SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 10/06/23 TIME: 1:30 P.M. DEPT: E CASE NO: CV1802171

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: S. HENDRYX

PLAINTIFF: KIMBERLY SANDOVAL vs. DEFENDANT: ACADIA HEALTHCARE COMPANY, INC., ET AL	

NATURE OF PROCEEDINGS: MOTION TO STRIKE – COSTS OR, IN THE ALTERNATIVE, TAX COSTS BY DEFENDANTS ARCADIA HEALTHCARE AND BAYSIDE MARIN

RULING

This matter presents the novel legal question of whether a joint Code Civ. Proc., § 998 offer to compromise, made to a single Defendant by the same individual Plaintiff who is suing in dual capacities, must be apportioned among that individual's different roles in order to be valid. On these specific facts, the court determines the answer is no. For the reasons discussed below, the court denies Defendant's motion to strike the entire cost memorandum, and grants, in part, Defendant's motions to tax individual cost items.

BACKGROUND

While he was being treated for alcohol and drug abuse at the facility owned by Defendant Acadia Healthcare Co., Inc. (Acadia), Plaintiff Kimberly Sandoval's husband sustained fatal injuries after he fell down a dangerous staircase at the treatment facility. In the First Amended Complaint, Sandoval sues Acadia, alleging causes of action for: 1 –wrongful death damages, as the wife of the deceased Rahul Pinto (Code Civ. Proc., § 337.60); and 2 – as the successor in interest to the Estate of Rahul Pinto in a "survival" cause of action. (Code Civ. Proc., § 377.20.)[1] Both causes of action are based on the same facts.

On September 24, 2019 Sandoval presented a Code Civ. Proc., § 998 offer to compromise to Acadia, titled "Plaintiff Kimberly Sandoval's Offer to Compromise", and proposing that a judgment be entered in the action "in favor of her, and against Defendant Acadia Healthcare Company, Inc. in the sum of $7,000,000 (Seven Million Dollars and 00/00), the same to include all costs of suit. . . . **Demand is inclusive of all liens.**" (Corsiglia Ex. 1, *emphasis added.*) Defendant Acadia allowed the offer to lapse.

[1] Summary judgment was granted on June 9, 2020 on Sandoval's separate cause of action for wrongful death/medical malpractice against decedent's treating physician Dr. Raymond Deutch.

Following a 15-day jury trial, the court entered judgment for Plaintiffs and against Acadia on the jury's special verdict: 1 – for Sandoval's individual injuries in the wrongful death causes of action in the amount of $6,649,804; and 2 – in favor of the Estate of Rahul Pinto in the "survival" cause of action in the amount of $2.37 million for medical expenses decedent had incurred, for a total judgment of $8,938,178.31.[2]

On May 3, 2023, Sandoval timely served and filed a Memorandum of Costs requesting $3,584,637 in total costs (Code Civ. Proc., § 1032 (b))[3], that included items for expert witness fees under § 998(d), and prejudgment interest pursuant to Civil Code section 3291.[4] (Exhibit "3" to Corsiglia Decl.)

Defendant has moved to strike/tax Sandoval's requests for expert witness fees and prejudgment interest and for various other statutory costs; e.g., for trial technicians and preparation of demonstrative aids. (Code Civ. Proc., § 1033.5, Cal. Rules of Court, rule 3.1700) Defendant argues the cost memorandum should be stricken in its entirety under § 998, because Plaintiff Sandoval did not recover a judgment greater than her $7 million offer to compromise for her sole wrongful death claims. (MPA p. 5) Alternatively, Defendant moves to tax other costs as not being necessary to the conduct of the litigation or reasonable in amount.

In response to the motion, Sandoval has agreed to tax certain non-recoverable costs. (Oppo. p. 6.) Beyond that, Sandoval argues that the unapportioned joint § 998 offer was clearly designed to settle all of Sandoval's claims made in both capacities, and because she recovered a total judgment of $8,938,178, which is well in excess of the rejected $7 million settlement offer, she is entitled to recover her expert fees and prejudgment interest. Plaintiff also maintains that the individual costs challenged by Defendant should not be taxed as they are permitted by law and were reasonably necessary to litigate this heavily-contested case to a favorable judgment.

DISCUSSION

I.

Sandoval is Entitled to Recover Section 998 Costs

A.

Section 988 Legal Standard

"Section 998 is intended to encourage the settlement of lawsuits prior to trial, by penalizing a party who fails to accept a reasonable offer." (*Persson v. Smart Inventions, Inc.* (2005) 125 Cal. App. 4th 1141.) The statute reads in part:

> (d) If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover postoffer costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or

---

[2] This amount reflects a deduction of $50,000 awarded by the jury for Pinto's past lost income, which the parties agree was incorrectly included in the award. (Oppo. p. 5, n. 1.)

[3] All statutory references are to the Code of Civil Procedure, unless otherwise indicated.

[4] The Memorandum of Costs seeks expert witness fees in the amount of $182,354.55 (Attachment 8b), and prejudgment interest in the amount of $3,178,385.33. (Attachment 16).

during trial or arbitration, of the case by the plaintiff, in addition to plaintiff's costs.

Our courts have interpreted that statute to permit plaintiff to recover: 1– the reasonably necessary post-offer costs for the services of expert witnesses, who are not regular employees of any party (§ 998(d)); and 2 – post-offer interest on the judgment pursuant to Civ. Code, § 3291, as calculated from the date of Plaintiffs' first offer that is exceeded by the judgment. (See *Gonzalez v Lew* (2018) 20 Cal.App. 5th 155, 160.)

B.

Section 998 Offer

Defendant proffers two reasons why Sandoval cannot collect expert fees and prejudgment interest under § 998:

1 – the offer to compromise by the "plaintiff Kimberly Sandoval" did not also include plaintiff Sandoval in her capacity "as the successor-in-interest to the Estate of Rahul Pinto", and therefore it could not be considered to be a "joint" offer encompassing both sets of claims. (MPA p. 9:17-18.); and

2 – if Sandoval's offer was a true "joint" offer to settle both sets of claims, it was invalid since it did not apportion the amount of the $7 million offer between: 1 – the claims made by Sandoval, as an individual, for her personal wrongful death damages; and 2 –the "survival" claims for decedent's injuries made by Sandoval as the successor in interest to her deceased husband's estate.

"The party offering the settlement bears the burden of demonstrating that a section 998 offer is valid, and the offer must be strictly construed in favor of the party subjected to its operation. (*Barella v. Exchange Bank, supra,* 84 Cal.App.4th at p. 799.) An offer of settlement must be certain, and when an offer is made jointly, the offeree must be able to evaluate the likelihood of each offeror receiving a more favorable verdict at trial. (See *Hurlbut v. Sonora Community Hospital* (1989) 207 Cal.App.3d 388, 410 [plaintiffs' joint offer to defendant].)" (*Persson v. Smart Inventions, Inc., supra,* 125 Cal. App. 4th at p. 1170.) The application of section 998 to undisputed facts is a legal issue. (*Gonzalez v. Lew* (2018) 20 Cal.App.5th 155, 160.)

1.

Sandoval Made A "Joint" § 998 Offer to Compromise All Claims

If Defendant is correct and Sandoval made the offer solely for her individual wrongful death damages, then the jury's separate award of $6.6 million for Sandoval's wrongful death damages did not exceed the $7 million offer to compromise the wrongful death cause of action, and Sandoval is not entitled to recover her expert witness fees or prejudgment interest.

Acadia's counsel David Klehm declares that his client understood the offer by "plaintiff Kimberly Sandoval" was not a joint offer to compromise both sets of claims because the offer did not include the approximately $2.37 million in medical bills incurred by the decedent. (Klehm decl. ¶ 2.) As evidence of this purported understanding, Klehm points to the offer itself which refers only to Kimberly Sandoval in the singular as "Plaintiff", and contrasts this designation to other pleadings and papers filed on behalf of both Plaintiffs: e.g., "Plaintiffs'

Demand to Exchange Expert Witness Information"; the October 22, 2018 Case Management Statement that was submitted by "Plaintiffs, Kimberly Sandoval"; as well as other filings signed by counsel Bradley Corsiglia as "Attorneys for Plaintiffs." (See MPA pp. 8-9.)

Sandoval rejects this analysis, arguing the offer clearly specified that it was "inclusive of all liens", indicating that the offer also applied to the medical costs incurred by decedent and recoverable under the survival cause of action. (Oppo. p. 2.) The court finds that Plaintiff's argument to be more persuasive.

Any initial ambiguity created by referring to "Plaintiff" in the singular, is satisfactorily resolved when one considers the substantive terms of the offer. At the time of the offer, Defendant was certainly aware of the huge medical costs incurred by decedent, and that medical liens would attach to any recovery by Sandoval for these special damages under the survival cause of action. The offer expressly included recovery of these costs by the estate.

Despite this language and without providing any explanation, defense counsel simply concludes that his client did not believe the offer also included the $2.37 million in medical bills incurred by decedent. In so doing, counsel unreasonably reads this material term out of the settlement offer. If there was any doubt about the scope of the offer Defendant could have requested clarification, if any was needed. By not doing so, Defendant and its counsel ignored the relevance of this language at their peril.

Reading the settlement offer in the context of this litigation, the court finds that Sandoval was presenting a joint § 998 offer to settle *both* Sandoval's wrongful death claim and the survival claim.

2.

The § 998 Offer is Valid

Alternatively, Acadia contends that the unallocated joint offer was invalid on its face, Defendant asserts that without this apportionment, the joint offer to compromise did not afford it the opportunity to evaluate the separate and distinct losses suffered by each "plaintiff" as a result of Pinto's death. The argument goes, that without an allocation of the offer between the distinct claims, it was impossible to conclude that Sandoval received a more favorable judgment in each of her separate capacities than each plaintiff would have received under the settlement offer. (MPA p. 9-12) In support of this argument, Defendant relies upon a line of cases represented by *Gilman v. Beverly California Corp.* (1991) 231 Cal. App. 3d 121, *post.*

a.

Gilman Line of Cases

Gilman, supra, holds that an unallocated joint offer ***from*** multiple plaintiffs to a single defendant is void because it did not allow the defendant "to determine whether each individual plaintiff in fact obtained a more favorable judgment than her offer." (*Id.*, 231 Cal.App. 3d at p. 124.)
In *Gilman*, four heirs of decedent sued the skilled nursing facility for wrongful death/medical malpractice, and presented the single defendant with a § 998 joint offer to compromise without allocating the settlement amount among their individual claims. At trial, plaintiffs ***collectively*** obtained a more favorable judgment than the offer. The trial court awarded plaintiffs their expert witness costs under Code of Civil Procedure section 998 and prejudgment interest pursuant to

Civil Code § 3291. In reversing the award, the Court of Appeal held the unallocated joint settlement offer was invalid because it did not permit the defendant "to evaluate the separate and distinct loss suffered by each plaintiff as a result of the death of [their decedent]. Without an apportionment of the damages among the four plaintiffs, it is impossible to say that any one of them received a judgment more favorable than she would have received under the offer." (*Id.* at p. 126.)

Gilman relied on *Hurlbut v. Sonora Community Hospital* (1989) 207 Cal.App.3d 388, where the court held that a joint unallocated offer to compromise, ***tendered by three plaintiffs***, precluded the court from being able to determine "whether *each* plaintiff received a judgment more favorable than the offer." (*Id.*, at p. 409, italics in original.) There, each of the plaintiffs received a verdict for less than the offer, although the aggregate verdict was greater than the offer.

Applying the same reasoning, other courts have invalidated unallocated joint offers made either to multiple plaintiffs or to multiple defendants. (See *Burch v. Children's Hosp. of Orange County Thrift Stores, Inc.* (2003) 109 Cal. App. 4th 537, 544 ["The rule applies with equal force whether the lump sum offer is made by a plaintiff to multiple defendants, or by a defendant to multiple plaintiffs."].)

In these situations, the courts have held that a § 998 offer made to multiple parties is valid "only if it is expressly apportioned among them and not conditioned on acceptance by all of them." (*Burch, supra*, 109 Cal.App.4th at p. 544 [single offer from one plaintiff ***to multiple defendants***]; *accord. Taing v. Johnson Scaffolding Co.* (1992) 9 Cal.App.4th 579, 585 [holding plaintiff's single offer ***to multiple defendants*** for injuries sustained at construction site, was invalid because it was not "sufficiently specific to permit the individual defendant to evaluate it and make a reasoned decision whether to accept, without the additional burden of obtaining the acceptance of codefendants. . . ."]; accord. *Meissner v. Paulson* (1989) 21 Cal.App. 3d 785, 791 ["[O]nly an offer made to a single plaintiff, without need for allocation or acceptance by other plaintiffs, qualifies as a valid offer under section 998."]; *see*, *Randles v. Lowry* (1970) 4 Cal.App. 3d 68, 74 [a single offer by one defendant ***to three plaintiffs*** (husband, wife and child) who sued defendant for personal and property damages resulting from a car accident, was held to be invalid because it "was impossible to say that any one plaintiff received a less favorable result than he would have under the offer of compromise."].)

b.

Stallman Line of Cases

In a split of authority on this issue, Sandoval relies on a line of cases represented by *Gonzalez v. Lew, supra,* 20 Cal. App. 5th 155 and *Stallman v. Bell* (1991) 235 Cal. App. 3d 740, which have rejected the absolute rule, *ante*, that an unallocated joint offer is always invalid. (Oppo. pp. 8-10.)

Instead, these courts take a more pragmatic approach by examining the facts surrounding the litigation, the alignment of the multiple plaintiffs' interests, and whether the jury returned single or separate verdicts, in order to determine if the party claiming costs has, in fact, obtained a more favorable judgment than the offer.

Stallman, a case closely resembling ours, involved a wrongful death action brought by the decedent's wife, Ann Stallman and a survival action brought by William Stallman as administrator of the decedent's estate, against multiple defendants, for fatal injuries sustained when defendants' truck crashed into plaintiffs' car. Plaintiffs made an unallocated offer of $225,000 which was refused, and a jury returned a verdict for plaintiffs jointly in the amount of $224,500, i.e., less than the § 998 offer. Nevertheless, the court granted plaintiffs' request for expert witness fees under § 998, but disallowed prejudgment interest. Both sides appealed.

The appellate court rejected defendants' argument that the unallocated offer was void from its inception because it was made jointly by both the individual plaintiff and the decedent's estate without explaining how it should be divided between them. The court concluded that since the jury returned a single verdict for both plaintiffs, it could be easily determined whether plaintiffs received a more favorable judgment compared to the single offer, and on these facts the joint offer did not prevent determination of whether plaintiffs received a more favorable judgment. (*Id.* at p. 747.) The *Stallman* court additionally found the joint offer to be valid because any damages awarded to the estate would ultimately pass to plaintiff Ann Stillman as the sole intestate heir. (*Ibid.*)

Similar reasoning was used in *Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241 to validate a joint offer ***from multiple plaintiffs*** to the defendant. There, a toddler suffered severe injuries after she fell out of a moving car. (*Id.* at p. 248.) The toddler filed a personal injury claim against the manufacturer of a custom part installed on the car, while her mother, the driver of the car, sought emotional distress damages. The two plaintiffs offered to settle their claims for $1 million and the defendant rejected the offer. (*Id.* at pp. 246–247, 249.) The mother later dismissed her claim and the case proceeded to trial only on the toddler's claim. (*Id.* at p. 262.) The jury awarded the toddler more than $23 million in damages. (*Id.* at p. 250.) Citing *Randles* and *Hurlbut*, defendant argued that the joint § 998 offer was invalid because it was impossible to determine whether a more favorable verdict was obtained at trial. (*Id.* at p. 263.) The *Fortman* court rejected that contention, noting that while in *Randles* and *Hurlbut* it could not be determined after trial whether the individual plaintiffs received more than they would have received had the offer to compromise been accepted, the "[toddler's] $23 million-plus award leaves no doubt in anyone's mind that her recovery far exceeded the statutory offer" of $1 million. (*Id.* at p 263.)

In *Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, plaintiffs' decedent, a Marine Corps pilot, died in a helicopter crash. The surviving spouse and children sued the manufacturer of the helicopter engine contending it used defective fuel nozzles in the engine. (*Id.* at p. 615.) The manufacturer rejected the plaintiffs' $1 million unallocated joint settlement offer; the jury subsequently awarded the three plaintiffs $2.1 million in economic damages and awarded the decedent's spouse $1.3 million in noneconomic damages. (*Id.* at p. 628.) The trial court awarded the plaintiffs additional costs, including expert witness fees, based on their section 998 offer. On appeal, defendant made the same argument as Acadia does here, i.e., the joint offer was invalid because "it could not evaluate the joint offer with respect to each plaintiff at the time the offer was made and it is now impossible to tell what portion of the combined verdict the jury assigned to each plaintiff.... [I]t cannot be determined if the award was more favorable than the terms of the offer; and the court should have denied plaintiffs' motion for prejudgment interest and expert fees." (*Ibid.*)

Noting that the results reached in *Gilman* and *Stallman* could not be reconciled, but finding *Stallman* to be better reasoned, the *Johnson* court rejected defendant's argument and concluded that where a single joint action for wrongful death is given to all heirs (Code Civ. Proc., § 377.60), who can only bring one action and where the judgment must be for a single lump sum even though the heirs share the damages in proportion to their loss, there would appear to be little, if any, justification for invalidating a joint offer. (*Johnson, supra,* 28 Cal. App. 4th at p. 630.) Following the reasoning of *Stallman*, the *Johnson* court affirmed the cost award. The court emphasized, as a matter of "[c]ommon sense," where plaintiffs made a joint offer of $1 million and received verdicts of $2.1 million (for all three heirs) and $1.3 million (for the decedent's spouse), "[c]ompelling logic leads to the conclusion that these plaintiffs recovered more than the amount of their section 998 offer." (*Ibid.*)

Most recently, in *Gonzalez v. Lew*, *supra*, 20 Cal.App. 5th 155, two persons, Virginia and a young boy named Maverick, died in a residential fire in the home their family rented. Juan is Virginia's husband and Maverick is Juan's son with a different woman, Kathleen. In a single action against the building's owners/landlords, Virginia's husband Juan and their children brought a wrongful death cause of action for Virginia's death, and Juan and Katherine alleged a wrongful death cause of action for their son Maverick's death. Both sets of plaintiffs made a single, unapportioned joint settlement offer of $1.5 million which defendants rejected. Defendants countered with a global offer of $1 million, which plaintiffs rejected. The jury returned separate verdicts: $2,254,300 to Virginia's heirs, and $357,100 to Maverick's heirs. Plaintiffs jointly requested expert witness fees and prejudgment interest under § 998, claiming they recovered more than their settlement offer to the Lews. The Lews moved to strike the plaintiffs' costs, contending the plaintiffs' joint § 998 offer was invalid because it involved two independent wrongful death claims. (*Id.* at p. 159.) The trial court denied the motion to tax, finding § 998 does not require the separation of claims and that section does not invalidate joint offers. (*Id.* at pp. 159-160.)

The appellate court agreed and held "the idea that an offer jointly made is invalid from its inception simply because it is jointly made, has been repeatedly rejected." (*Id.* at p. 167.) After conducting a thorough review of the divergent lines of cases, the court noted that unallocated settlement offers may be valid in situations where: one plaintiff does not have to obtain the consent of another to settle; the plaintiffs exhibit a unity of interest and suffer a single indivisible injury; or where the jury renders a verdict from which it is easy to determine whether a more favorable result was obtained at trial. (*Id.* at pp. 163-164.)

On the facts before it, the *Gonzalez* court adopted the rationale in *Fortman*, finding that Plaintiffs were properly awarded their § 998 costs and concluding the record clearly indicated that Virginia's heirs obtained a more favorable result at trial ($2.25 million) than the plaintiffs' $1.5 million settlement offer. (*Id.* at pp. 170-171.)

c.

Analysis

Reviewing the cases discussed above, the court adopts the pragmatic approach as reflected in *Gonzalez, Stallman, et al.* and court finds Sandoval's unallocated settlement offer to Defendant Acadia for both of her claims, did not render the § 998 offer invalid from its inception. Rather, Sandoval is the only person who is entitled to receive the judgment under both claims, she did not have to obtain anyone's consent to settle, there was no uncertainty over what claims are intended to be covered in the settlement offer and it was easy to determine if Plaintiffs received a more favorable jury award.

First, the record shows that at the time of the offer, Defendant was aware of the Estate's claim of $2.37 million in medical costs. (See Corsiglia decl. Ex. A, MPA p. 5, attached to Memorandum of Costs). It would not have been difficult for Defendant to evaluate its potential liability for Sandoval's recovery under each claim. To paraphrase Defendant's own language, this information placed Defendant on notice of "who gets what", such that it could make a reasoned comparison between the § 998 offer and any potential recovery by Sandoval. (MPA p. 11:18-19)

Secondly, since the offer was made to only one offeree, we are not faced with the unfairness noted above, i.e., where one of the parties wishes to settle, but the offer is conditioned upon the acceptance by all offerees. (See *Burch, supra*, 109 Cal.App.4th at p. 544.)

Third, there is no conflict or uncertainty about Sandoval's offer to settle both of her claims, since it is made to a single Defendant by a single individual who will receive the entire judgment amount. (See *Peterson v. John Crane, Inc.* (2007) 154 Cal.App.4th 498, 507 ["Thus, when Peterson assumed the roles of successor-in-interest and legal heir, she did not become a different person, a different plaintiff, or a different party, but merely acquired the legal capacity to pursue particular legal theories (as the same individual party). There was only one offeree plaintiff for purposes of section 998."].)

Here, we have a global offer of compromise made by one individual to settle her two sets of claims, and under these facts no apportionment is necessary to allow Defendant to evaluate its potential liabilities to that individual. If Sandoval desired to end the litigation by making a single, global offer to settle both claims, the court should not create obstacles that would otherwise undermine § 998's policies of "encouraging reasonable settlements, compensating injured parties, and avoiding the injection of uncertainty into the 998 process, . . ." (*Gonzalez, supra*, 20 Cal.App. 5th at p. 172.)

The court finds that Sandoval's § 998 offer is valid and her total recovery after trial of $8.9 million for both of her claims, is obviously greater than her rejected $7 million settlement offer. The motion to strike the entire cost memorandum on the ground that she did not recover a jury verdict greater than her settlement offer is denied. Accordingly, Sandoval is entitled to recover her reasonable expert witness fees and also the prejudgment interest from the date of Plaintiffs' offer.

II.

Motion to Tax Other Costs

Defendant moves to tax the following costs:

1. Fees for six expert consultants who were not deposed and who did not testify. ($54,900.00);
2. Fees paid to six expert witnesses who were disclosed and deposed and who testified at trial ($127,864.00);
3. Reimbursement of fees paid to the defendant's witnesses for their deposition time ($ 9,350.01);
4. Costs for service of process on witness Nurse Kevin Oco ($1,490.00); and
5. Fees for services of video technicians and equipment rental for presentation of electronic evidence, including videos of depositions, powerpoint presentations, audio recordings. ($84,627.78.)
6.

A.

Legal Standard

Code of Civil Procedure Section 1032(b) provides that "[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." Costs allowable under section 1033.5(a) are recoverable as a matter of right, so long as they were reasonably necessary to the conduct of the litigation and reasonable in amount. (§ 1033.5(c)(2), (3); *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 130.) An item not specifically allowable under subdivision (a), and *not prohibited* under subdivision (b), may nevertheless be recoverable in the discretion of the court if "reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation." (§ 1033.5(c)(2)(4); *Ladas v. California State Automobile Assn.* (1993) 19 Cal.App.4th 761,773-774.)

Section 1033.5 identifies allowable costs, including among other things: filing, motion, and jury fees; service of process fees; ordinary witness fees; travel expenses and fees for taking and transcribing necessary depositions; and the electronic presentation of evidence.

If the items on a memorandum of costs appear to be proper charges, the verified memorandum is prima facie evidence that the costs identified therein were necessarily incurred by the defendant, and the objecting party has the burden of showing that an item is not properly chargeable or is unreasonable. (*Adams v. Ford Motor Co.* (2011) 199 Cal. App. 4th 1475, 1486–1487; *Nelson v. Anderson, supra,* 72 Cal.App.4th at p. 131.) If the items are properly objected to, those items are put in issue and the burden of proof is on the party claiming them as costs. (*Ibid.*)

"Where costs are not expressly allowed by the statute, the burden is on the party claiming the costs to show that the charges were reasonable and necessary. [Citation.] 'Whether a cost item was reasonably necessary to the litigation presents a question of fact for the trial court and its decision is reviewed for abuse of discretion.' [Citation.]" (*Foothill-De Anza Community College Dist. v. Emerich* (2007) 158 Cal.App.4th 11, 29–30, *internal citations omitted.*)

B.

Analysis

1. Expert Consultants Fees - $54,900.00 (Attachment 8b)

Plaintiff has agreed to tax these expert costs in the amount of $**27,415** because these were pre-offer costs that were improperly included in the cost memorandum. (Oppo. p. 14; Corsiglia decl. ¶ 7.) The motion is granted as to these fees.

As for the remainder of fees, Defendant argues the fees for consultant experts not ordered by the court are improper; and in any case, Plaintiff has not proved these costs were reasonable and necessary. (MPA p. 13-16.)

Courts have recognized that section 998 covers the cost of experts who aid in the preparation of the case for trial, even if they do not actually testify. (*Bates v. Presbyterian Intercommunity Hosp., Inc.* (2012) 204 Cal. App. 4th 210, 222; *Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 112, 124.) Attached to Plaintiff's Opposing papers are the invoices for these fees. Also, in his declaration defense counsel Mr. Corsiglia's attests to the necessity and reasonableness for the assistance and advice of these experts. (Corsiglia decl. ¶ 5, Ex. 4.)

In its Reply, Defendant attacks the invoices of Dr. Gagne ($8,640), Dr. Ignatov ($11,700.) and Marlon Professional Corp. ($25,600) [including 20 hrs. for "case and deposition review"], as "block billing" that lacking in sufficient detail to determine the necessity and reasonableness of their services. (Reply p. 7) Comparing this § 998 fee request to the proof required in analyzing a prevailing party's motion for attorney fees under Civil Code § 1717(a), Defendant asserts that the Plaintiff's expert consultants were required to identify each deposition and record reviewed and the nature of the research each expert conducted in order to establish the necessity and reasonableness of their fees. Defendant has not cited to the court any case which applies that rule to a determination of the reasonableness of expert fees under § 998.

Even assuming the rules are the same, courts recognize block billing to be improper only "when the practice prevents [trial courts] from discerning which tasks are compensable and which are not. [Citations.]" (*Heritage Pac. Fin., LLC v. Monroy* (2013) 215 Cal. App. 4th 972, 1010–1011.) The court finds the invoices adequately allow a determination of the reasonableness of the services provided.

First, the court finds that Dr. Gagne's invoice adequately breaks down the individual tasks to substantiate the hours billed and does not qualify as "block billing." It is also true that the invoices of Dr. Ignatov and the Marlon Group were less specific and these consultants grouped all the tasks performed for the hours billed, e.g., Dr. Ignatov - "Re: Sandoval v. Bayside Marin Treatment Center, File review, additional records, research. 5.25 [hrs.]" However, Plaintiff's counsel additionally submitted a verified declaration describing the purposes for which these experts were consulted and attesting that these experts "spent a considerable amount of time reviewing the voluminous case file and provided me with valuable expert assistance leading up to trial." (Corsiglia decl. ¶ 5.)

This declaration and the fact that Plaintiff had paid for their services without dispute before obtaining a favorable judgment, provides sufficient evidence of the necessity and reasonableness of their costs. "The reasonableness of the expert costs is readily ascertainable from counsel's

expert disclosure declaration which places the challenged services in context, as well as from the paid invoices themselves." (*Jones v. Dumrichob* (1998) 63 Cal. App. 4th 1258, 1268.)

Defendant could have, but has not, rebutted Plaintiff's evidence by a showing that the medical records and the deposition testimony were not so numerous and extensive to justify the hours these consultants recorded in reviewing them. For example, Defendant could have presented examples of the hours spent by its own experts in reviewing the same documents.

The court finds Defendant has failed to sustained its burden to establish the consultant fees were improper or unnecessary, and denies the motion to tax these fees is denied, except as described above.

2. Testifying Experts - $127,864 (Attachment 8b)

Without discussion or argument, Defendant moves to tax the costs of the testifying expert witnesses. (MPA p. 14-15.)

Because a party's verified memorandum of costs constitutes prima facie evidence that the listed expert witness fees were reasonable, an opposing party moving to tax costs has the burden of showing that the fees were improper and unnecessary. (*Bender v County of Los Angeles* (2013) 217 Cal.App.4th 968, 989 [defendants failed to meet their burden on their motion to tax costs for plaintiff's two expert witnesses, presenting no evidence that these costs were unreasonable or unnecessary].)

"[T]he decision to award expert witness fees, and the determination of whether these fees were reasonably necessary, are issues left to the discretion of the trial court." (*Adams v. Ford Motor Co., supra,* 199 Cal. App. 4th at p. 1484.) The trial court is " 'in a far better position, having heard the entire case and observed the demeanor of witnesses, to exercise its discretion and determine what was a reasonable amount and what was reasonably necessary. [Citation.]" (*Adams, id.* at p. 1484.)

Based on the invoices provided by Plaintiff (Corsiglia Ex. 5), counsel's declaration of the relevance and necessity of these witnesses (Corsiglia decl. ¶ 6), the highly contested issues at trial, together with the court's own observations of these witnesses during trial, the court finds these costs were reasonable and necessary to the conduct of the litigation. Defendant has not sustained its burden to show otherwise.

The motion to tax these costs is denied.

3. Reimbursement of Fees Paid for Deposition of Defendant's Experts - $6,049.00 (Attachment 8a)

Defendant moves to tax Plaintiff's costs for deposing Defendant's disclosed experts: David Kan, M.D. ($2025); Samuel Miles, M.D., Ph.D. ($1,687); Mitchell Spirt, M.D. $1,737) and Brent Bowers (§ 600) (Corsiglia decl. ¶ 8), on the ground the court did not order the depositions of these experts. (MPA p. 15) Defendant does not contest the reasonableness of the amounts paid.

Section 1033.5(b)(1) provides that fees for experts not ordered by the court are not allowed, "except where expressly authorized by law." Nevertheless, it has been recognized that § 998 vests the trial court with discretion to award costs for deposing the opposing side's expert

witnesses if the trial court finds it was reasonably necessary to the conduct of the litigation. (*Chaabanv. Wet Seal, Inc.* (2012) 203 Cal. App. 4th 49, 55.) The court finds Plaintiff was reasonably justified in taking the depositions of these critical defense experts, and denies the motion to tax these costs.

Plaintiff concedes her cost bill erroneous includes $3,050 paid to several treating physicians for their deposition and their trial testimony, when the witnesses fees paid to these non-designated treating physicians is statutorily limited to ordinary fees of $35.00/day, plus mileage. (Gov. Code § 68093.) (Corsiglia decl. ¶ 9.) Plaintiff agrees to tax her cost bill in the amount of $2,910.00. (Oppo. p. 16-17) The motion to tax this cost is granted. The motion to tax the difference is denied.

4. Fees for Service of Process on Nurse Kevin Oco - $1,490 (Attachment 5)

Defendant contends these process server fees were not reasonably necessary since Nurse Oco did not testify at trial. (MPA p. 16.) Because reasonable costs for service of process are expressly allowable (Code Civ. Proc. § 1033.5(a)(4), the burden is on Defendant to show them to be unnecessary or unreasonable. (*Nelson, supra,* 72 Cal. App. 4th at p. 131.) Defendant has not sustained its burden to show that Plaintiff's unsuccessful attempts to serve process on this witnesses were not reasonable and necessary. As Plaintiff points out, Nurse Oco's testimony at trial was essential, but because he was evading service Plaintiff had no choice but to play his deposition testimony at trial. (Corsiglia decl. ¶ 10, Ex. 7.) The court finds this cost to be reasonable and necessary, and not just convenient, and the motion to tax this cost is denied.

5. Trial Technicians - $84,627.78 (Attachment 16)

Defendant moves to tax costs incurred for post-offer services for electronic trial presentation paid to EJV communications ($49,809) and Verdict Group, Inc. ($34,818.00), asserting "it is impossible to determine what these two different Trial Technicians did during the trial." (MPA p. 16.) Defendant also maintains that the fees it had paid the Trial Technician named Drew for handling the visual displays during trial, should not be awarded to Plaintiff.

Unlike other specifically authorized costs (e.g., filing fees), the statute conditionally allows for electronic trial presentation costs if "they were reasonably helpful to aid the trier of fact." (Code Civ. Procedure § 1033.5(a)(13).) Plaintiff, as the party seeking these fees, bears the burden of making this showing.

Attached to Defense counsel Mr. Corsiglia's declaration are the detailed invoices from the two technology providers. (Corsiglia Exs. 8,9.) Corsiglia explains that EJV Communications (EJV) provided technicians who assisted counsel by providing trial preparation of evidence and exhibits used throughout the trial and whose services included extensive editing of multiple videotaped depositions and the preparation and editing of various PowerPoint presentations. The technicians also assisted counsel during trial with videotape editing and playback. (Corsiglia decl. ¶ 11.) The court finds EJV's technicians enhanced counsel's advocacy and effectiveness in presenting Plaintiff's case, and they were reasonably necessary to the conduct of the litigation.

Mr. Corsiglia's declaration also shows that Plaintiff and Defendant split the cost of Verdict Group's technician Mr. Lloyd from March 29 through the end of trial on April 13, 2023, with Plaintiff paying the remainder. (decl. ¶ 12) As explained by Corsiglia, Mr. Lloyd was present

throughout the trial and on stand-by to monitor the equipment and to fix any glitches. He provided both sides with audio-visual equipment and support so the jury could view videotaped and remote witness testimony. (Corsiglia decl. ¶ 12)

By sharing the costs of Mr. Lloyd's services, Defendant implicitly concedes Mr. Lloyd's expenses to be a reasonable and necessary cost for this trial. (See *Bender*, *supra*, 217 Cal.App.4th 968, 989 [costs for a trial technician for nine days of trial was found to be reasonable and necessary].) On this record, Defendant cannot claim ignorance of Mr. Lloyd's non-partisan support services, or how they differed from those exclusively provided by EJV as part of Plaintiff's litigation team.

Plaintiff has agreed to tax the cost bill in the amount of $8,600, reflecting the amount of the services paid by Defendant. The court grants the motion to tax for this amount.

Plaintiff has sustained her burden by providing evidence showing that the services and costs paid by Plaintiff for these technical services (except for the amount taxed) to be reasonable in amount and necessary for Plaintiff's preparation and conduct of trial. The motion to tax the remainder of these costs is denied.

6. Prejudgment Interest - $3,178,568 (Attachment 16)

Defendant moves to tax the claimed prejudgment interest ($3,178,568) on the ground that Plaintiff did not recover a more favorable judgment than the § 998 offer. (MPA pp. 16-17.) Defendant does not contest the calculation of the prejudgment interest. As discussed above, this court has found that Sandoval's recovery was greater that the settlement offer and the motion to tax is denied.

A personal injury plaintiff is also entitled to prejudgment interest at the annual rate of 10 percent, calculated from the date of the plaintiff's first offer that is exceeded by the judgment, pursuant to Civil Code § 3291: "[T]he judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to Section 998 of the Code of Civil Procedure which is exceeded by the judgment, and interest shall accrue until the satisfaction of judgment." The court finds that Plaintiffs' calculation $3,178,568, made after deducing the $50,000 improperly awarded by the jury for Pinto's lost income, and the amount of Pinto's share of comparative fault (1%), to be accurate. (Corsiglia decl. ¶ 13, Ex. 10.) The judgment entered shall include this amount.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for October, 2023 is as follows:
https://www.zoomgov.com/j/1605153328?pwd=eUU1OE9BTG5tWHgrOFNKMmVvd2tFQT09
Meeting ID: 160 515 3328
Passcode: 360075

If you are unable to join by video, you may join by telephone by calling* 1-669-254-5252 *and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: marin.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 10/06/23 TIME: 1:30 P.M. DEPT: E CASE NO: CV2202843

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: S. HENDRYX

PLAINTIFF: THE COUNTY OF MARIN, ET AL vs. DEFENDANT: MONSANTO COMPANY, ET AL	

NATURE OF PROCEEDINGS: MOTION TO AMEND

RULING

Plaintiffs' motion to amend the Complaint to join the City of Larkspur and the Town of Fairfax as plaintiffs is granted. (Code Civ. Proc., §§ 378, subd. (a)(1) & 473, subd. (a)(1).)
The Motion for Paul M. Stephan to Appear as Counsel Pro Hac Vice is granted *nunc pro tunc* to September 6, 2023.

BACKGROUND

This lawsuit arises out of alleged polychlorinated biphenyl ("PCB") contamination of the County of Marin (the "County"), along with municipalities within the County's geographic boundaries, and the San Francisco Bay (the "Bay"). The State of California, the County, and numerous municipalities within the County ("Plaintiffs") allege that the Monsanto Company caused PCB contamination of the environment in and near the County over a period of several decades. (Complaint, ¶ 6.) According to the Complaint, the California State Water Resources Control Board has issued a regulation (the "Phase II Permit") that regulates discharge from stormwater systems, including several stormwater systems in Marin County. (*Id.*, ¶¶ 107-08.) "[T]he next version of the Phase II Permit will require the County and the Municipalities to sharply limit...PCB discharges." (*Id.*, ¶ 110.) Plaintiffs allege that they "will soon become subject to [these] new, stringent regulations[,]" "will incur substantial costs to comply[,]" and "will continue incurring these costs for at least the next several decades[.]" (*Id.*, ¶¶ 13-14.) They bring claims for representative and non-representative public nuisance, private nuisance, and trespass, stating that Monsanto, not taxpayers, should foot the bill. (*Id.*, ¶ 16.)

Plaintiffs now seek to amend the complaint to join the City of Larkspur ("Larkspur") and the Town of Fairfax ("Fairfax") as Plaintiffs. (Memorandum, p. 1.) The proposed amendment entails no substantive changes; the only effect would be the joinder of Larkspur and Fairfax. (Edling

Dec., ¶ 2; see generally Proposed First Amended Complaint.) Defendants have agreed to join Larkspur as a plaintiff, but will not consent to the joinder of Fairfax. (Edling Dec., ¶ 4.)

LEGAL STANDARD

Under Code of Civil Procedure section 473, subdivision (a)(1), the Court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding. As judicial policy favors resolution of all disputed matters in the same lawsuit, courts liberally permit amendments of the pleadings. (*Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939.) Denial is rarely justified. "If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion. [Citations]." (*Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530; see also Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2022) ¶ 6:639.) As long as no prejudice to the defendant is shown, the liberal policy regarding amendment prevails. (*Mesler v. Bragg Mgt. Co.* (1985) 39 Cal.3d 290, 297.)

Generally, courts allow the amendment and then let the parties test the legal sufficiency in other appropriate proceedings such as a demurrer. (See *Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048, and *Atkinson* v. *Elk Corp.* (2003) 109 Cal.App.4th 739, 760; see also Weil & Brown, *supra*, at ¶ 6:644.)

While California law holds that this leave is to be granted liberally to accomplish substantial justice for both parties (*Hirsa v. Superior Court* (1981) 118 Cal.App.3d 486, 488-489), a party requesting leave to amend must also comply with California Rules of Court, rule 3.1324. Compliance is satisfied by including a copy of the proposed amended pleading; detailing what changes will be made from the previous pleading by stating what allegations are to be deleted or added as compared to the previous pleading, including page, paragraph and line number; and attaching a declaration by plaintiff's counsel as to: (1) the effect of the amendment, (2) why the amendment is necessary and proper, (3) when the facts giving rise to the amended allegations were discovered, and (4) why the request was not made earlier.

Code of Civil Procedure, section 378, subdivision (a) provides that "all persons may join in one action as plaintiffs if (1) [t]hey assert any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action; or (2) [t]hey have a claim, right, or interest adverse to the defendant in the property or controversy which is the subject of the action." "The purpose of section 378 is to permit the joinder in one action of several causes arising out of identical or related transactions and involving common issues. The statute should be liberally construed so as to permit joinder whenever possible in furtherance of this purpose." (*Coleman v. Twin Coast Newspaper, Inc.* (1959) 175 Cal.App.2d 650, 653.)

DISCUSSION

Plaintiffs argue that Fairfax's, Larkspur's, and the existing Plaintiffs' claims are predicated on "virtually identical allegations." (Memorandum, p. 3.) They add that Fairfax "drains into the

Bay," "will be required to limit PCB discharges [to the Bay]" as a co-permittee to the Phase II Permit, and "is impacted by PCBs in the same manner as other Plaintiffs." (*Ibid.*) The Court agrees that joinder is proper under these circumstances, especially as Defendants do not argue that they will be prejudiced by the amendment. (See *Mesler, supra,* 39 Cal.3d 290, 297.)

Defendants object that Fairfax's claims are not ripe for adjudication. (Opposition, p. 4.) An opposition to a motion to amend is not a proper vehicle for Defendants' ripeness objection. (See *Kittredge, supra,* 213 Cal.App.3d 1045, 1048 [procedure is to permit amendment and then allow the parties to test the legal sufficiency by other means].) In the Court's view, that Fairfax's allegations and the existing Plaintiffs' allegations are identical makes the instant motion an even less appropriate vehicle for addressing ripeness issues because it means the ripeness objection would apply equally to Fairfax and the existing Plaintiffs. If this is the case, efficiency favors adding Fairfax as a Plaintiff and litigating Defendants' ripeness objections as to all Plaintiffs in unison.

Any ripeness objections can be addressed at a later time. Plaintiffs bring claims for public and private nuisance and trespass, all based on historic and/or ongoing – not future – PCB contamination. The legal and factual questions central to resolving those claims (i.e., did Defendants' behavior create a nuisance or amount to trespass?) are ripe for judicial resolution.

Accordingly, the Court grants Plaintiffs' request to amend the Complaint to join Fairfax and Larkspur as Plaintiffs. (Code Civ. Proc., §§ 378, subd. (a)(1) & 473, subd. (a)(1).)

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for October, 2023 is as follows:
https://www.zoomgov.com/j/1605153328?pwd=eUU1OE9BTG5tWHgrOFNKMmVvd2tFQT09
Meeting ID: 160 515 3328
Passcode: 360075

If you are unable to join by video, you may join by telephone by calling* 1-669-254-5252 *and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: https:// www.marin.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 10/06/23 TIME: 1:30 P.M. DEPT: E CASE NO: CV2301150

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: S. HENDRYX

PLAINTIFF: ANDERSON CAREGIVERS LLC vs. DEFENDANT: MARGARET MALKEMUS, ET AL	

NATURE OF PROCEEDINGS: DEMURRER – ON DEFENDANT MARGARET MALKEMUS' DEMURRER TO PLAINTIFF'S COMPLAINT FOR DAMAGES AND CONCURRENT MOTION TO STRIKE PORTIONS [DEFT] MARGARET MALKEMUS

RULING

Defendant Margaret Malkemus' Demurrer to the Complaint is dropped form calendar. Plaintiff dismissed her complaint on September 26, 2023.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for October, 2023 is as follows:
https://www.zoomgov.com/j/1605153328?pwd=eUU1OE9BTG5tWHgrOFNKMmVvd2tFQT09
Meeting ID: 160 515 3328
Passcode: 360075

If you are unable to join by video, you may join by telephone by calling* 1-669-254-5252 *and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: https:// www.marin.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 10/06/23 TIME: 1:30 P.M. DEPT: E CASE NO: CV0000737

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK: S. HENDRYX

PETITIONER: JACOB FRIEDMAN vs. RESPONDENT: CITY OF FAIRFAX, ET AL	

NATURE OF PROCEEDINGS: WRIT OF MANDATE HEARING

RULING

Petitioner Jacob Friedman's ("Friedman") petition for writ of mandate is granted in part and denied in part.

The petition is granted as to the following issue only at this time. Respondent Town of Fairfax (the "Town") is directed to set aside the Order to Stop Work to the extent it applies to construction that was specifically identified and approved in Friedman's original application, construction documents, approved plans, and the permit issued based on those documents. Friedman was entitled to a hearing prior to any suspension of the permit (and order to stop work based on that suspension) under *Trans-Oceanic Oil Corp. v. City of Santa Barbara* (1948) 85 Cal.App.2d 776 and *City of San Marino v. Roman Catholic Archbishop of Los Angeles* (1960) 180 Cal.App.2d 657. Friedman's petition is denied to the extent it requests the Court to direct the Town to adopt a different appeal process.

The Court does not rule on the remaining issues in Friedman's petition, namely, the Order to Stop Work on construction not yet approved by the Town, and the green tag. As reflected above, in order to suspend the permit and issue an Order to Stop Work based on that suspension, the Town is required to provide Friedman a hearing. At that hearing, the remaining issues may be raised by the parties and ruled upon by the Town. If there are further proceedings after that hearing that properly bring those issues before the Court, the Court will rule on them at that time.

Factual Allegations in the Verified Petition

On August 29, 2023, Friedman filed his Verified Petition for Alternative Writ and Stay and Writ of Mandamus (the "Petition") against the Town and the Office of Building Inspector of the Town of Fairfax. Friedman alleges that on July 6, 2021, he submitted an application to the Town for the construction of a house and an accessory dwelling unit ("ADU") at the property at 79 Wood Lane in Fairfax. (Petition, ¶6.) On January 20, 2022, the Planning Commission approved the

application. (*Id.*, ¶8.) On August 4, 2022, the Town issued a building permit (the "Permit"), and Friedman hired a crew and mobilized equipment to begin work on the project. (*Id.*, ¶¶9, 10.)

After the Town issued the Permit, Friedman informed the Town that he intended to submit an application pursuant to Government Code Section 65852 et seq. ("SB 9"). (*Id.*, ¶11.) Friedman submitted his application for changes to his plans on August 9, 2022. (*Id.*, ¶12.)

On August 10, 2022, the Town, through Building Official Mark Lockaby ("Building Official"), issued and posted an Order to Stop Work ("OSW") prohibiting further work at the project, noting that construction and excavation was beyond the scope of the Permit. (*Id.*, ¶13.)

On August 25, 2022, Friedman filed a petition for alternative writ and stay and mandamus. The parties resolved their dispute and the petition was dismissed without prejudice. (*Id.*, ¶14.)

Work continued at the project. Friedman made various changes to the structure. The Building Official requested documentation about the changes from Friedman, and Friedman provided them. The changes to the plans included: (a) a portion of the basement was shown to be an accessory dwelling unit; (b) a portion of the top floor had been prepared to be a junior ADU, including enclosing an upper deck, and the addition of an exterior stairway; and (c) the front low pitched roof is shown as being eliminated, and instead a roof deck above a portion of the lower floor even with the top floor is shown. (*Id.*, ¶15.) The Building Official agreed that Friedman could continue with work at the project, but requested that Friedman obtain approval of the second two changes from the Planning Commission before performing any further work on those changes. (*Id.*, ¶16.)

Believing the Building Official to be incorrect, Friedman continued construction with the intent to submit the changes for approval after the project was completed. (*Id.*, ¶17.)

On June 8, 2023, the Building Official issued a notice to stop work on the project, noting that construction had not been approved. (*Id.*, ¶18.) Friedman submitted an appeal of this notice, which the City Council has not ruled upon, and continued working on the project. (*Id.*, ¶¶19-21.)

On July 20, 2023, the Building Official completed an electrical inspection of the project. Although the electrical system was in working order and up to code, the Building Official refused to approve it until Linda Neil signed off on it. (*Id.*, ¶22.) The Town's counsel told Friedman's counsel that the Town was withholding approval to force Friedman to submit new plans to the Planning Commission for approval. (*Id.*, ¶23.)

Friedman continued working on the project but was accruing damages caused by the Town's actions. On July 28, 2023, Friedman's counsel sent an email to the Town requesting that it issue a green tag for the project. For several weeks, the Building Official failed to respond to Friedman when Friedman tried to reach him. (*Id.*, ¶¶24-27.) On August 11, 2023, the Building Official advised Friedman that he would suspend the Permit under California Building Code [A] 105.6 until Friedman obtained approvals from the Town. (*Id.*, ¶¶28, 29.) A similar letter was posted at the work site, along with a stop work order, on August 14, 2023. (*Id.*, ¶30.) On August 17, 2023, the Building Official sent another letter to Friedman stating that the construction

documents he submitted did not reflect some of the construction that was being completed at the project. (*Id.*, ¶32.)

The Verified Petition asserts a single cause of action for a writ of mandamus under Code of Civil Procedure Sections 1085 and 1086. Friedman alleges that once the Town exercised its discretion as to whether a particular portion of work was installed in good and proper order, it was required by law to ministerially sign off on that inspection and issue a green tag allowing PG&E to connect power to the property. The Town violated its duties by (1) failing to issue the green tag once the Building Officer determined the electrical service and system was in good and working order; and (2) issuing, posting, and maintaining the OSW from August 11, 2023, prohibiting Friedman from continuing work under the Permit.

In his Prayer for Relief, Friedman requests an alternative writ and stay order requiring the Town to (1) rescind and stay enforcement of the OSW; (2) issue the green tag for the electrical system; and (3) establish an appeal procedure under the building code as required by section 1.8.8.1 et seq. and *Lippman v. City of Oakland* (2017) 19 Cal.App.5th 750. Friedman also seeks a writ of mandamus pursuant to Sections 1085-1087 ordering the Town to rescind and stay enforcement of the OSW and issue the green tag.

Procedural Background

On September 5, 2023, Friedman appeared ex parte seeking an order on the merits of his petition. The Court denied this request based on Friedman's failure to show sufficient urgency for an ex parte order. The Court issued an OSC ordering the Town to show cause why the petition should not be granted, to be heard on October 6, 2023. The Court entered a briefing schedule, requiring the Town's Opposition/Return to be filed by September 19, 2023 and any Reply/Traverse from Friedman to be filed by September 26, 2023.

Following the September 5th ex parte hearing, Friedman submitted an appeal with the Town to reconsider the suspension of the Permit. On September 13th, the Town rejected the appeal and upheld the Building Official's suspension of the Permit until Petitioner submits an application and receives approval of his modifications from the Planning Commission. (Declaration of Christopher Moffitt ("Moffitt Decl.,"), ¶2 and Exh. A.)

Standard

"A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by that inferior tribunal, corporation, board, or person." (Code Civ. Proc. § 1085.) A writ of mandate "will issue against a county, city, or other public body . . . ." (*County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 593 [citation and internal quotations omitted].)

A writ of mandate under Section 1085 is available where "the petitioner has no plain, speedy and adequate alternative remedy; the respondent has a clear, present and usually ministerial duty to perform; and the petitioner has a clear, present and beneficial right to performance." (*Conlan v.*

Bonta (2002) 102 Cal.App.4th 745, 751-752.) "Mandate will not issue to compel action unless it is shown the duty to do the thing asked for is plain and unmixed with discretionary power or the exercise of judgment. Thus, a petition for writ of mandamus under Code of Civil Procedure section 1085 may only be employed to compel the performance of a duty which is purely ministerial in character." (*Unnamed Physician v. Board of Trustees of Saint Agnes Medical Center* (2001) 93 Cal.App.4th 607, 618 [citation omitted].)

Request for Judicial Notice

The Town's request for judicial notice of Exhibits A-N, filed in connection with its Opposition to Friedman's ex parte application, is granted. (Evid. Code §§ 452, 453.)

The Fairfax Town Code

Section 15.04.010 of the Fairfax Town Code ("Town Code") provides that the Town has adopted Division II of Chapter 1 of the 2022 edition of the California Building Code ("CBC"), except for CBC Section 113. (Town Code § 15.04.010(A)(2)(a).)

CBC Section 105.1 provides: "Any owner or owner's authorized agent who intends to construct, enlarge, alter, repair, move, demolish or change the occupancy of a building or structure, or to erect, install, enlarge, alter, repair, remove, convert or replace any electrical, gas, mechanical or plumbing system, the installation of which is regulated by this code, or to cause any such work to be performed, shall first make application to the building official and obtain the required permit."[1] CBC Section 105.3 sets forth the information to be provided in an application for a permit, which includes the identification and description of "the work to be covered by the permit for which application is made" and requires the submission of construction documents. CBC Section 107.4 provides: "Work shall be installed in accordance with the approved construction documents, and any changes made during construction that are not in compliance with the approved construction documents shall be resubmitted for approval as an amended set of construction documents."

CBC Section 105.6 provides that the Building Official "is authorized to suspend or revoke a permit issued under the provisions of this code whenever the permit is issued in error or on the basis of incorrect, inaccurate or incomplete information, or in violation of any ordinance or regulation or any provisions of this code."

Town Code Section 17.024.060 provides: "No person, firm, or corporation shall erect, construct, enlarge, alter, repair, move, improve, convert or demolish any building or structure in the town, or cause the same to be done, without first obtaining a separate building permit for each such building or structure from the building official."

Town Code Section 17.024.120 provides the Town's appeal process: "All decisions of the Planning Commission in proceedings for the revocation or modification may be appealed and reviewed in substantially the same manner as provided for in Chapter 17.036 of this title."

---

[1] Exceptions from permit requirements are set forth in Section 105.2. These exceptions do not appear to be at issue in this action.

Discussion

Hearing Requirement

The Town argues that Building Code Section 105.6 authorizes the Building Official to suspend or revoke a permit, when the permit was issued on the basis of incorrect, inaccurate or incomplete information or is in violation of an ordinance or regulation, without a hearing. Therefore, the Town argues, it did not have a ministerial duty to provide Friedman with a hearing before suspending the Permit or issuing the OSW. Instead, it had discretion to suspend the Permit without a hearing and the Court cannot compel the Town to exercise its discretion differently. The Town argues that, as it previously advised Friedman, it exercised its discretion to suspend the Permit because there were three changes to the job plans that differed from the Permit.

The Court disagrees with the Town and finds that the Town owed a mandatory duty to provide Friedman with a hearing before suspending the Permit. In *Trans-Oceanic Oil Corp. v. City of Santa Barbara* (1948) 85 Cal.App.2d 776, the court stated:

> A permit may not be revoked arbitrarily 'without cause.' (53 C.J.S. § 44, p. 651.) It is conceded that in revoking the permit granted to appellant, the City Council of Santa Barbara did so without prior notice to appellant, without a hearing, and without evidence. In determining that a permit, validly issued, should be revoked, the governing body of a municipality acts in a quasi-judicial capacity. In revoking a permit lawfully granted, due process requires that it act only upon notice to the permittee, upon a hearing, and upon evidence substantially supporting a finding of revocation . . . The resolution of revocation in the instant case, adopted without notice or hearing or reception of competent evidence, was inoperative and of no legal force.

(*Id.* at pp. 783-784; see also *City of San Marino v. Roman Catholic Archbishop of Los Angeles* (1960) 180 Cal.App.2d 657, 669 ["it is conceded in this case that the rectory permit was 'revoked' without prior notice and without a hearing. Therefore, since the permit was validly issued, the attempted revocation was a violation of due process and 'was inoperative and of no legal force'"] [citation omitted].) Friedman's due process rights govern over the Code sections relied upon by the Town. (See *California Grocers Assn. v. City of Los Angeles* (2011) 52 Cal.4th 177, 188.)

Accordingly, the Town is directed to set aside the suspension of the Permit and the OSW to the extent it is directed at work previously approved by the Town and authorized under the Permit.

Appeal Procedure

The Town argues that it is not required to provide an appeal process in accordance with CBC Section 1.8.8.1 because this section is found under Division I of Chapter 1, which was never adopted by the Town. Instead, the Town processes appeals pursuant to Town Code Section

17.024.120, which provides: "All decisions of the Planning Commission in proceedings for the revocation or modification may be appealed and reviewed in substantially the same manner as provided for in Chapter 17.036 of this title." Chapter 17.036 provides for an appeal to the Town Council for any alleged "error in any order, requirement, permit, decision or determination made by an administrative official, advisory body or Planning Commission in the administration or enforcement of this title." (§ 17.036.010.) The Town Council may affirm, reverse, or modify the action taken, and the decision of the Town Council may be reviewed by the court. (§§ 17.036.060, 17.036.070.)

Friedman contends that even though the Town has not expressly adopted Section 1.8.8.1, the entirety of the CBC, including section 1.8.8.1, is applied against the Town in the State Housing Law, Health & Safety Code Section 17910 et seq. ("State Housing Law"). Friedman cites to *Lippman v. City of Oakland* (2017) 19 Cal.App.5th 750, in which the court found that the City of Oakland's single hearing officer appeals process conflicted with the procedures set forth in the CBC, including Section 1.8.8.1. The court rejected the City's argument that there was no conflict between the appeal process set forth in its municipal code and the CBC because the CBC required only the establishment of "process" to hear and decide appeals, which did not require an "appeals board". The court explained:

> We read the plain language of Building Code section 1.8.8.1 as mandating that local governments establish an appellate process, which may be satisfied in one of three ways: (1) by creating a local appeals board for new construction and a housing appeals board for existing buildings; (2) by creating an agency authorized to hear such appeals; or (3) by having the governing body of the city serve as the local appeals board or housing appeals board. Notably, however, the Building Code does not contemplate an appeal before a single hearing officer. Rather, the Building Code refers to an "appeals board." (Building Code, § 1.8.8.1, italics omitted.) A "local appeals board" is defined as "the *board or agency* of a city or county which is *authorized* by the governing body of the city or county *to hear appeals* regarding the building requirements of the city or county." (Health & Saf. Code, § 17920.5, italics added; see also Building Code, § 1.8.8.2.) The Building Code section explains, "In any area in which there is no such board or agency, 'Local appeals board' means the governing body of the city, county, or city and county having jurisdiction over the area." (Building Code, § 1.8.8.2, italics omitted; see also Health & Saf. Code, § 17920.5.) Thus, a city council or board of supervisors may be considered the local appeals board. Further, the local appeals board or governing body may act as the "housing appeals board." (Building Code, § 1.8.8.2; Health & Saf. Code, § 17920.6.) Consequently, at minimum, there is a mandatory duty to establish a local appeals board or an agency authorized to hear appeals. And, if no such board or agency exists, the governing body shall act as the local appeals board.

(*Id.* at p. 760 [emphasis in original].)

The appeal process set forth in Town Code Section 17.024.120 and Chapter 17.036, which provides for appeals to the Town Council, is consistent with CBC Section 1.8.8.1 and *Lippman.* Section 1.8.8.1 provides that where no appeal board has been established, a city's governing body shall serve as the local appeal board, and *Lippman* confirmed that "a city council or board of supervisors may be considered the local appeals board." (*Id.* at p. 760.) Friedman does not provide any explanation as to how the Town's procedure is otherwise inconsistent with CBC Section 1.8.8.1, so his request for writ of mandate directing the Town to adopt a different appeals procedure is denied.

Remaining Issues

The remaining issues raised in the petition, namely the OSW as it pertains to work not yet approved by the Town and the green tag, are premature and/or not properly before the Court as they will likely be subjects at issue in any hearing provided to Friedman.[2] The Court will not rule on them in the first instance.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for October, 2023 is as follows:
https://www.zoomgov.com/j/1605153328?pwd=eUU1OE9BTG5tWHgrOFNKMmVvd2tFQT09
Meeting ID: 160 515 3328
Passcode: 360075

If you are unable to join by video, you may join by telephone by calling* 1-669-254-5252 *and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: marin.courts.ca.gov

[2] This includes any application of Government Code Section 65852.21. Friedman acknowledges on page 7 of his brief that this could be raised at the hearing, as he includes his discussion of this section under the heading "If a hearing were conducted, the Town would fail to show that Friedman has violated Building Code 105.6.: