge of the events at issue or, as the court put it, where the party seeking to depose an

apex employee "has shown good cause that the official has unique or superior personal knowledge of discoverable information."

The notice of motion refers to both CCP sections 2031.310 and 2030.300 as bases for the motion but these apply to requests for inspection and interrogatories, respectively, not to depositions.

Plaintiffs rely in part on several news articles discussing Defendants but these do not provide any clear indication of a basis for deposing Deepak as an apex employee. There is no clear discussion in the articles of the involvement of Deepak or the other Isranis.

Plaintiffs also rely, however, on the testimony of Defendant employees. One employee, Leslie Quintanar, testified that she would talk regularly with Deepak about her work and the running of the HSLC and other facilities, including licensing and staffing issues. Employee Heather Smith, deposed as the person most knowledgeable ("PMK") about HSLC's corporate structure, testified that she frequently spoke and met with Deepak, who was on the board as the general partner for HSLC specifically. She described him as the Israni family member who was most involved in running their business. Plaintiffs also point out that the applicable law on elder abuse requires that they legally must demonstrate the involvement of a corporate officer, director, or managing agent in order to obtain enhanced remedies against the employer. Welfare and Institutions ("W&I") Code section 15657(a)-(c); Civil Code section 3294(b). They add also that they have made alter-ego claims and Deepak's testimony is necessary to determine the validity of these, because it is necessary in order to determine whether there is the requisite unity of interest between the entity and any of the Isranis.

The court GRANTS the motion, with respect to deposing Deepak as an employee of the entity, not as a party, since Plaintiffs have not yet served Deepak as a party in this action.

Sanctions

The Notice of Motion caption states that the motion includes a "Request for Sanctions Against Defendants Under CCP§ 2031.310(h). However, the body of the notice of motion does not mention sanctions or state the basis or type of sanctions.

In order to obtain sanctions, the moving party must request sanctions in the notice of motion, identify against whom the party seeks the sanctions, and specify the kind of sanctions. CCP § 2023.040. The sanctions are limited to the "reasonable expenses" related to the motion. *Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 Cal.App.4th 256, 262.

The court DENIES any request for sanctions due to the failure to request them properly.

The prevailing party shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. Opposing counsel shall inform the preparing counsel of objections as to form, if any, or whether the form of order is approved, within five days of receipt of the proposed order. The preparing party shall submit

the proposed order and any objections to the court in accordance with California Rules of Court, Rule 3.1312.

5. SCV-271360, Saolpek v Williams

Defendant Michelle Williams' Application for Determination of Good Faith Settlement is GRANTED.

Background

This is a personal injury and premises liability action. David Salopek ("Plaintiff") alleges that on or about May 17, 2022, he was walking southbound on the sidewalk near 212 South E Street in Santa Rosa, California ("Property"), owned by Defendant Martha Ghanayem as Trustee of the Gabe G and Martha G Ghanayem Trust ("Ghanayem Trust Defendant"); and operated by Sunita Ram and Mohammad Salim Ibrahim, both individually and doing business as Sam's Market #8, a business located that the Property ("Sam's Market Defendants"), when he was struck by a vehicle that was backing out of the parking lot of the Property, driven by Michelle Williams ("Defendant Williams"). Plaintiff further alleges that the Ghanayem Trust Defendant and the Sam's Market Defendants were negligent in their design, maintenance, management, operation, and use of the Property, including the parking lot, causing dangerous conditions to pedestrians who used the sidewalk, such as Plaintiff.

On August 9, 2022, Plaintiff filed his Complaint alleging two causes of action (1) negligence (against Defendant Williams), and (2) premises liability (against Ghanayem Trust Defendant and Sam's Market Defendants).

On August 31, 2022, Defendant Williams filed an Answer and Cross Complaint for Indemnity against the Ghanayem Trust Defendant and the Sam's Market Defendants.

On November 8, 2022, the Ghanayem Trust Defendant filed a Cross Complaint for Contribution, Indemnity, and Declaratory Relief against Defendant Williams and the Sam's Market Defendants.

Motion and History

On December 20, 2022, Defendant Williams filed this Notice of and Application for Good Faith Settlement Determination. Defendant Williams has agreed to settle Plaintiff's claims for a total payment of $100,000.00 and now requests the Court determine her settlement with Plaintiff to have been made in good faith.

Defendant Ghanayam opposed the motion on the basis that the settlement is disproportionate and not "within the ballpark" of a reasonable settlement range. The moving party filed a reply.

At the original hearing on January 6, 2023, the parties appeared. The court requested clarification regarding retirement assets and negotiation of medical obligations and addressed the question of whether the car which Defendant Williams was driving belonged to her father,

implicating possible insurance issues. The court continued the matter to allow for supplemental briefing or information.

Defendant Williams on January 10, 2023 filed a supplemental declaration of Marc Faustino ("Faustino") in support of the motion. Williams also filed on January 27, 2023, a declaration of attorney Mark Carbone ("Carbone").

Discussion

Any party to an action in which it is alleged that two or more parties are joint tortfeasors may seek a judicial determination that a settlement was made in good faith; such a determination bars any other joint tortfeasor from any further claims against the settling tortfeasor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault. (CCP § 877.6 (a); (c).)

The case of *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 468, 499, established factors ("*Tech-Bilt* Factors") to be considered by the court in determining whether a settlement was made in good faith. The *Tech-Bilt* Factors are as follows: (1) a rough approximation of the plaintiff's total recovery and the settlor's proportionate liability; (2) the amount paid in settlement; (3) the allocation of settlement proceeds among plaintiffs; (4) a recognition that a settlor should pay less in settlement than he or she would if found liable after trial; (5) the financial condition and insurance policy limits of the settling defendant; and (6) the existence of collusion, fraud, or tortious conduct aimed to injure the interests of the nonsettling defendants. (*Ibid.*)

If a non-settling party contests that the settlement was made in good faith, the moving party must make a sufficient showing of all the *Tech-Bilt* Factors in either in the original application or in counter-declarations filed after the opposition challenging the good faith of the settlement has been filed.

(See *City of Grand Terrace v. Superior Court* (1987) 192 Cal.App.3d 1251, 1261-1262.)

However, ultimately, the party asserting the lack of good faith shall have the burden of proof on that issue. (CCP § 877.6 (d).)

A lack of good faith may be established by demonstrating that the settlement is "grossly disproportionate to what a reasonable person at the time of settlement would estimate the settlor's liability to be." (*Abbott Ford Inc. v. Superior Court* (1987) 43 Cal.3d 858, 874.) Accordingly, the party opposing a good faith settlement must demonstrate that, based on the information available at the time of settlement, "the settlement is so far 'out of the ballpark' in relation to" the *Tech-Bilt* Factors that it is "inconsistent with the equitable objectives of the statute." (*Tech-Bilt, supra,* 38 Cal.3d at 499-500.) However, " 'even where the claimant's damages are obviously great, and the liability therefor certain, a disproportionately low settlement figure is often reasonable in the case of a relatively insolvent, and uninsured, or underinsured, joint tortfeasor.' [Citation.]" (*Id.* at 499.)

"[T]he determination whether the settlement was in good faith must be based on competent, admissible evidence." (*Brehm Communities. v. Superior* Court (2001) 88 Cal.App.4th 730, 736.) Good faith may be determined based on affidavits served with the notice of hearing,

and any counter-affidavits fled in response thereto, or the court may, in its discretion, receive other evidence at the hearing. (CCP § 877.6 (b).) Additionally, any affidavits or declarations setting forth only conclusions, opinions or ultimate facts are insufficient, as they do not "show facts and circumstances from which the ultimate fact sought to be proved may be deduced by the court." (*Greshko v. County of Los Angeles* (1987) 194 Cal.App.3d 822, 834.) Without such evidence concerning each of the *Tech-Bilt* Factors, "it is impossible for a court to exercise its discretion in an appropriate fashion." (See *City of Grand Terrace, supra*, 192 Cal. App.3d at 1263.)

The court will initially address *Tech-Bilt* Factors (2), (3), (4) and (6), which do not appear to be in dispute. As to factor (2), the amount paid in settlement, Defendant Williams has agreed to settle Plaintiff's claims for a total payment of $100,000.00. As to factor (3), the allocation of settlement proceeds, this is a non-issue as there is only one plaintiff. As to factor (4), a recognition that a settlor should pay less in settlement than he would if her were found liable after trial, the court recognizes and has considered this factor. Finally, as to factor (6), the existence of collusion, fraud, or tortious conduct injure the interests of the nonsettling defendants, this is a non-issue as neither party has suggested, or provided the court with any evidence of, any collusion, fraud, or tortious conduct between Defendant Williams and Plaintiff. Accordingly, the court's analysis turns on factor (1) and factor (5).

As to factor (1), a rough approximation of plaintiff's total recovery and settlor's proportionate liability, Defendant Williams asserts Plaintiff's known bills for emergency treatment and rehabilitation currently total $365,092.91 and approximates a total recovery of "no more than" $500,000.00. (Garber Declaration, ¶¶5-9; Reply, 5:13-14.) She supports this approximation by arguing that Plaintiff is on Medicare, and "has a had a number of chronic serious medical issues before the accident and further, according to discovery responses, he was involved in a prior accident where he was injured." (Reply, 5:4-16.) Additionally, she argues it is likely liability is shared by all parties and that Plaintiff "could be found up to 50% comparative fault and the defendants splitting the remaining 50%; alternatively, liability could be divided evenly amongst the parties." (Reply, 4:3; 2:24-26.) Defendant Williams provides Plaintiff's response to interrogatories and Defendant Williams' deposition transcripts as evidence of Plaintiff's potential comparative fault and the remaining defendants' potential liability. The Ghanayem Trust Defendant argues Defendant Williams' proposed settlement of $100,000.00 is "barely 1/10 of what may be rendered to Plaintiff at trial, given that he claims future surgery" and that Defendant Williams is "the sole defendant at fault in this case." (Welch Declaration, ¶¶9-10; Opposition, 8:17.) However, apart from addressing that Plaintiff may require follow up procedures related to the accident, the Ghanayem Trust Defendant does not provide evidence to support the approximate total recovery it has set forth (i.e. approximate cost of potential future surgery) or to support its assertion that Defendant Williams is solely liable for Plaintiff's injuries. (See *Greshko, supra,* 194 Cal.3d at 834 [finding an attorney's declaration regarding settling defendant's liability insufficient where he failed to provide specific supporting facts or expert opinion.].)

In the Carbone declaration, Williams provides some of Plaintiff's medical records but provides little explanation or discussion of them. At this point, they add little of value to the analysis but they are not necessary to support the motion given the other information previously provided.

As to factor (5), the financial condition and insurance limits of the settling defendant, Defendant Williams has asserted in her declarations that she does not own any real property or any other significant assets, besides her personal vehicle, and that she settled for the entire per person bodily injury limit of her insurance policy. (See Williams Declaration, ¶¶3-6.) Defendant Williams' insurance policy limit is not disputed by the parties. However, regarding her financial condition, the Ghanayem Trust Defendant argues that Defendant Williams has been employed by the same employer for 10 years and "therefore has ability to pay more than her applicable policy to represent her fair share of liability for Plaintiff's claimed injuries and damages." (Opposition, 8:2-4.)

At the original hearing, the parties also discussed with the court the possibility that there was another applicable insurance policy through Defendant Williams's father, who may have still owned the car which Williams had been driving. The Faustino Declaration filed after that hearing, is the declaration of an employee of the CSAA Insurance Exchange, who spoke to Marc Williams ("Marc"), father of Defendant Williams. Faustino states that Marc told him that up to the time that he sold the car to Defendant Williams in 2021, before the accident, the car had been insured through GEICO but that after the sale, Marc cancelled the GEICO insurance effective May 15, 2021. Faustino provides a copy of Marc's GEICO account printout showing that the coverage ended on May 15, 2021. Faustino adds that he obtained a letter from GEICO confirming that the coverage ended on May 15, 2021.

Based on the arguments and evidence available to the Court in connection with the application, the Ghanayem Trust Defendant has not shown that the settlement was grossly disproportionate or "so far out of the ballpark" that a denial of the application for good faith settlement determination is warranted.

The Court finds that Defendant Williams' financial condition and insurance policy limits warrants granting this application, even if the settlement amount may be low in proportion to Defendant Williams' potential liability, as other courts have held that a settlement is nonetheless reasonable in cases where the defendant is relatively insolvent, as Defendant Williams is here. (See *County of Los Angeles v. Guerrero* (1989) 209 Cal.App.3d 1149.)

Conclusion

Application for Determination of Good Faith Settlement is GRANTED.

Counsel for Defendant Williams shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. Opposing counsel shall inform the preparing counsel of objections as to form, if any, or whether the form of order is approved, within five days of receipt of the proposed order. The preparing party shall submit the proposed order and any objections to the court in accordance with California Rules of Court, Rule 3.1312.