# SUPERIOR COURT OF CALIFORNIA
# COUNTY OF MARIN

DATE: 05/14/24 TIME: 1:30 P.M. DEPT: A CASE NO: CV1402511

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER: CLERK: Q. ROARY

| | |
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| PLAINTIFF: VOLPE COMPANY, INC.<br><br>vs.<br><br>DEFENDANT: SAUSAL CORPORATION (COMPLEX) | |

NATURE OF PROCEEDINGS: 1) MOTION – ATTORNEY'S FEES
2) MOTION – TAX COSTS

RULING

Volpe Company, Inc.'s ("Volpe") Motion for Attorneys' Fees is **GRANTED** in the amount of $939,284.89.

Sausal Corporation's ("Sausal") Motion to Tax Costs is **GRANTED** as to the $3,441 for electronic filing and service fees and $7,845.94 for transcripts. The motion is **DENIED** in all other respects.

Volpe is ordered to submit a proposed amended judgment to the Court which includes attorney's fees and costs and serve it on counsel for Sausal. Sausal shall have ten (10) days from service of the proposed amended judgment to submit and serve any objections to the proposed judgment.

## I. Volpe's Motion for Attorney's Fees

### A. Background

On June 30, 2014, Volpe filed its Complaint against Sausal, alleging breach of contract and common counts. Volpe filed a First Amended Complaint on October 10, 2014. (Declaration of Richard Bowles ("Bowles Decl."), ¶2 and Exh. A.) Volpe, a subcontractor, alleged that it entered into a written agreement with Sausal (the "Subcontract") with respect to a public works project in Novato. Under the Subcontract, Volpe agreed to furnish labor, materials, transportation, supplies, equipment and services related to the project, and Sausal agreed to pay Volpe no less than $408,007. (*Id.*, Exh. A at ¶9.) Volpe furnished $858,500 of labor, material and services, but Sausal failed to pay $459,768. (*Id.*, Exh. A at ¶10.)

Sausal filed a Cross-Complaint against Volpe for breach of contract. (Bowles Decl., ¶2.) Other parties were named as defendants and cross-defendants, but the claims against those parties were settled before trial, leaving only the competing breach of contract claims between Volpe and Sausal. (*Id.*, ¶3.)

After a jury trial ("Trial #1), the jury returned a verdict that became the Judgment After Jury Trial. The jury found among other things that Volpe and Sausal entered into a contract, that Sausal failed to comply with the requirements of Section 7.6 of the Project Manual, that Volpe was harmed as a result, and that Volpe's monetary damages were $380,116.30. The jury also found against Sausal on its breach of contract cross-claim. The jury further found that as of December 31, 2013, $263,552 of this damages amount had been paid to Sausal by the City for work performed by Volpe, and that Sausal did not withhold this money based on a good faith dispute directly related to performance of the work by Volpe. (Bowles Decl., Exh. B.)

Following the jury verdict, Volpe filed a motion for attorney's fees and costs. In an Order dated December 20, 2019, Judge Chou granted Volpe's request and awarded attorney's fees in the amount of $459,012.14 and expenses in the amount of $9,928.75. The Order noted that there were several unilateral fee provisions in the Subcontract, all in favor of Sausal, and that if read as reciprocal, the fee clause in Section 10 was broad enough to apply to Volpe's suit. The Order further concluded that because Volpe was entitled to fees in excess of $263,552.50, the amount paid by the City and withheld by Sausal, it was unnecessary to break down the fees required to recover that amount for purposes of Public Contract Code Section 10262.5 and Business & Profession Code Section 7108.5 (the "prompt payment statutes").

The court entered a Judgment on December 20, 2019, which included the award of attorneys' fees and costs to Volpe.

Sausal appealed the Judgment. In a decision filed on September 29, 2021, the Court of Appeal reversed the Judgment on Volpe's breach of contract claim, directed modification of the award pursuant to the prompt payment statutes, and remanded for further proceedings. As to Volpe's breach of contract claim, the Court of Appeal found that the City's failure to provide written notice to Volpe did not constitute a violation of Sausal's obligations under Section 4017, and that Sausal's receipt of the City's consent shortly after another subcontractor started work on the project did not render Sausal noncompliant. Because the jury did not determine whether Sausal committed any other breach of the Subcontract, and Volpe had advanced several theories to support its breach of contract claim, the Court of Appeal remanded this claim rather than direct entry of judgment for Volpe. The Court of Appeal also reversed the attorney's fee order which was based on Volpe's breach of contract claim, but stated it did not decide the issue as to whether an award of fees was appropriate under Civil Code Section 1717. With respect to the jury's finding relating to the prompt payment statutes, the Court of Appeal rejected most of Sausal's challenges, but agreed the $263,552 amount should be slightly reduced. The court stated in footnote 9 of its decision that it saw no basis to vacate the prompt payment penalties award based on its reversal of the breach of contract claim.

On remand, the case was reassigned to this Department A. The parties waived a jury, and the matter was tried before Judge Freccero on July 31, 2023 ("Trial #2"). In a Statement of Decision filed on December 18, 2023, the Court found that Volpe was entitled to recover for work on

some, but not all, of the change orders, that Sausal was not entitled to a setoff, that Volpe was entitled to total compensation of $756,868.90, that Sausal paid or was entitled to a credit of $463,854.83, and that Volpe's damages flowing from Sausal's breach of contract was $293,014.07. Following the instructions from the Court of Appeal, the Court found that the amount of prompt payment penalties owed on the unpaid amount was $292,385.84. The Court stated that it would determine costs of suit and any award of attorney's fees upon proper application to the Court.

### B. Request for Judicial Notice

Volpe's request for judicial notice of Judge Chou's December 20, 2019 Order regarding attorney's fees (Exhibit 1) is granted. Sausal's request for judicial notice of the Jury Verdict Form from Trial #1 (Exhibit A), the Court of Appeal decision (Exhibit B), the Judgment from Trial #2 (Exhibit C), the declaration of Bruce Volpe in support of Volpe's first motion for attorney's fees and costs (Exhibit D), the declaration of Richard Bowles in support of Volpe's first motion for attorney's fees and costs (Exhibit E), Volpe's memorandum in support of its motion for summary judgment (Exhibit F), and Volpe's response to Sausal's closing brief (Exhibit G) is granted. (Evid. Code §§ 452, 453.)

"Taking judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning. While courts take judicial notice of public records, they do not take notice of the truth of matters stated therein. When judicial notice is taken of a document, . . . the truthfulness and proper interpretation of the document are disputable." (*Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375 [citations and internal quotations omitted].)

### C. Discussion

Volpe seeks an award of attorney's fees under Civil Code Section 1717, Public Contract Code Section 10262.5, and Business and Professions Code Section 7108.5.

#### 1. Civil Code Section 1717

Sausal argues that Volpe is not entitled to attorney's fees under Civil Code Section 1717 because the provisions at issue in the Subcontract are indemnity provisions, rather than attorney's fees provisions, and further that Volpe was not the prevailing party. Notably, Sausal does not challenge the reasonableness of the fees requested or the hourly rates charged by Volpe's counsel.

##### a. Action on the Contract; Attorney's Fees/Indemnity Provisions

Civil Code Section 1717 (a) provides, in part:

> In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be

> the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.
>
> Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract.

(Civil Code § 1717.)

"Section 1717 was enacted to establish mutuality of remedy where contractual provision makes recovery of attorney's fees available for only one party, and to prevent oppressive use of one-sided attorney's fees provisions." (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128 [citations omitted].) Section 1717 "makes an otherwise unilateral right reciprocal, thereby ensuring mutuality of remedy, [] 'when the contract provides the right to one party but not to the other.' In this situation, the effect of section 1717 is to allow recovery of attorney fees by whichever contracting party prevails, 'whether he or she is the party specified in the contract or not'." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 611 [citations omitted].) "Therefore, a party prevailing on a contract claim generally is entitled to fees under section 1717 whenever that party would have been liable under the contract for attorney fees had the other party prevailed." (*Westwood Homes, Inc. v. AGCPII Villa Salerno Member, LLC* (2021) 65 Cal.App.5th 922, 927 [citation and internal quotations omitted]; *Brown Bark III, LP v. Haver* (2013) 219 Cal.App.4th 809, 818 ["To ensure mutuality of remedy, however, section 1717 makes an attorney fee provision reciprocal even if it would otherwise be unilateral either by its terms or in its effect."].)

Here, there are several unilateral fee provisions in the Subcontract, all in favor of Sausal. Section 10 provides: "should Subcontractor fail to rectify any contractual deficiencies . . . . Contractor shall have the right to take whatever steps he deems necessary to correct said deficiencies and charge the cost to Subcontractor, who shall be liable for the full cost of Contractor's corrective actions, including reasonable . . . . attorney's fees." Section 15.1 provides that if "subcontractor . . . . fails to properly...prosecute the work covered by this agreement, or fails to make prompt payment to his workers, subcontractors or suppliers . . . . or is otherwise guilty of a material breach of a provision in this agreement, and fails within forty-eight hours after receipt of written notice to commence and continue satisfactory correction of such default . . . . then contractor...shall have the right to. . . (a) supply. . . workers . . . materials, equipment, and other facilities and Contractor deems necessary for the completion of subcontractors work . . . . and charge the cost thereof to Subcontractor . . . . and actual attorney's fees incurred as a result of subcontractor's failure of performance." Finally, Section 15.2 provides that upon subcontractor's default, the cost of performing subcontractor's work, plus actual attorney's fees, shall be deducted from any monies due to subcontractor and subcontractor

shall be liable for the payment of any such expenses which exceed the unpaid balance on the contract.[1]

Reversing the names of the parties in Section 10 of the Subcontract, to make it reciprocal, the section would read: "[S]hould [Sausal] fail to rectify any contractual deficiencies . . . . [Volpe] shall have the right to take whatever steps [it] deems necessary to correct said deficiencies and charge the cost to [Sausal], who shall be liable for the full cost of [Volpe's] corrective actions, including reasonable . . . attorney's fees." The Court agrees with Judge Chou's Order that this section is sufficiently broad to encompass Volpe's suit. The language "whatever steps necessary to correct said deficiency" is broad enough to include litigation, and the term "rectify any contractual deficiency" is the equivalent to "enforce the contract." Volpe had to resort to litigation to cure Sausal's contractual deficiency (failure to pay).

Sausal argues that the language in Sections 10 and 15 are not attorney's fees provisions, but rather indemnity provisions to which Section 1717 does not apply. However, Sausal cites no authority that supports its argument.

"A clause which contains the words 'indemnify' and 'hold harmless' is an indemnity clause which generally obligates the indemnitor to reimburse the indemnitee for any damages the indemnitee becomes obligated to pay third persons." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 969.) The cases upon which Sausal relies fall within this rule, as they involve provisions which expressly used the language "indemnify" and/or "hold harmless", with attorney's fees being an item of loss in the indemnity provision. Some of the contracts in those cases also contained additional language which contemplated third party actions, further supporting the conclusion the provision was for indemnity. For example, in *Meininger v. Larwin-Northern California, Inc.* (1976) 63 Cal.App.3d 82, the provision stated: "The Subcontractor shall indemnify and hold and save Larwin harmless from and against any and all actions or causes of action, claims, demands, liabilities, loss, damage or expense of whatsoever kind and nature, *including counsel or attorneys' fees*", and also followed language dealing with tort claims of third parties, making "the reasonable and logical interpretation . . . that [the provision] provides for attorneys' fees in third party tort actions". (*Id.* at p. 85.) In *Myers*, *supra*, the provisions at issue used the words "indemnify", "hold free", and "hold harmless", and in *Alki Partners, LP v. DB Fund Services, LLC* (2016) 4 Cal.App.5th 574, 598, the provision stated that Alki "shall indemnify [the other party] against any and all costs, losses, claims, damages or liabilities, joint or several, including without limitation, reasonable attorneys' fees . . . ." The contract in *Alki Partners* also referenced a subset of third party claims (criminal proceedings), which "further support[ed] the conclusion the parties intended this to be a standard third party indemnity provision, and not a prevailing party fee clause . . . ." (*Alki Partners*, 4 Cal.App.5th at p. 603.) The *Los Angeles Unified School District* case did not address

[1] The Court agrees with Judge Chou's comment that that it appears Sausal attempted to avoid Section 1717 mutuality by writing the fee provisions in such a way so as to avoid reference to "enforcement" of the contract, and phrasing the provisions such that they would only appear to cover recovery by Sausal upon breach by Volpe.

whether any particular provision was an attorney's fee or indemnity provision. (See *Los Angeles Unified School Dist. v. Torres Construction Corp.* (2020 57 Cal.App.5th 480, 512.)

Here, Sections 10 and 15 do not use the words "indemnify" or "hold harmless," and do not include additional language regarding third party claims which would support an interpretation that these sections were indemnity rather than attorney's fees provisions. Instead, these sections address one party's right to attorney's fees upon breach of the Subcontract by the other party. The language in Sections 10 and 15 is in contrast to other provisions of the Subcontract which actually do use language such as "indemnity", "defend and save harmless", and "hold free and harmless", namely, Sections 15.9(b), 15.10(a), 15.10(b), and 15.10(d).

Sausal also argues that Sections 10 and 15 cannot be attorney's fees provisions governed by Section 1717 because they do not use the words "enforce" or "enforcement" with respect to an action on the contract. However, these words are not required in order for that provision to be covered by Section 1717. "An action (or cause of action) is 'on a contract' for purposes of section 1717 if (1) the action (or cause of action) 'involves' an agreement, in the sense that the action (or cause of action) arises out of, is based upon, or relates to an agreement by seeking to define or interpret its terms or to determine or enforce a party's rights or duties under the agreement; and (2) the agreement contains an attorney fees clause." (*Douglas E. Barnhart,* 211 Cal.App.4th at p. 242.) "The requirement under Civil Code section 1717 be 'on a contract' has been liberally construed." (*Orozco v. WPV San Jose, LLP* (2019) 36 Cal.App.5th 375, 407-408.) Cases have found provisions to be governed by Section 1717 even though they did not expressly reference enforcement of the contract. (See *Kangarlou v. Progressive Title Co., Inc.* (2005) 128 Cal.App.4th 1174, 1177 ["In the event of failure to pay fees or expenses due you hereunder, on demand, I agree to pay the attorney's fees and costs incurred to collect such fees or expenses" was reciprocal fee provision under Section 1717]; *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1193 ["You promise to reimburse Company for any legal fees, liability, or loss which Company incurs as a result of any unauthorized disclosure or use of Confidential Information by You" was reciprocal fee provision under Section 1717].) In *International Billing Services*, the court rejected the plaintiff's argument that the provision was required to use the words "incurred to enforce" the contract, stating: "There is no legislative form language required by section 1717, so long as the agreement authorizes an award of fees incurred to enforce the contract." (*Id.* at pp. 1183-1184.)

Here, Volpe's breach of contract claim against Sausal was an action on the Subcontract. The Subcontract defined the parties' rights and duties with respect to performance and payment, and Volpe alleged that Sausal breached the Subcontract by failing to pay Volpe for work it performed. As noted above, Section 10 authorized Volpe to recover its attorney's fees from Sausal upon breach by Sausal; the language "whatever steps necessary to correct said deficiency" is broad enough to encompass Volpe's action against Sausal, and the term "rectify any contractual deficiency" is the equivalent to "enforce the contract." Volpe had to resort to litigation to cure Sausal's contractual deficiency, i.e., Sausal's failure to pay.

Finally, the attorney's fee language in Section 10 applies to the entire contract. "'Where a contract provides for attorney fees in an action to enforce the contract, the attorney fees provision is made applicable to the entire contract by operation of Civil Code section 1717.'" (*Carr Business Enterprises, Inc. v. City of Chowchilla* (2008) 166 Cal.App.4th 14, 19 [citation

omitted].) Sausal argues that it does not apply to the entire contract because Volpe was represented by counsel, citing the following language in Section 1717: "Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract." Sausal argues that this representation is stated in the Subcontract near the parties' signatures, where the language states: "NOTE: This document has important legal consequences. Consultation with an attorney prior to execution of this document is encouraged." This language does not state that Volpe was represented by counsel; rather, it is only a warning that consultation with counsel is encouraged.

**b. Prevailing Party**

"In cases where Civil Code section 1717's definition of 'prevailing party' applies, the identification of the party entitled to a fee award must be determined by the final result of the litigation, i.e., after conclusion of the appeal if an appeal is taken." (*Butler-Rupp v. Lourdeaux* (2007) 154 Cal.App.4th 918, 928.) Accordingly, the Court determines whether Volpe is the prevailing party based on the final outcome of the litigation following Trial #2.

Although neither Volpe nor Sausal was the prevailing party with respect to Trial #1 or the appeal,[2] Volpe can still recover all of its attorney's fees in this action because it was ultimately the prevailing party following Trial #2. With respect to contractually based fee awards, a "party prevailing on the contract" is "the party who recovers a greater net relief in the action on the contract." (Civ. Code, § 1717(b)(1).) "[I]n deciding whether there is a 'party prevailing on the contract,' the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876.) While the Court ultimately found that Volpe had not established a right to recover on a some of its allegations (change orders totaling $70,853.08) in Trial #2, it found in favor of Volpe on most of Volpe's allegations in its breach of contract claim and awarded Volpe $293,014.07 in damages for breach of the Subcontract. The Court also found in favor of Volpe on the prompt payment penalties, in a modified amount.

Accordingly, the Court awards Volpe its attorney's fees for the entirety of the litigation. The Court can award appellate attorneys' fees, based on Section 1717, even though the Court of Appeal stated that each party was to bear its own costs. (*Id.* at pp. 925-927; *Mustachio v. Great Western Bank* (1996) 48 Cal.App.4th 1145, 1149.)

**2. Public Contract Code Section 10262.5 and Business and Professions Code Section 7108.5**

Public Contract Code Section 10262.5 and Business and Professions Code Section 7108.5 require that progress payments be made by prime contractors to subcontractors within ten days of

[2] While Volpe prevailed in Trial #1 based on one of its breach of contract theories, the Court of Appeal reversed, finding that the evidence did not support that theory. Accordingly, Volpe was not the prevailing party in Trial #1. Neither was Sausal, however, as the Court of Appeal recognized that Volpe had advanced other theories that were not specifically addressed in the jury verdict and remanded the case for this Court to adjudicate those other theories.

receipt of progress payments by the owner to the prime contractor. The statutes provide for penalties, interest and attorney's fees for failure to comply. The purpose of the various prompt payment statutes is remedial: to encourage general contractors to pay timely their subcontractors and to provide the subcontractor with a remedy in the event that the contractor violates the statute. (*S&S Cummins Corp. v. West Bay Builders, Inc.* (2008) 159 Cal.App.4th 765, 777, rehearing denied.)

"In any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to his or her attorney's fees and costs." (Bus. & Prof. Code, § 7108.5.) Public Contract Code Section 10262.57 is the companion section to Section 7108.5 for contracts within the State Contract Act (Pub. Contract Code, § 10100 et seq.). An attorney's fee provision identical to that contained in Section 7108.5 is included. (*Morton Eng'g & Const., Inc. v. Patscheck* (2001) 87 Cal.App.4th 712, 719–20.)

Because the jury found in Trial #1 that money had been paid to Sausal and withheld from Volpe with no good faith basis, and the Court of Appeal upheld this part of the verdict after slightly modifying the amount and the Court's Judgment after Trial #2 awarded the modified amount, Volpe is entitled to its attorney's fees under these statutes as well.

Sausal argues that the alleged violations of the prompt payment statutes were a separate cause of action from the breach of contract cause of action, and Volpe has admitted in its pleadings that the fees it incurred were in connection with the breach of contract cause of action. As a result, Sausal argues, there are no attorney's fees to be awarded in connection with the prompt payment statute claims. However, as Volpe points out, it did not assert a separate cause of action for violation of the prompt payment statutes. Rather, these penalties flowed from the same conduct that was the basis of Volpe's breach of contract cause of action. Volpe had to prove a breach of the Subcontract to establish its entitlement to prompt payment penalties.

### 3. Reasonableness of Fees

The party claiming attorney's fees has the burden of proving that they are reasonable. (See Code of Civ. Proc. § 1033.5(c)(5).) A request for fees should be supported by evidence of the work performed, the hours worked, and the hourly rate charged. (*Lin v Jeng* (2012) 203 Cal.App.4th 1008, 1026.) The party seeking an award of fees has the burden of establishing entitlement to an award and of documenting the appropriate hours spent and the hourly rates. (*Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 486.) The opposing party has the burden of identifying the challenged entries with sufficient argument and citations to the evidence, general arguments that the fees claimed are duplicative or unrelated are insufficient. (*Id.* at p. 488.) If presented with detailed and comprehensive billing records, it is incumbent on a party opposing an attorney fee motion to provide some explanation why the efforts of counsel were inefficient or duplicative. (*Christian Research Inst. v Alnor* (2008) 165 Cal.App.4th 1315, 1321.)

In his Order on Volpe's first motion for attorney's fees, Judge Chou found that $459,012.14 was a reasonable amount of attorney's fees incurred through the date of that Order (December 20, 2019). Sausal provides no evidence or argument to show this amount is unreasonable (just as it failed to do in opposition to Volpe's first motion), so the Court adopts that number here as a reasonable amount of fees incurred up to that date. Volpe submits documentation showing that

it has incurred an additional $480,272.75 since that time, excluding time spent on its Reply and at the hearing on this motion. Volpe states in its Memorandum that it anticipates approximately $10,000 in additional fees for the Reply and hearing.

The Court awards Volpe $939, 284.89 in attorney's fees, which includes $459,012.14 through December 20, 2019, $480,272.75 from December 21, 2019 through February 14, 2024. To the extent Volpe seeks additional fees through the hearing on this motion, the Court expects it will submit sufficient documentation supporting the request before or at the hearing.[3]

## II. Sausal's Motion to Tax Costs

### A. Standard

Pursuant to Code of Civil Procedure Section 1032(b), "[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." 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. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 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.*)

### B. Discussion

#### 1. Court Reporter Fees (line 11)

Volpe seeks $21,325 for court reporter fees. Of this amount, $6,875 was from Trial #1 and $14,450 was from Trial #2. Sausal does not appear to object to the fees for Trial #1 (and, in fact, proposes that the same amount be awarded for Trial #2.) The invoices from Trial #2 are submitted as Exhibit 3 to the Declaration of Joseph Nykodym. These invoices include appearance or per diem fees, as well as $7,845.94 for transcripts.

Code of Civil Procedure Section 1033.5(a)(11) allows for costs for "court reporter fees as established by statute." Costs for transcripts of court proceedings are recoverable under section 1033.5(a)(9) only where the transcript is "ordered by the court". Volpe does not show that the transcripts were ordered by the Court, so the Court grants Sausal's motion as to $7,845.94 for transcripts.

#### 2. Blow-ups and Trial Exhibits (line 12)

"Models, the enlargement of exhibits and photocopies of exhibits . . . may be allowed if they were reasonably helpful to aid the trier of fact." (Code Civ. Proc. § 1033(a)(13).) Photocopying charges are not allowed "except for exhibits." (*Id.*, § 1033(b)(3).) Exhibit costs must be

[3] The Court declines to increase the award based on a higher adjusted rate for Volpe's counsel.

"reasonably necessary to the conduct of the litigation" and be "reasonable in amount". (*Id.*, § 1033(c)(2) and (3).)

Volpe seeks $3,569 for "blow-ups and trial exhibit binders." Sausal argues that Volpe fails to provide any basis for determining that these exhibits were "reasonably helpful to aid the trier of fact." Volpe submits the declaration of Joseph Nykodym, which includes a declaration from Kenneth McKenzie that was submitted with Volpe's opposition to Sausal's motion to strike costs before Judge Chou. Mr. McKenzie's declaration explained the basis for the $3,569.42, which was incurred in preparing two enlarged exhibits and 25 binders of documentary exhibits. Judge Chou denied the motion to strike these costs, stating: "With respect to the $3,036.74 for the five exhibit trial binders . . . The Court finds the service to have been unquestionably necessary for this case and the expense of $3,036.74, as set forth in the Quivix invoices provided in Exhibit B to the McKenzie Declaration to be reasonable in amount." Volpe notes that these utility of the exhibits and duplicated documents was established at both trials.

The Court denies Sausal's motion to tax these costs. Judge Chou, who presided over Trial #1, was most familiar with the exhibits and binders and found they were "unquestionably necessary".

### 3. Electronic Filing and Service Fees (line 14)

Volpe seeks $3,441 for electronic filing and service fees. Code of Civil Procedure Section 1033.5(a)(14) provides "[f]ees for the electronic filing or service of documents through an electronic filing service provider if a court requires or orders electronic filing or service of documents." Sausal argues that the Court did not require electronic filing or service of documents, so this amount should be taxed in its entirety. Volpe again relies on Mr. McKenzie's declaration, and Judge Chou's decision denying the motion to strike these costs. Volpe's current memorandum of costs includes these costs as well as additional subscription time and service charges relating to Trial #2.

Volpe argues that the parties were required to use Caseanywhere to serve pleadings and other documents, and that this service charges a quarterly "System Access Fee" of $120. The amount Volpe claims is for a subscription which covers the periods of Trial #1 and Trial #2, excluding the time the case was on appeal.

Sausal's motion to tax these costs is granted. Volpe presents no evidence that the parties were "required" to use Caseanywhere. Further, Mr. McKenzie's declaration states that it paid a monthly fee to Caseanywhere and attaches a single invoice for $164. There is no basis provided for Mr. McKenzie's statement that the total paid to Caseanywhere was $1,437.40, or that the fees paid to Caseanywhere were for services only for this case as opposed to an access fee for the law firm in general.

***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 May, 2024 is as follows:***
https://www.zoomgov.com/j/1602925171?pwd=NUdsaVlabHNrNjZGZjFsVjVSTUVqQT09
Meeting ID: 160 292 5171
Passcode: 868745

***If you are unable to join by video, you may join by telephone by calling (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: 05/14/24 TIME: 1:30 P.M. DEPT: A CASE NO: CV1902225

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER: CLERK: Q. ROARY

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|---|---|
| PLAINTIFF: KAYLIN PAGAN<br><br>and<br><br>DEFENDANT: LESLY AMANDA VELASQUEZ, ET AL | |

NATURE OF PROCEEDINGS: MOTION – SUMMARY JUDGMENT

RULING

Defendant City of San Rafael's ("the City") motion for summary adjudication is **GRANTED** as to Issue No. 4. (Code Civ. Proc., § 437c, subd. (p)(2).) Because this issue is dispositive, the Court does not reach the parties' arguments as to any of the other issues.

***Background***

This case arises out of automobile accident. On January 4, 2018, Plaintiff Kaylin Pagan ("Plaintiff") was a passenger in a car driven by Defendant Lesly Velasquez ("Velasquez"). (Responsive Separate Statement ("RSS"), No. 1.) It had been raining that day and both Pagan and Velasquez observed that the roadway was wet from rain. (RSS, Nos. 10-11.) Velasquez knew that when she was driving in the rain, she had to be more cautious than usual. (RSS, No. 12.)

Velasquez was driving northbound on Lincoln Avenue near Red Rock Way. (RSS, No. 6.) Around that location, Lincoln Avenue curves to the left and becomes Los Ranchitos Road. (RSS, No. 7.) As Velazquez turned into this curve, the car hydroplaned. (Gilbert Dec., Ex. 2, 77:24-78:6.) The back of the car swerved into oncoming traffic, and Velasquez oversteered in an attempt to correct it. (RSS, Nos. 17-18.) She lost control of the car, and it veered off the roadway to the right, flipping over and falling down the adjacent hillside. (RSS, Nos. 20-21.) Plaintiff was injured in the accident. (RSS, No. 22.)

Plaintiff brought suit against the City, among other defendants. The SAC alleges that the roadway was defective and dangerous because there was nothing to warn drivers of an upcoming sharp left turn; nothing to warn drivers to slow down in wet conditions; and no barriers to prevent cars that left the roadway from rolling down the steep hillside immediately next to the road. (SAC, ¶¶ 11, 24; see also RSS, No. 26.) Among other causes of action, the SAC asserts a claim for premises liability under Government Code, section 835. This is the sole cause of action

alleged against the City. The City now moves for summary judgment or, alternatively, summary adjudication as to six issues.

***Legal Standard***

Any party may move for summary judgment. (Code of Civ. Proc, § 437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c); *Aguilar*, *supra*, 25 Cal.4th 826, 843.) Similarly, "[a] party may seek summary adjudication on whether a cause of action, affirmative defense, or punitive damages claim has merit or whether a defendant owed a duty to a plaintiff. A motion for summary adjudication . . . shall proceed in all procedural respects as a motion for summary judgment." (*California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 630, internal citations and quotation marks omitted; and see Code Civ. Proc, § 437c, subd. (f).) The object of the summary judgment procedure is "to cut through the parties' pleadings" to determine whether trial is necessary to resolve the dispute. (*Aguilar*, *supra*, 25 Cal.4th 826, 843.)

The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact." (*Aguilar*, *supra*, 25 Cal.4th 826, 850; see Evid. Code, § 110.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Aguilar*, *supra*, 25 Cal.4th 826, 851.) A defendant meets its burden of showing that a cause of action has no merit if it shows that or more elements of the cause of action cannot be established. (Code Civ. Proc., § 437c, subd. (p)(2).)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (Code of Civ. Proc, 437c, subd. (c); *Aguilar*, *supra*, 25 Cal.4th 826, 850.) A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying facts in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, *supra*, 25 Cal.4th 826, 850, fn. omitted.) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id.* at 843.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences drawn therefrom." (*Aguilar*, *supra*, 25 Cal.4th 826, 856.) The moving party's evidence is strictly construed, while the opponent's is liberally construed. (*Id.* at 843.)

***Evidentiary Objections***

Plaintiff's Objections

California Rules of Court, rule 3.3154 provides that "[a]ll written objections to evidence must be served and filed separately from the other papers in support of or in opposition to the motion. . . . [O]bjections must not be restated or reargued in the separate statement." Additionally, "[e]ach written objection must be numbered consecutively and must: (1) Identify the name of the document in which the specific material objected to is located; (2) State the exhibit, title, page, and line number of the material objected to; (3) Quote or set forth the objectionable statement or material; and (4) State the grounds for each objection to that statement or material." (Cal. Rules

of Court, rule 3.1354.) The rule goes on to prescribe further requirements for formatting evidentiary objections. (*Ibid.*)

Plaintiff did not file separate evidentiary objections, but instead only stated her evidentiary objections within her responsive separate statement. Her evidentiary objections also fail to reference specific pieces of evidence. For example, the City's proposed undisputed material fact No. 3 is "Pagan and Velasquez knew they were not supposed to be in the car together due to Velasquez's provisional driver's license." As support, it cites two separate paragraphs of the Declaration of Kevin E. Gilbert and two separate exhibits to the same, each consisting of deposition testimony from different witnesses. In the column for Plaintiff's response, she has written merely "Objection, irrelevant." This notation fails to indicate what portion of the evidence cited in support of undisputed material fact No. 3 is being objecting to on relevance grounds. Plaintiff's evidentiary objections violate essentially every rule applicable to written objections.

A trial court does not abuse its discretion by refusing to rule on evidentiary objections that are not filed in compliance with the applicable rules. (See *Hodjat v. State Farm Mutual Automobile Ins.* (2012) 211 Cal.App.4th 1, 8 [no abuse of discretion where trial court refused to rule on evidentiary objections that were not filed separately but included within separate statement].) The Court can discern two objections pertaining to evidence submitted by the City and critical to the Court's resolution of this motion. The Court will rule on these objections because it can do so without undue hardship. It will not rule on any of Plaintiff's other evidentiary objections because, in addition to being procedurally improper, they were not material to the disposition of the motion. (Code Civ. Proc., § 437c, subd. (q).) Plaintiff's counsel is admonished that Plaintiff's lack of compliance with the applicable procedural rules is unacceptable and must be corrected moving forward.

- Gilbert Dec., ¶ 3, Ex. 1, 36:1-4 (cited in connection with RSS, No. 12); "Objection, irrelevant." – Overruled.

- Gilbert Dec., ¶ 11, Ex. 9 (cited in connection with RSS, No. 29); "Objection, hearsay, improper opinion testimony." – Overruled. Neither the paragraph from Mr. Gilbert's declaration, nor the photos, contains any hearsay. Similarly, neither of them contains any statement of opinion.

The City's Objections

The Court only had cause to reach Issue No. 4 (open and obvious condition of the property defect). Its resolution of this issue was dispositive of the motion. Before it had access to the City's evidentiary objections, the Court reviewed the evidence Plaintiff offered and determined that it was either unresponsive to Issue No. 4 or otherwise insufficient, as discussed below. As a result, the Court does not rule on the City's evidentiary objections because they were not material to its disposition of the motion. (Code Civ. Proc., § 437c, subd. (q).)

***Other Procedural Matters***

A separate statement in support of a motion for summary adjudication must "separately identify . . . [e]ach cause of action, claim for damages, issue of duty, or affirmative defense that is the subject of the motion" and "[e]ach supporting material fact claimed to be without dispute *with respect to* the cause of action, claim for damages, issue of duty, or affirmative defense that is the subject of the motion." (Cal. Rules of Court, rule 3.1350(d)(1) [emphasis added].) The italicized language requires the movant to tie each proposed undisputed material fact to the issue sought to be adjudicated.

The City's separate statement repeats verbatim the issues on which it seeks summary adjudication, as required (Cal. Rules of Court, rule 3.1350(b)), but does not tie each issue to the relevant undisputed material facts. Instead, for all but the first issue, it sets forth the issue, states that there are no new undisputed facts applicable to the issue, and refers the Court to the material facts offered in relation to Issue No. 1. This defeats the purpose of the rule requiring the separate statement to tie the facts to the issues, which is to enable the court to easily determine which facts it must contend with to resolve each issue. (See *Collins v. Hertz Corp.* (2006) 144 Cal.App.4th 64, 74 [function of the separate statement is, in part, to "provide[] a convenient and expeditious vehicle permitting the trial court to hone in on the truly disputed facts"].) Plaintiff has not objected to this error in the City's separate statement or indicated that she had difficulty determining which facts she needed to address to oppose the motion, and the Court is prepared to address the merits of the motion notwithstanding this procedural error. Nevertheless, the City is admonished to follow all applicable rules when filing documents with the Court moving forward.

Along with its reply, the City filed a response to Plaintiff's responsive separate statement. The summary judgment statute does not provide for a "reply separate statement." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 306 [abrogated in unrelated part as stated in *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 853, fn. 12].) Accordingly, the Court disregards this document.

***Discussion***

Government Code, section 835 ("Section 835") provides that "a public entity is liable for injury caused by a dangerous condition of its property" under certain conditions. To hold a public entity liable under Section 835, a plaintiff must prove (1) that the property was "in a dangerous condition" at the time of the injury; (2) that the dangerous condition was the proximate cause of the injury; (3) that the dangerous condition created a reasonably foreseeable risk of the kind of injury that occurred; and either (4a) an employee of the public entity, acting within the scope of his employment, committed some negligent or wrongful act or omission that created the dangerous condition, or (4b) the public entity had actual or constructive notice of the dangerous condition a sufficient time prior to the injury to have taken measures to protect against it. (Gov. Code, § 835; see also *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1126.)

A "dangerous condition" within the meaning of the statute is "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." (Gov. Code, § 830, subd. (a).) The existence of a dangerous condition can be resolved as a matter of law "if reasonable minds can only come to one conclusion." (*Zelig v. County of Los Angeles* (2001) 27 Cal.4th 1112, 1133.)

If the danger is "obvious from the appearance of the property itself," then the property is not in a "dangerous condition" as a matter of law. (*Matthews v. City of Cerritos* (1992) 2 Cal.App.4th 1380, 1385 [granting summary judgment on Section 835 claim on this basis].) "[P]remises liability may not be imposed on a public entity when the danger of its property is readily apparent." (*Biscotti v. Yuba City Unified School Dist.* (2007) 158 Cal.App.4th 554, 560; accord *Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 131 ["The manifest intent of the Tort Claims Act is to impose liability only when there is a substantial danger which is *not* apparent to those using the property in a reasonably foreseeable manner with due care."] [emphasis in original].)

Issue No. 4: Alleged Defects Open and Obvious

The City argues that the danger associated with both the slipperiness of the roadway due to rain and the leftward curve in the road was obvious and apparent.

As to the slipperiness, it is undisputed[1] that it had been raining on the day of the accident, that both Pagan and Velasquez observed the surface of the road to be wet from the rain, and that Velasquez knew that when she was driving in the rain she had to be more careful than usual. (RSS, Nos. 10-12.) The Court may also take judicial notice of the fact that a roadway may be slippery when it is wet from rain.[2] (Evid. Code, 451, subd. (f).) The City has carried its initial burden to establish that there is no material dispute as to the fact that the roadway at issue was obviously wet with rain and obviously carried the enhanced danger typically associated with a wet road, as compared with a dry one. Plaintiff has not offered any evidence or argument to counter the City's showing as to the obviousness of the risk posed by the rain.

As to the curve, the City submits images of the roadway at issue. (Gilbert Dec., Ex. 9; see also *Martinez v. Chippewa Enterprises, Inc.* (2004) 121 Cal.App.4th 1179, 1184 [at summary judgment, "defendant's photographs prima facie established the obviousness" of the alleged "dangerous condition"].) This evidence is described as "Google street view images showing the view driving northbound on Lincoln Avenue as it approaches the curve in the roadway and becomes Los Ranchitos Road from April 2011, April 2015, and May 2017, the view on Los Ranchitos Road past the curve from May 2017, as well as an aerial view of the roads." (Gilbert Dec., ¶ 11.) Based on this description and the Traffic Collision Report's account and illustration[3] of where Velasquez was driving shortly before losing control of the car, the street view photos depict what a northbound driver would see when approaching the leftward curve at issue. (See Gilbert Dec., Ex. 5, pp. 1, 4-5.) The Court has carefully reviewed these photos and concludes that they depict the correct area. The Court has further determined that the leftward curve in the

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[1] Plaintiff's response to the City's proposed undisputed material fact No. 12 is "Objection, irrelevant." (See RSS, No. 12.) This is not effective to dispute the fact. For each material fact proposed by the moving party, the responsive separate statement "must unequivocally state whether that fact is 'disputed' or 'undisputed.'" (Cal. Rules of Court, rule 3.1350(f)(2).) Additionally, "[a]n opposing party who contends that a fact is disputed must state, on the right side of the page directly opposite the fact in dispute, the nature of the dispute and describe the evidence that supports the position that the fact is controverted." (*Ibid.*)

[2] The City's request for judicial notice is granted to this extent. (Evid. Code, § 451, subd. (f).) The Court does not have occasion to reach the City's request for judicial notice as to Gilbert Dec., Ex. 10.

[3] Plaintiff did not object to this evidence.

road, and the danger associated with it as compared to a straight stretch of roadway, is obvious to northbound drivers in the exercise of reasonable care.

To counter the City's showing as to the obviousness of the curve in the road, Plaintiff presents evidence that "roadway curves are considered locations for serious crashes that often result in injuries and deaths"; that "proper signage ahead of . . . and through the curves help [sic] motorists navigate the curves safety [sic]; that curve warning signs "are traffic control devices that are necessary to protect the traveling public"; and that "[a] proper sign is required per the CA MUTCD.[4]" (PUMF, No. 7.) She further presents evidence that "the City of San Rafael . . . failed to warn the motorist public of the upcoming sharp curve" (PUMF, No. 4), that the location at issue previously had a curve warning sign and a sign imposing a 20 mile per hour reduced speed limit, but the City removed it (PUMF, No. 5); and that such signs had been replaced as of May 17, 2022 (PUMF, No. 6).

None of this evidence bears on the obviousness of the leftward roadway curve at issue in this case or whether such curve was apparent to northbound drivers exercising reasonable care. As to the presence of the signs, the fact that the City once took additional precautions, either before or after Plaintiff's accident, does not establish that the danger associated with the curve was not obvious. Mounting a curve warning sign and imposing a reduced speed limit are actions consistent with making an area safer. A public entity cannot be held liable for failing to make a property *safer* if property was not in a dangerous condition to begin with. (*Belcher v. City and County of San Francisco* (1945) 69 Cal.App.2d 457, 463.) "[A] city is not an insurer of the safety of pedestrians but is required only to exercise ordinary care to maintain its streets in a reasonably safe condition for those using them. . . . [L]iability is not to be fastened upon a municipality merely because it may appear that certain property, in nowise dangerous either in its construction or intended use, could possibly be made safer by other means." (*Ibid.*; accord *Mixon v. Pacific Gas & Electric Co.* (2012) 207 Cal.App.4th 124, 136 ["A public entity may be held liable if its property is in a *dangerous* condition. [It] is not required to go beyond the elimination of danger and maximize every safety precaution. There is no evidence that the crosswalk pattern used, although perhaps not the safest possible, created a dangerous condition."] [emphasis in original].) The City has met its burden of showing that the property was not in a dangerous condition because the dangers identified in Plaintiff's SAC were obvious. As a result, Plaintiff was required to present evidence creating a material dispute of fact as to the obviousness of the danger. She has not carried that burden.

The Court concludes that there is no dispute as to the fact that the roadway's slipperiness and its relatively sharp leftward curve were obvious to drivers exercising reasonable care. As a result, the City's failure to warn of these conditions cannot constitute a dangerous condition as a matter of law. This disposes of the first two "dangerous conditions" set forth in the SAC. (See SAC, ¶¶ 11a, 11b, 24a, 24b.) Similarly, because the danger associated with the leftward curve was

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[4] "CA MUTCD" refers to the California Manual on Uniform Traffic Control Devices. (See Shatnawi Dec., Ex. 4, p. 4.) Nowhere in her moving papers does Plaintiff explain what this document is, who issued it, or what, if any, legal effect it has. To the extent the CA MUTCD has binding legal effect, any statements from Mr. Shatnawi, Plaintiff's expert, about what it "requires" are inadmissible because "an expert is not permitted to give an opinion on questions of law or legal conclusions." (*City of Rocklin v. Legacy Family Adventures-Rocklin, LLC* (2022) 86 Cal.App.5th 713, 728.) Mr. Shatnawi's report describes the CA MUTCD as setting forth "standards," making it unclear that this document "requires" anything. (Shatnawi Dec., Ex. 4, p. 14.)

obvious, the presence of a barrier would only have rendered safer a feature of the property that did not constitute a dangerous condition to begin with. As a matter of law, there can be no liability for the City's failure to take this extra precaution. This means the third "dangerous condition" in the SAC likewise cannot support liability. (See SAC, ¶¶ 11c, 24c.)

Plaintiff spends much of her opposition advocating for a fourth "dangerous condition" – that the roadway at the site of the accident featured "severe degradation, alligator cracking, delamination, potholes, settlement and depressions in the wheel path[,]" and that this is what caused the vehicle to hydroplane. (Opposition, p. 5; see also Plaintiff's Additional Disputed Material Facts, No. 3.) Plaintiff's SAC does not plead this defect in the roadway surface as one of the "dangerous conditions" on which her claim is predicated. It pleads only the lack of any warning of the sharp left curve, the lack of any warning to slow down under wet conditions to accommodate the curve and the slipperiness of the roadway, and the lack of a barrier.[5] (SAC, ¶¶ 11, 24.)

"The materiality of a disputed fact is measured by the pleadings, which 'set the boundaries of the issues to be resolved at summary judgment.'" (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1250 [quoting *Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 648].) As a result, "[t]o create a triable issue of material fact, the opposition evidence must be directed to issues raised by the pleadings. If the opposing party's evidence would show some factual assertion, legal theory, defense or claim not yet pleaded, that party should seek leave to amend the pleadings before the hearing on the summary judgment motion." (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1264-65.) As a result, Plaintiff cannot defeat summary judgment by relying on a new legal theory relating to the cracked surface of the road.

The Court grants the City's motion for summary adjudication as to Issue No. 4. This resolution of the motion amounts to a ruling that as a matter of law, Plaintiff cannot establish the "dangerous condition" element of her Section 835 claim, which is the sole claim against the City. As a result, the Court does not address Issue Nos. 1-3, 5, and 6.

***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 May, 2024 is as follows:***
https://www.zoomgov.com/j/1602925171?pwd=NUdsaVlabHNrNjZGZjFsVjVSTUVqQT09
Meeting ID: 160 292 5171
Passcode: 868745

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[5] The Court acknowledges that in one of the two places in which the SAC sets forth these three proposed dangerous conditions, it includes the qualifier that that roadway's condition was dangerous "for numerous reasons, including but not limited to" the three listed. (SAC, ¶ 11.) Plaintiff cannot rely on this boilerplate catch-all allegation as carte blanche to defeat summary judgment on an unpleaded theory. (See *Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493 ["[T]he burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability as alleged in the complaint . . . [A] moving party need not refute liability on some theoretical possibility not included in the pleadings."].)

***If you are unable to join by video, you may join by telephone by calling (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: 05/14/24 TIME: 1:30 P.M. DEPT: A CASE NO: CV2100550

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER: CLERK: Q. ROARY

| | |
|---|---|
| PLAINTIFF: ERIKA SAMANO<br><br>vs.<br><br>DEFENDANT: COMET BUILDING MAINTENANCE, INC. (COMPLEX) | |

NATURE OF PROCEEDINGS: MOTION – OTHER: PRELIMINARY APPROVAL OF CLASS SETTLEMENT

RULING

Plaintiff's unopposed motion for preliminary approval of class-action settlement is **GRANTED**.

The court preliminarily finds that the requirements for conditional class certification for settlement purposes are met in that (a) the parties are sufficiently numerous that it is impracticable to bring them all before the court; (b) there are questions of law or fact common to the class that are substantially similar and predominate over questions affecting individual members; (c) the claims of the named representative are typical of those of the class; and (c) the named representative can fairly and adequately protect the interests of the class. (Code Civ. Proc., § 382; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App. 4th 224, 240.)

Accordingly, the Court orders that:

1. The proposed class is conditionally certified and plaintiff is conditionally appointed class representative.

2. The court conditionally appoints the Mallison & Martinez as class counsel.

3. The court appoints Phoenix Class Action Administrators to carry out the administration duties of the settlement as proposed.

4. The court has reviewed and approves the plan for notice, objections, and exclusion from the class.

5. After considering the factors set forth in *Clark v. American Residential Services LLC* (2009) 175 Cal.App. 4th 785, 799, the court preliminarily rules that the proposed class settlement is fair and reasonable.

6. The court conditional finds, subject to final approval, that the proposed attorney's fee amount set at no more than 35% of the maximum settlement is fair and appropriate.

7. **A final approval hearing shall be held on October 1, 2024 at 1:30 p.m. in Department A.**

Absent objection, the court will sign the proposed order submitted by Plaintiff.

***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 May, 2024 is as follows:***
https://www.zoomgov.com/j/1602925171?pwd=NUdsaVlabHNrNjZGZjFsVjVSTUVqQT09
Meeting ID: 160 292 5171
Passcode: 868745

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# SUPERIOR COURT OF CALIFORNIA
# COUNTY OF MARIN

DATE: 05/14/24 TIME: 1:30 P.M. DEPT: A CASE NO: CV2300411

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER: CLERK: Q. ROARY

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|---|---|
| PLAINTIFF: RAYMUNDO GONZALEZ SANCHEZ, ET AL<br><br>and<br><br>DEFENDANT: DOUGLAS LYMAN WRISTON | |

NATURE OF PROCEEDINGS: 1) MOTION – OTHER: TERMINATING, EVIDENTIARY, ISSUE PRECLUSION AND MONETARY SANCTIONS
2) CASE PROGRESS CONFERENCE – DISCOVERY STATUS, TRIAL SETTING, AND TO SET A MEDIATION DEADLINE

RULING

Defendants' motion for terminating, evidentiary, issue preclusion and monetary sanctions is **DENIED**. Plaintiffs' counsel has served the missing verifications upon defense counsel. (Morgan decl. ¶4.) Therefore, terminating, evidentiary and issue preclusion sanctions are not warranted. With respect to monetary sanctions, the motion could have been avoided had Defendant's attorney simply contacted Plaintiffs' attorney regarding the missing verifications.

***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 May, 2024 is as follows:***
https://www.zoomgov.com/j/1602925171?pwd=NUdsaVlabHNrNjZGZjFsVjVSTUVqQT09
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# SUPERIOR COURT OF CALIFORNIA
# COUNTY OF MARIN

DATE: 05/14/24 TIME: 1:30 P.M. DEPT: A CASE NO: CV2301468

PRESIDING: HON. STEPHEN P. FRECCERO

REPORTER: CLERK: Q. ROARY

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|---|---|
| PLAINTIFF: SAVE OUR CITY, ET AL<br><br>vs.<br><br>DEFENDANT: ALL PERSONS INTERESTED IN RESOLUTION NO. 2023-31, ET AL | |

NATURE OF PROCEEDINGS: MOTION TO COMPEL – DISCOVERY FACILITATOR PROGRAM

RULING

Based on the stipulation of the parties, the matter has been **continued to June 4, 2024 at 1:30 pm in Courtroom A.**

***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 May, 2024 is as follows:***
https://www.zoomgov.com/j/1602925171?pwd=NUdsaVlabHNrNjZGZjFsVjVSTUVqQT09
Meeting ID: 160 292 5171
Passcode: 868745

***If you are unable to join by video, you may join by telephone by calling (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***