Superior Court of the State of California
County of Orange
TENTATIVE RULINGS FOR DEPARTMENT N16

HON. Donald F. Gaffney

Counsel and Parties Please Note:
Law and Motion in Department N16 is heard on Wednesdays at 9:00 a.m.

Date: April 24, 2024

Tentative Rulings will be posted on the Internet on the day before the hearing by 5:00 p.m. [or earlier] whenever possible. To submit on the tentative ruling, please contact the clerk at (657) 622-5616, after contacting opposing party/counsel. Prevailing party shall give notice of the Ruling and prepare the Order/Judgment for the Court's signature if required.

NOTE: After posting of tentative rulings, the Court will not take the motion off calendar and will grant a continuance of the motion only upon stipulation of all affected parties.

If no appearances are made on the calendared motion date, then oral argument will be deemed to have been waived and the tentative ruling will become the Court's final ruling.

#	Case Name	Tentative
1	Hinchman vs. Huntington Beach Propane, Inc.	**TENTATIVE RULING:** For the reasons set forth below, Defendants Huntington Beach Propane, Inc. and Jason Gagnon's Demurrer to Plaintiff Christopher Hinchman's Complaint is SUSTAINED with 30-days leave to amend as to the 1st, 4th and 7th causes of action for breach of oral contract, breach of the implied covenant of good faith and fair dealing, and declaratory relief. The Demurrer is OVERRULED as to the 2nd and 3rd causes of action for breach of implied-in-fact contract and breach of implied-in-law contract. The Motion to Strike is DENIED as moot. As to the 1st cause of action for breach of oral contract, this claim is not sufficiently pled. "An oral contract may be pleaded generally as to its effect, because it is rarely possible to allege the exact words." (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 616.) Nevertheless, "[t]he elements of a breach of oral contract cause are: "(1) existence of the contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) damages to plaintiff as a result of the breach." (*Aton Ctr., Inc. v. United Healthcare Ins. Co.* (2023) 93 Cal.App.5th 1214, 1230.)

		"The vital elements of a cause of action based on contract are mutual assent (usually accomplished through the medium of an offer and acceptance) and consideration. As to the basic elements, there is no difference between an express and implied contract...Both types of contract are identical in that they require a meeting of minds or an agreement [citation]. Thus, it is evident that both the express contract and contract implied in fact are founded upon an ascertained agreement or, in other words, are consensual in nature, the substantial difference being in the mode of proof by which they are established." (*Allied Anesthesia Med. Grp., Inc. v. Inland Empire Health Plan* (2022) 80 Cal.App.5th 794, 808.) Here, the Complaint alleges that Defendants GAGNON and HB PROPANE needed Plaintiff's expertise since it was experiencing difficulties and failures in the propane market; that GAGNON "desired to partner and bring" Plaintiff on board to assist him in saving the company; that he conveyed this interest to Plaintiff during many conversations; that HB PROPANE made "numerous promises" to Plaintiff, either orally or in writing; and that GAGNON terminated Plaintiff's employment under false pretenses. (*See* Complaint, ¶¶ 34, 35, and 37.) The cause of action also incorporates the prior allegations of the Complaint, which allege that in 2019, GAGNON actively recruited Plaintiff and "wanted PLAINTIFF to take on the role of general manager...with the promise that PLAINTIFF would essentially become a partner (or part owner) of the Company"; that GAGNON promised Plaintiff "a long and illustrious career" and assured Plaintiff "that he would be joining not as just an employee but as part owner of the Company"; that in October 2019, Plaintiff began his employment as General Manager of HB PROPANE "with the understanding that Defendant GAGNON viewed him as a partner in the Company"; that GAGNON "continuously told PLAINTIFF that he was not looking for just any employee, but for someone who would be a partner in the business"; that between 2019 and 2022, GAGNON continued to tell Plaintiff "that he wanted to build a partnership with him"; and that GAGNON consistently told Plaintiff he "was essentially a partner" and "intended on Plaintiff running Defendant HB Propane". (*See* Complaint, ¶¶ 17-20, 22, 25, and 33.) It appears Plaintiff is seeking to allege a breach of oral contract cause of action based on Defendants failure to make him a partner in HB PROPANE, but the Complaint never alleges that GAGNON or HB PROPANE "promised" Plaintiff that he would become a partner in HB PROPANE if Plaintiff did x, y, or z. As set forth above, the Complaint only alleges that GAGNON "wanted" a

		partner, or that Plaintiff "would essentially become a partner" or "viewed him as a partner" or "would be" or "intended" or "essentially was" – none of these allegations are a promise by Defendants to make Plaintiff a partner in HB PROPANE. As such, the Complaint fails to allege a meeting of the minds between Plaintiff and Defendants as to the terms of the oral contract. As to the 2nd cause of action for breach of implied-in-fact contract, this claim is sufficiently pled. "A cause of action for breach of implied contract has the same elements as does a cause of action for breach of contract, except that the promise is not expressed in words but is implied from the promisor's conduct." (*Aton, supra*, 93 Cal.App.4th at 1230.) The Complaint alleges that "from on or about October 2019 and up to and including March 24, 2024, PLAINTIFF continued to perform the duties of a general manager, inter alia, for Defendant HBP as alleged herein. In exchange, PLAINTIFF was promised partnership, stock options, and other perks and benefits, and continued employment with Defendant HB PROPANE". (*See* Complaint, ¶ 40.) The Complaint also alleges that as validation of GAGNON's intention that Plaintiff would become part owner of the company, the parties entered into the Stock Option Agreement, was given substantial raises, a company car, and a credit card. (*See* Complaint, ¶¶ 23 and 24.) These allegations are sufficient to allege a cause of action for breach of implied-in-fact contract. The Demurrer as to this cause of action is overruled. As to the 3rd cause of action for breach of implied-in-law contract, this claim is sufficiently pled. The Complaint alleges that Plaintiff performed the duties of general manager for HB PROPANE; that in exchange Plaintiff was promised partnership and stock options and other perks and benefits with HB PROPANE; that Defendants knew or should have known that Plaintiff would be reasonably induced to rely on Defendants' promises, assurances, and representations; that this caused Plaintiff to exert a tremendous amount of time, effort, expertise and ingenuity in his field for the benefit of HB PROPANE; that Defendants reaped enormous benefits from Plaintiff's work including causing HB PROPANE to increase in value and become highly recognized in its field; that Defendants voluntarily accepted and continued to accept Plaintiff's efforts; and that in spite of Plaintiff's performance of his duties and obligations, Defendants terminated Plaintiff without notice in order to avoid having to pay him the stock options upon the sale of HB PROPANE. (*See* Complaint, ¶¶ 46, 47, 49, and 50-52.) These allegations are sufficient to allege a cause of action for breach of implied-in-law contract or "quasi-contract".

		"The so-called 'contract implied in law' in reality is not a contract. [Citation omitted.] 'Quasi-contracts, unlike true contracts, are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. They are obligations created by law for reasons of justice.' Rest., Contracts, s 5, com. a. Quasi contractual recovery is based upon benefit accepted or derived for which the law implies an obligation to pay. 'Where no benefit is accepted or derived there is nothing from which such contract can be implied.' [Citation omitted.]" (*Weitzenkorn v. Lesser* (1953) 40 Cal.2d 778, 794.) As to the 4th cause of action for breach of the implied covenant of good faith and fair dealing, this claim is not sufficiently pled. The Complaint alleges that "[t]he agreements alleged in paragraphs 15-54, inclusive, and incorporated herein by reference herein contained an implied covenant of good faith and fair dealing, which obligated Defendants to perform the terms and conditions of the agreement fairly and in good faith and to refrain from doing any act that would prevent or impede PLAINTIFF from performing any or all of the conditions of the contract that they agreed to perform, or any act that would deprive PLAINTIFF of the benefits of the contract that should have been provided by the Defendants to Plaintiff"; that the various oral promises made in conjunction with the STA served to secure and enhance Plaintiff's performance; that "Defendants breached the implied covenant of good faith and fair dealing under the various agreements (written and oral) as alleged in paragraphs 15-54"; that "Defendants never intended on fulfilling their promises or providing Plaintiff with any stocks, and instead discarded him once the benefit they were seeking was secured"; that Defendants acted with malicious intent to push Plaintiff out of the company and to deprive him of the fruits of his labor; and that Plaintiff has been damaged as a result. (*See* Complaint, ¶¶ 56-58, and 61-64.) Here, the breach of implied covenant of good faith and fair dealing claim is based on the same set of facts as the breach of contract claims. The Complaint does not allege conduct that goes beyond the mere breach of these alleged contracts. "A 'breach of the implied covenant of good faith and fair dealing involves something beyond breach of the contractual duty itself' and it has been held that 'bad faith implied unfair dealing rather than mistaken judgment…Thus, allegations which assert such a claim must show that the conduct of the defendant, whether or not it also constitutes a breach of a consensual contractual term, demonstrates a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence but rather by a conscious and

		deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1394-1395.) "If the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damage or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated." (*Id.*at 1395.) As to the 7th cause of action for declaratory relief, this claim is not sufficiently pled. Code of Civil Procedure section 1060 authorizes an action for declaratory relief. 'In cases of actual controversy relating to the legal rights and duties of the respective parties,' any person may bring an action for a declaration of his or her rights and duties in connection with that controversy. (Code Civ. Proc., § 1060.) 'The declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought.' (*Ibid.*)" (*Taxpayers for Improving Pub. Safety v. Schwarzenegger* (2009) 172 Cal.App.4th 749, 768.) Here, the Complaint alleges that there is an actual controversy between Plaintiff and Defendants concerning their respective rights and duties; that Plaintiff alleges that the parties entered into the Stock Purchase Agreement whereby Plaintiff could only be terminated for cause; that the Stock Option Agreement provides that in the case of a sale of HB PROPANE, Plaintiff would be entitled to 20% of the shares of HB PROPANE, that Plaintiff believes Defendants dispute these allegations; and that a judicial determination and declaration of the parties rights and duties respective relative to the incidents and claims alleged is necessary as Plaintiff has no adequate remedy at law. (*See* Complaint, ¶¶ 84-86.) These allegations are insufficient to allege a declaratory relief cause of action. The Complaint fails to allege what the "actual controversy" is between Plaintiffs and Defendants. The Complaint does not allege the terms of the Stock Option Agreement, does not allege that Plaintiffs and Defendants dispute the interpretation of the Stock Option Agreement, does not allege that Defendants contend that Plaintiff could be terminated without cause, and does not allege that Defendants dispute that Plaintiff is not entitled to 20% of HB PROPANE upon its sale.

		Based on the court's ruling on the Demurrer, the Motion to Strike is denied as moot. Should Plaintiff desire to file an amended complaint that addresses the issues in this ruling, Plaintiff shall file and serve the amended complaint within 30 days of service of the notice of ruling. Moving Party to give notice.
2	Long vs. C.C.H.C., Inc.	**TENTATIVE RULING:** For the reasons set forth below, Defendant Sasan Salmi, M.D.'s Demurrer to the 1st and 4th causes of action in the First Amended Complaint is SUSTAINED with leave to amend. The Demurrer to the 2nd cause of action is SUSTAINED without leave to amend. The Motion to Strike is GRANTED. Plaintiffs' request for judicial notice is GRANTED. **<u>Second Cause of Action for Elder Abuse/Neglect</u>** "The Elder Abuse and Dependent Adult Civil Protection Act ["Elder Abuse Act"] affords certain protections to elders and dependent adults." (Winn v. Pioneer Medical Group, Inc. (2016) 63 Cal.4th 148, 152 (Winn).) "'The purpose of the [Act was] essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect.' [Citation.]" (Covenant Care, Inc. v. Superior Court (2004) 32 Cal.4th 771, 787 (Covenant Care).). The acts proscribed by the Elder Abuse Act "do not include acts of simple professional negligence, but refer to forms of abuse or neglect performed with some state of culpability greater than mere negligence." (Delaney v. Baker (1999) 20 Cal.4th 23, 32.) It also does not apply to acts of gross negligence by healthcare providers. (Sababin v. Superior Court (2006) 144 Cal.App.4th 81, 88 (Sababin).) Under the Elder Abuse Act, "abuse" includes "physical abuse, neglect, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering" and "the deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering" (Welf. & Inst. Code, § 15610.07, subd. (a).) "Neglect" means "[t]he negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise" or "the negligent failure of an elder or dependent adult to exercise that

		degree of self care that a reasonable person in a like position would exercise." (Welf. & Inst. Code, § 15610.57, subd. (a).) "Neglect includes, but is not limited to… Failure to provide medical care for physical and mental health needs." (Id., § 15610.57, subd. (b).) "'[N]eglect" within the meaning of Welfare and Institutions Code section 15610.57 covers an area of misconduct distinct from 'professional negligence.' As used in the [Elder Abuse] Act, neglect refers not to the substandard performance of medical services but, rather, to the 'failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.' [Citation.] Thus, the statutory definition of 'neglect' speaks not of the undertaking of medical services, but of the failure to provide medical care. [Citation.]" (Covenant Care, supra, 32 Cal.4th at p. 783; Carter v. Prime Healthcare Paradise Valley LLC (2011) 198 Cal.App.4th 396, 404-405 (Carter).) "The Elder Abuse Act's heightened remedies are available only in limited circumstances. A plaintiff must prove, by clear and convincing evidence, that a defendant is liable for either physical abuse under section 15610.63 or neglect under section 15610.57, and that the defendant committed the abuse with 'recklessness, oppression, fraud, or malice.' (§ 15657.)" (Winn, supra, 63 Cal.4th at p. 156.) "Recklessness refers ' "to a subjective state of culpability greater than simple negligence, which has been described as a 'deliberate disregard' of the 'high degree of probability' that an injury will occur." ' [Citation.] Oppression, fraud and malice involve intentional or conscious wrongdoing of a despicable or injurious nature. [Citation.]" (Sababin, supra, 144 Cal.App.4th at p. 89.) As such, the facts supporting an elder abuse cause of action must be pled with particularity. (Covenant Care, 32 Cal.4th at p. 790; Carter, supra, 198 Cal.App.4th at p. 410.) When the court ruled on Defendant Salmi's demurrer to the original complaint, it noted that the complaint alleged Defendant Salmi was Decedent's attending physician, he did not examine her upon her entry into Coventry on April 8, 2022, examined her on April 10, 2022,[1] and was of the opinion that she was suffering from

[1] The FAC changed the dates and some of the allegations. The original complaint alleged that Defendant Salmi first examined Decedent two days after her admission on April 10, 2022, gave the orders to stop her medications and to give her the IV flush that day, and that Decedent was found unresponsive the next day. [Complaint, ¶ 39-41] The FAC changed those allegations and now alleges that Defendant first examined Decedent on April 11, 2022, [FAC, ¶ 45] and deleted the allegations that Defendant Salmi gave orders to stop her medications.

		encephalopathy due to prior medication, ordered labs, no medications and that she be hydrated, the staff did not follow his orders, and that when he learned she was unresponsive on April 11, 2022, he called to transfer her to the hospital. The court sustained the demurrer to the elder abuse cause of action because the allegations showed that Defendant Salmi provided medical care, and that a physician who gives instructions to a member of the staff is generally not liable for the negligence of the staff member in carrying out his instructions. The court noted that the complaint did not allege that Defendant Salmi provided Decedent with care sporadically or inconsistently but alleged that he examined her and made an order that the staff failed to follow. [ROA 65] The amendments to the FAC do not cure the deficiencies noted by the court. While Plaintiffs added allegations regarding Defendant Salmi's involvement in Decedent's initial transfer to Encompass, which includes giving orders for numerous medications without examining her [FAC, ¶ 33], expanded allegations in paragraph 13 regarding the responsibilities he agreed to undertake as head of Decedent's care team at Coventry [FAC, ¶ 13], and provided additional factual allegations regarding what occurred during the time Decedent was at Coventry [FAC, ¶ 33-38, 45, 46], the allegations still show only that Defendant Salmi provided medical care to Decedent. In opposition, Plaintiffs argue that Defendant Salmi caused Decedent's initial overmedication at Encompass, denied her the needed physical assessments on April 8th, 9th, and 10th at Coventry, and denied her a transfer to a hospital on April 11th. However, Plaintiffs have no response to Defendant Salmi's assertion that he examined her within 72 hours of her admission to Coventry, as required under Title 22, California Code of Regulations section 72303. Despite Plaintiffs' argument that Defendant Salmi knew or should have known that Decedent was exhibiting signs of overmedication as early as April 6th and should have examined her upon her admission to Coventry on April 8th, there are no such allegations in the FAC. Instead, the FAC alleges: (1) On April 4, 2022, when Defendant Salmi ordered Decedent's admission to Encompass, he did not see her and ordered numerous medications for her; (2) on April 6, 2022, she was returned to Providence with a diagnosis of an altered level of consciousness and lethargy, readmitted for continued complaints of pain and followed by Dr. Daoud, who suspected she was suffering from possible opioid induced

		hyperalgesia; (3) after a period of stabilization, it was determined that she was appropriate for transfer to Coventry on April 8, 2022; (4) she was transferred to Coventry by ambulance that evening; (5) at 10:30 p.m., Defendant Salmi was contacted by text message and he responded "ok" to order Decedent's admission to Coventry; and (6) without seeing Decedent, Defendant Salmi adopted orders for her daily care, monitoring, and activity, and ordered medications to be administered. [FAC, ¶ 33-35] The FAC alleges that Defendant Salmi admitted Decedent to Coventry without reviewing her records. [FAC, ¶ 35] As for Plaintiffs' argument that Defendant Salmi denied Decedent a transfer to the hospital the morning of April 11, 2022, despite the additions, the FAC still alleges that, upon Defendant Salmi's initial assessment on the morning of April 11, 2022, he determined that Decedent suffered from encephalopathy caused by overmedication, ordered the labs and for the nursing staff to begin IV fluids to flush the overmedication from Decedent's system, and the staff failed to follow his orders. [FAC, ¶ 45-47] The allegations show that Defendant Salmi provided medical care and made a judgment call to order labs and to order IV to flush her system instead of immediately transferring her to the hospital. Plaintiffs fail to cite any authority to show that Defendant Salmi's conduct rises to the level of elder abuse and was anything other than perhaps medical malpractice. The demurrer to the 2nd cause of action is sustained without leave to amend. **<u>First Cause of Action for Negligence/Willful Misconduct</u>** Willful misconduct "is not a separate tort, but simply an aggravated form of negligence, differing in quality rather than degree from ordinary lack of care [citation]. [Citation.] Its pleading requirements are similar to negligence but stricter. [Citation.] [¶] [T]he well-known elements of any negligence cause of action [are] duty, breach of duty, proximate cause and damages. [Citations.] [Citation.]" (Berkley v. Dowds (2007) 152 Cal.App.4th 518, 526, internal quotation marks omitted) "In addition, ' "[t]hree essential elements must be present to raise a negligent act to the level of willful misconduct: (1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril. [Citations.]" ' [Citation.]" (Id., at p. 528.) "Willful misconduct involves more than a failure to use ordinary care; it involves a more positive intent actually to harm another or to do an act with a positive, active, and absolute disregard of its consequences. [Citation.]"

		(Carter, supra, 198 Cal.App.4th at p. 412, internal quotation marks omitted.) When the court sustained the demurrer to this cause of action, it ruled that it did not sufficiently allege willful misconduct because there were no facts that Defendant Salmi acted with deliberate indifference and conscious disregard for the health, safety and well-being of Decedent, as he did examine Decedent, and prepared an order relating to her medication, but the facility staff did not implement his order. [ROA 65] The 1st cause of action relies on the same general facts in the FAC. As previously discussed, it still basically alleges medical malpractice. Plaintiffs argue that Defendant Salmi had actual or constructive knowledge of the peril to be apprehended because he knew that Decedent had previously undergone surgery and that he prescribed massive amounts of painkillers and other medications, which resulted in her return to the hospital on April 6th with altered levels of consciousness, lethargy and inability to eat. [FAC, ¶ 33] However, as previously noted, the FAC does not allege that Defendant knew why Decedent returned to the hospital on April 6th; it alleges when she was readmitted and that she was followed by Dr. Daoud. [FAC, ¶ 33-34] Plaintiffs also argue that Defendant Salmi knew that if he did not timely assess Decedent's medical condition and respond appropriately, she would sustain serious injury, including complications due to overmedication and death. [FAC, ¶ ¶ 85-86, 95-98, 102] However, all of those paragraphs in the FAC contain conclusory allegations that Defendant Salmi "withheld and denied" Decedent a timely, accurate, and comprehensive assessment, in "conscious disregard" of his duties, breached his duties of care to Decedent, intentionally and recklessly denied and withheld services, and caused her to suffer overmedication and injuries. Such conclusory allegations are insufficient, as "'[n]o amount of descriptive adjectives[, adverbs] or epithets may turn a negligence action into an action for intentional or willful misconduct.' [Citation.] (Carter, supra, 198 Cal.App.4th at p. 410.) Lastly, Plaintiffs argue that Defendant Salmi consciously failed to act to avoid the peril. They again assert that he knew of Decedent's altered state as early as April 6, 2022, but did not examine her when she was admitted to Coventry, continued to prescribe her medication, and when he finally saw her on April 11, 2022, he did not send her to the hospital but ordered labs and an IV flush. All of these arguments were addressed in the elder abuse

cause of action. The allegations do not rise to the level of willful misconduct. The demurrer to the 1st cause of action for negligence/willful misconduct is SUSTAINED with leave to amend.

Fourth Cause of Action for Wrongful Death

"'A cause of action for wrongful death is ... a statutory claim. [Citations.] Its purpose is to compensate specified persons—heirs—for the loss of companionship and for other losses suffered as a result of a decedent's death.' [Citation.] ' "The elements of the cause of action for wrongful death are the tort (negligence or other wrongful act), the resulting death, and the damages, consisting of the pecuniary loss suffered by the heirs." ' [Citation.]" (Lattimore v. Dickey (2015) 239 Cal.App.4th 959, 968.) The underlying tort for wrongful death can be medical malpractice. (See ibid.)

The 4th cause of action for wrongful death is based on Defendant Salmi's "negligence, abuse and neglect." [FAC, ¶ 125] As the demurrer to the negligence/willful misconduct and elder abuse causes of action are sustained, the demurrer to this cause of action is sustained as well, with leave to amend.

Motion to strike

Defendant Salmi moves to strike the following in the FAC:

- Page 33, paragraph 96, at line 27: "recklessness, oppression, fraud or malice"
- Page 37, paragraph 108, at lines 12-13: "with recklessness and with malice, oppression, or fraud"
- Page 37, paragraph 108, at line 13: "punitive"
- Page 39, paragraph 115, at lines 17: "were malicious, oppressive, fraudulent and/or reckless"
- Page 42, prayer item 3, at line 13: "For attorney's fees and costs pursuant to Welf. & Inst. Code § 15657"
- Page 42, prayer item 4, at line 14: "punitive damages

"The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper: (a) Strike out any irrelevant, false, or improper matter inserted in any pleading (b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (Code Civ. Proc., § 436.)

		"In any action for damages arising out of the professional negligence of a health care provider, no claim for punitive damages shall be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed." (Code Civ. Proc., § 425.13, subd. (a).) The motion to strike is GRANTED in its entirety. Plaintiffs did not obtain an order to include a punitive damages claim against Defendant Salmi based on professional negligence. The allegations and prayers are all otherwise based on the Elder Abuse Act and they are stricken because the elder abuse cause of action is insufficient as to Defendant Salmi. Should Plaintiff desire to file an amended complaint that addresses the issues in this ruling, Plaintiff shall file and serve the amended complaint within 30 days of service of the notice of ruling. Moving party to give notice.
3	Hong vs. Nguyen	**TENTATIVE RULING:** **<u>Motions to Compel.</u>** Plaintiffs Danh Hong and Nhu Thuan T. Nguyen move to compel Defendant Ngoc Hong Nguyen to provide further responses to certain of the form interrogatories (set one) and requests for production of documents (set one). For the following reasons, the motions are GRANTED in part and DENIED in part. Plaintiffs filed a request for judicial notice with their reply papers, asking the Court to take judicial notice of a page file in Orange County Superior Court Probate Case No. 2023-01346391. The court grants the request to take judicial notice of the documents but not as to the truth of the matters stated therein. (Evid. Code § 452 (d) and (h); *Richtek USA, Inc. v. UPI Semiconductor Corp*. (2015) 242 Cal.App.4th 651, 658.) Plaintiff seeks further responses to the first set of form interrogatories 15.1, 17.1, 50.1, 50.2, 50.3, 50.4, 50.5, and 50.6. If a timely motion to compel has been filed, the burden is on the responding party to justify any objection or failure fully to answer the interrogatories. (*Coy v. Superior Court* (1962) 58 Cal.2d 210, 220-21; *Fairmont Ins. Co. v. Superior Court* (2000) 22 Cal.4th 245, 255.)

		With respect to form interrogatory 15.1, Defendant's response appears to be sufficient except with respect to subpart (c), to which Defendant responded, "All Exhibits attached to the Complaint plus such other documents produced by Responding Party in response to the Interrogatory for Identification and Production Set One." Defendant is ordered to specifically identify the documents responsive to this interrogatory. With respect to form interrogatory 17.1, Defendant is ordered to provide a further response to form interrogatory 17.1 as it relates to Requests for Admission (RFAs) 1-7, 12-13, 15, 17, 20-21, 23-30, 36, 38, 40-41, 45-48, 51-52, 55-56, 58, 61-62, 65-67, 70, and 72-73. Defendant did not respond to form interrogatory 17.1 as to these RFAs, and Defendant's objections to these RFAs do not excuse it from so responding. Defendant is ordered to provide further responses consistent with this ruling within 30 days of notice of ruling. With respect to form interrogatories 50.1, 50.2, 50.3, 50.4, 50.5, and 50.6, Defendant responded "N/A." These interrogatories relate to an agreement alleged in the pleadings. In their moving papers, Plaintiffs do not show that an agreement is alleged in the Complaint and thus how form interrogatories 50.1 through 50.6 are relevant to this action. The motion is denied as to these interrogatories. Plaintiff also seeks further responses to requests for production (RFP) 1-19, 23-31, and 33-41. A motion to compel further responses "shall" set forth "specific facts showing good cause justifying the discovery sought by the demand." (Code Civ. Proc., § 2031.310(b)(1).) Case law provides the burden is on a moving party to show good cause. (*See, e.g., Digital Music News, LLC v. Superior Court* (2014) 226 Cal.App.4th 216, 224 [disapproved on other grounds by *Williams v. Super. Ct.* (2017) 3 Cal.5th 531]; *Kirkland v. Super. Ct.* (2002) 95 Cal.App.4th 92, 98.) To establish "good cause," the burden is on the moving party to demonstrate both: (1) relevance to the subject matter (e.g., how the information in the documents would tend to prove or disprove some issue in the case), and (2) specific facts justifying discovery (e.g., why such information is necessary for trial preparation or to prevent surprise at trial). (*Glenfed Develop. Corp. v. Superior Court* (1997) 53 Cal.App.4th 1113, 1117; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2019) ¶ 8:1495.6.) Specifically, the

		moving party can show good cause by "identify[ing] a disputed fact that is of consequence in the action and explain[ing] how the discovery sought will tend in reason to prove or disprove that fact or lead to other evidence that will tend to prove or disprove the fact." (*Digital Music News*, 226 Cal.App.4th at p. 224.) The fact that there is no alternative source for the information sought is an important factor in establishing good cause for inspection, but is not necessary in every case. (*Associated Brewers Distrib. Co., Inc. v. Superior Court* (1967) 65 Cal.2d 583, 588.) Arguments made in the moving papers or in a separate statement are insufficient to satisfy this requirement; good cause must be shown by way of admissible evidence, such as by declaration. (*Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 224 (motion to compel production of documents must be supported by factual evidence by way of declarations setting forth specific facts justifying each category of materials sought to be produced; arguments in a separate statement or in briefs are insufficient); *People v. Hunter* (2017) 15 Cal.App.5th 163, 182 ("Declarations are generally used to establish the requisite good cause, and specific facts must be alleged").) Here, Plaintiffs' counsel's declaration does not establish good cause for the inspection demands. (Griffith Dec.) Indeed, Plaintiffs have not provided any evidence to show good cause for the RFPs. Thus, the motion to compel further responses to RFPs is denied. Pursuant to Code Civ. Proc. §§ 2030.300 and 2031.310, the Court shall impose a monetary sanction against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a further response, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. And if the results are mixed, the court has the discretion to apportion sanctions or award no sanctions on any terms as may be just. (*See Mattco Valley Forge v. Arthur Young & Co.* (1990) 223 Cal.App.3d 1429, 1437.) No sanctions are awarded in connection with the RFP motion. Defendant is ordered to pay sanctions relating to the interrogatories motion in the amount of $1,280 (4 hours at $300/hour), payable within 30 days of receiving notice of ruling. (Code Civ. Proc. §§ 2030.300.) Plaintiffs to give notice.

4	Nichols vs. Real Advantage Title Insurance Company	**TENTATIVE RULING:** **<u>Motion to Compel.</u>** Defendant Real Advantage Title Insurance Company moves to compel nonparty Pacifica Medical Towers Owners Association to comply with Plaintiff's deposition subpoena for production of business records. For the following reasons, the unopposed motion is GRANTED. Code Civ. Proc. § 2025.480(a) provides: "If a deponent fails to answer any question or to produce any document or tangible thing under the deponent's control that is specified in the deposition notice or a deposition subpoena, the party seeking discovery may move the court for an order compelling that answer or production." Defendant has established that it served Pacifica by personal service with the subpoena and with this motion. (Hoops Dec., ¶ 2, Ex. A; Proof of Personal Service filed on February 26, 2024.) Pacifica did not serve any objections to the subpoena, nor did it comply with the subpoena. (Hoops Dec., ¶ 4.) Pacifica is ordered to comply with the subpoena within 20 days of personal service of this ruling. Defendant to give notice.
5	Asics America Corporation vs. Shoebacca Ltd.	**TENTATIVE RULING:** For the reasons set forth below, Plaintiff and Cross-Defendant Asics America Corporation's Motion to Seal Certain Documents is GRANTED. Exhibits 11-4, 16-17, and 21-34 to the Declaration of Collin P. Wedel in support of Plaintiff's Opposition to Defendant's Motion to Reopen the Deposition of Travis Velez [ROA # 1080], and portions of Plaintiff's Opposition to Defendant's Motion to Reopen the Deposition of Travis Velez [ROA # 1079], are sealed. **<u>Statement of Law</u>** "Unless confidentiality is required by law, court records are presumed to be open." (Cal. Rules of Court, rule 2.550(c); *In re Marriage of Tamir* (2021) 72 Cal.App.5th 1068, 1079.)

		"A record must not be filed under seal without a court order. The court must not permit a record to be filed under seal based solely on the agreement or stipulation of the parties." (Cal. Rules of Court, rule 2.551(a).) "A party requesting that a record be filed under seal must file a motion or an application for an order sealing the record. The motion or application must be accompanied by a memorandum and a declaration containing facts sufficient to justify the sealing." (Cal. Rules of Court, rule 2.551(b)(1); see Cal. Rules of Court, rule 2.551(b)(2) [motion must be served on all parties]; see also Cal. Rules of Court, rule 2.551(b)(4)-(b)(5), (d) [rules regarding lodging of redacted and unredacted records].) > The court may order that a record be filed under seal only if it expressly finds facts that establish: > (1) There exists an overriding interest that overcomes the right of public access to the record; > (2) The overriding interest supports sealing the record; > (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; > (4) The proposed sealing is narrowly tailored; and > (5) No less restrictive means exist to achieve the overriding interest. (Cal. Rules of Court, rule 2.550(d); *Timothy W. v. Julie W*. (2022) 85 Cal.App.5th 648, 301; *In re Marriage of Tamir, supra*, 72 Cal.App.5th at p. 1079; see *Kirk v. Ratner* (2022) 74 Cal.App.5th 1052, 1056, fn. 2 [settlement agreement obligated any party petitioning to vacate the arbitrator's award to seek an order sealing all documents in the court file, and the superior court granted motions by all parties to seal all documents filed with the court].) > (1) If the court grants an order sealing a record and if the sealed record is in paper format, the clerk must substitute on the envelope or container for the label required by (d)(2) a label prominently stating "SEALED BY ORDER OF THE COURT ON (DATE)," and must replace the cover sheet required by (d)(3) with a filed-endorsed copy of the court's

order. If the sealed record is in electronic form, the clerk must file the court's order, maintain the record ordered sealed in a secure manner, and clearly identify the record as sealed by court order on a specified date.

(2) The order must state whether--in addition to the sealed records--the order itself, the register of actions, any other court records, or any other records relating to the case are to be sealed.

(3) The order must state whether any person other than the court is authorized to inspect the sealed record.

(4) Unless the sealing order provides otherwise, it prohibits the parties from disclosing the contents of any materials that have been sealed in anything that is subsequently publicly filed.

(Cal. Rules of Court, rule 2.551(e).)

(1) An order sealing the record must:

(A) Specifically state the facts that support the findings; and

(B) Direct the sealing of only those documents and pages, or, if reasonably practicable, portions of those documents and pages, that contain the material that needs to be placed under seal. All other portions of each document or page must be included in the public file.

(Cal. Rules of Court, rule 2.550(e).)

"While the findings may be set forth in cursory terms, '[i]f the trial court fails to make the required findings, the order is deficient and cannot support sealing.' [Citation.]" (*In re Marriage of Tamir, supra*, 72 Cal.App.5th at p. 1079.)

Plaintiff's Motion to Seal

Exhibits 11-14, 16-17, and 21-34 to the Declaration of Collin P. Wedel in support of Plaintiff's Opposition to Defendant's Motion

		to Reopen the Deposition of Travis Velez, as well as the Opposition to Defendant's Motion to Reopen the Deposition of Travis Velez, reference Plaintiff's non-public information regarding its business practices and strategies surrounding the sale of its off-price footwear. (Durken Declaration, ¶¶ 4-5.) (*Overstock.com, Inc. v. Goldman Sachs Group, Inc.* (2014) 231 Cal.App.4th 471, 503 [the right to privacy extends to one's confidential financial affairs].) Exhibits 12-14 and 21-34 were documents produced in discovery, and they were designated as "Confidential" pursuant to the Stipulation and Protective Order entered by this Court on April 9, 2021. (Kang Declaration, ¶ 2.) Exhibits 11, 16, and 17 are excerpts from depositions, and the deposition testimony was also designated as being "Confidential" under the Stipulation and Protective Order. (Kang Declaration, ¶ 3.) Since Defendant has not challenged the sealing of the subject documents, and it has not raised any arguments, or produced any evidence, that would override Plaintiff's right to privacy, the Court finds Plaintiff has met its burden to seal the subject records. (Cal. Rules of Court, rule 2.550(d); see *In re Marriage of Tamir*, *supra*, 72 Cal.App.5th at p. 1088 [while party may have general right to privacy, it should identify any specific prejudice or privacy concerns that would override the right to public access].) Other than the Court, no persons or parties are authorized to inspect the sealed record. The sealed material may not be disclosed in anything that is subsequently publicly filed. (Cal. Rules of Court, rule 2.551(e).) Plaintiff to give notice.
6	Carbon Capital Fund, LLC vs. Nguyen	**TENTATIVE RULING:** The unopposed motion of Omid Shirazi & Jeffrey Benice to be relieved as counsel of record for Plaintiff Carbon Capital Fund, LLC is GRANTED. The order relieving counsel will be effective upon the filing of a proof of service of the executed order upon all parties. Because Plaintiff Carbon Capital Fund, LLC is a corporate entity, it must be represented by an attorney. Thus, a Status Conference re Plaintiff's Failure to Be Represented by Counsel is set for May 14, 2024, at 9:00 a.m. in Department N16 to be heard concurrently with the Case Management Conference.

		Moving counsel to give notice and file a proof of service of such notice.
7	Coast Surgery Center vs. Blue Cross of California	**TENTATIVE RULING:** Plaintiff Coast Surgery Center moves for Orders sealing documents related to Plaintiff's opposition to Motions by (1) Regence BlueShield of Idaho, Inc. ("Regence"); (2) Group Hospitalization and Medical Services, Inc. ("GHMS"); and (3) Blue Cross and Blue Shield of North Carolina ("Blue Cross NC") to quash service of summons. For the reasons set forth below, the unopposed Motions are GRANTED. **Statement of Law** To seal a record, the moving party must file a motion for such relief, along with a memorandum and a declaration containing facts sufficient to justify the sealing. (CRC 2.551(b)(1).) The motion must be served on all parties, and unless the court orders otherwise, a complete copy of the document must be served on all other parties that already possess copies, along with the redacted version. (CRC 2.551(b)(2).) To grant a motion to seal, the court must expressly find that: 1. an overriding interest exists that overcomes the right of public access to the record; 2. the overriding interest supports sealing the records; 3. a substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; 4. the proposed sealing is narrowly tailored; and 5. no less restrictive means exist to achieve the overriding interest. (CRC 2.550(d); *McGuan v. Endovascular Technologies, Inc*. (2010) 182 Cal. App. 4th 974, 988.) These findings embody constitutional requirements for a request to seal court records, protecting the First Amendment right of public access to civil trials. (See *NBC Subsidiary (KNBC–TV), Inc. v. Superior Court* (1999) 20 Cal. 4th 1178, 1217–18; *Huffy Corp. v. Superior Court* (2003) 112 Cal. App. 4th 97, 104; *People v. Jackson* (2005) 128 Cal. App. 4th 1009, 1026–27 (finding that in determining whether to seal records, courts must weigh

constitutional requirements for disclosure against such factors as privacy rights).)

A sealing order must also: (a) specifically state facts supporting the above findings; and (b) be narrowly tailored (*i.e.*, it should direct sealing of only those documents and pages that contain material that needs to be placed under seal; all other portions of each document or page must remain in the public file). (CRC 2.550(e)(1).)

Examples of documents that may qualify to be sealed are:

- Documents containing trade secrets. (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 300 [*dictum*]; *McGuan v. Endovascular Tech., Inc.* (2010) 182 Cal.App.4th 974, 988 [dealing with quality control records and complaint handling procedures].)
- Documents containing material protected by a privilege. (*Huffy Corp. v. Superior Court* (2003) 112 Cal.App.4th 97, 108 [addressing attorney-client privilege (dictum)].)
- Confidential settlement agreement. (*Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1283 [dictum].)

A contractual duty not to disclose contract terms can be sufficient to constitute an overriding interest. (*Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1283-84 ["We agree with defendant that its contractual obligation not to disclose can constitute an overriding interest within the meaning of rule 243.1(d)"].)

Analysis

Plaintiff seeks to seal the following documents:

1. The Blue Cross Motion: Plaintiff seeks an order sealing [ROA # 422]:

    a. Plaintiff's Supplemental Brief In Support of Opposition to Defendant Blue Cross and Blue Shield of North Carolina's Motion to Quash Service of Summons for Lack of Personal Jurisdiction;
    b. Exhibits 1-6 to the Declaration of Ronald S. Kravitz In Support of Opposition to Defendant Blue Cross and Blue Shield of North Carolina's; and
    c. Exhibit A to the Declaration of Chad Bohorquez In Support of Opposition to Defendant Blue Cross and

		Blue Shield of North Carolina's Motion to Quash Service of Summons for Lack of Personal Jurisdiction. 2. The Group Hospitalization Motion: Plaintiff seeks an order sealing [ROA #430]: a. Plaintiff's Supplemental Brief In Support of Opposition to Defendant Group Hospitalization and Medical Services, Inc's Motion to Quash Service of Summons for Lack of Personal Jurisdiction; b. Exhibits 1-3 to the Declaration of Ronald S. Kravitz In Support of Opposition to Defendant Group Hospitalization and Medical Services, Inc's Motion to Quash Service of Summons for Lack of Personal Jurisdiction; and c. Exhibit A to the Declaration of Chad Bohorquez In Support of Opposition to Defendant Group Hospitalization and Medical Services, Inc's Motion to Quash Service of Summons for Lack of Personal Jurisdiction. 3. The Regence Motion: Plaintiff seeks an order sealing [ROA #426]: a. Plaintiff's Supplemental Brief In Support of Opposition to Defendant Regence BlueShield of Idaho's Motion to Quash Service of Summons for Lack of Personal Jurisdiction; b. Exhibits 1-4 to the Declaration of Ronald S. Kravitz In Support of Opposition to Defendant Regence BlueShield of Idaho's Motion to Quash Service of Summons for Lack of Personal Jurisdiction; and c. Exhibit A to the Declaration of Chad Bohorquez In Support of Opposition to Defendant Regence BlueShield of Idaho's Motion to Quash Service of Summons for Lack of Personal Jurisdiction. Plaintiff argues that the information from these documents have been designated as confidential in their entirety by the parties pursuant to a protective order and contain medical information, personal health information, and/or confidential business and/or proprietary information of Defendants. The court finds that there is an overriding interest that overcomes the right to public access to the documents that Plaintiff has

		identified. The parties intended the documents to be confidential and private and agreed as such. Further, the documents contain private health information and/or Defendants' proprietary business information. The motions are narrowly tailored to only those documents identified by Plaintiff in connection with Plaintiff's oppositions to the motions to quash. There is a substantial probability that the overriding interest will be prejudiced if these records are not sealed. Given that no less restrictive means exist to achieve the overriding interest, the motions are granted. Other than the Court, no persons or parties are authorized to inspect the sealed record. The sealed material may not be disclosed in anything that is subsequently publicly filed. (Cal. Rules of Court, rule 2.551(e).) Plaintiff to give notice.
8	Solis vs. Lauderdale	**TENTATIVE RULING:** **<u>Motion to Strike or Tax Costs</u>** Plaintiff Mary Solis moves to strike or tax the costs claimed in the Memorandum of Costs filed by Defendant Spencer Lauderdale. For the following reasons, Plaintiff's motion is GRANTED in part and DENIED in part. Defendant's claimed expert fees shall be taxed in the amount of $1,900.00. The remainder of the motion is DENIED. As an initial matter, "filing of a notice of appeal does not stay any proceedings to determine the matter of costs …." (*Bankes v. Lucas* (1992) 9 Cal.App.4th 365, 369; *Carpenter v. Jack in the Box Corp.* (2007) 151 Cal.App.4th 454, 461, 59 Cal.Rptr.3d 839 [appeal did not divest trial court of jurisdiction to consider fees and costs].) **<u>CCP Section 998 Offers and Their Effect on Costs</u>** " ' "[C]osts" of a civil action consist of the expenses of litigation .... The right to recover any such costs is determined entirely by statute.' " (*Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1148; accord, *Khosravan v. Chevron Corp.* (2021) 66 Cal.App.5th 288.) Code of Civil Procedure section 998, subdivision (b), provides, "Not less than 10 days prior to commencement of trial or arbitration ..., any party may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time. The written offer shall include a statement of the offer, containing the terms and

conditions of the judgment or award, and a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted."

Section 998, subdivision (c)(1), provides, "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff ... shall pay the defendant's costs from the time of the offer. In addition, ... the court ..., in its discretion, may require the plaintiff 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 during trial ..., of the case by the defendant." "Section 998 thus modifies the general cost recovery provisions of sections 1031 and 1032. (§ 998, subd. (a) ['The costs allowed under Sections 1031 and 1032 shall be withheld or augmented as provided in this section.'].)" (*Covert v. FCA USA, LLC* (2022) 73 Cal.App.5th 821, 832.)

Validity of Defendants' Section 998 Offer

On a motion to strike or tax costs, "[t]he burden is on the offering party to demonstrate that the offer is valid under section 998." (*Ignacio v. Caracciolo* (2016) 2 Cal.App.5th 81, 86; accord, *Khosravan*, 66 Cal.App.5th at 294.) "The offer must be strictly construed in favor of the party sought to be bound by it." (*Ignacio*, 2 Cal.App.5th at 86; accord, *Khosravan*, 66 Cal.App.5th at 295.)

" 'An offer to compromise under ... section 998 must be sufficiently specific to allow the recipient to evaluate the worth of the offer and make a reasoned decision whether to accept the offer.' " (*Menges*, 59 Cal.App.5th at 26; accord, *Khosravan*, 66 Cal.App.5th at 295.) "The inclusion of nonmonetary terms and conditions does not render a section 998 offer invalid; but those terms or conditions must be sufficiently certain and capable of valuation to allow the court to determine whether the judgment is more favorable than the offer." (*Menges*, 59 Cal.App.5th at 26; accord, *Khosravan*, 66 Cal.App.5th at 295.)

" 'To further the purposes of promoting reasonable settlement under section 998, we must consider the validity of section 998 offers as of the date the offers are served.' " (*Khosravan*, 66 Cal.App.5th at 295; accord, *Valentino v. Elliott Sav-On Gas, Inc.* (1988) 201 Cal.App.3d 692, 698 [the value of terms and conditions of a section 998 offer must be evaluated "as of the time" the offer was made "without the benefit of hindsight"].) "Where a

defendant's settlement offer contains terms that make it 'exceedingly difficult or impossible to determine the value of the offer to the plaintiff[,] ... a court should not undertake extraordinary efforts to attempt to determine whether the judgment is more favorable to the plaintiff. Instead, the court should conclude that the offer is not sufficiently specific or certain to determine its value and deny cost shifting under Code of Civil Procedure section 998.' " (*Khosravan,* , 66 Cal.App.5th at p. 295, 280 Cal.Rptr.3d 754; accord; see *Valentino,* 201 Cal.App.3d at 700 [courts should not "engage[ ] in pure guesswork"].)

On November 23, 2022, Defendants Spencer Lauderdale and Kathleen Lauderdale served a statutory section 998 Offer to Plaintiff in the amount of $100,000.00. Defendants' section 998 Offer states, in pertinent part:

> [D]efendants SPENCER LAUDERDALE and KATHLEEN LAUDERDALE, hereby offer to compromise this litigation for the sum of One Hundred Thousand Dollars ($100,000.00) pursuant to *Code of Civil Procedure* §998.
>
> Therefore, the undersigned, on behalf of himself/herself and his/her heirs, executors, wards, administrators, agents, officers, directors, shareholders, successors in interest, attorneys, and assigns, specifically waives and relinquishes any and all rights, actions, causes of action, claims, demands, costs, losses, expenses, and claims for compensation against releasees.

(Mandell Decl. ¶ 4, Exh. C.)

Defendants' section 998 offer was valid. Plaintiff did not contest the offer's validity. The terms are sufficiently specific and the amount of the offer is definitively stated—the offer is for $100,000.00.

Reasonableness and Good Faith of the Section 998 Offer

Because Defendants' section 998 offer was valid, the burden shifts to Plaintiff as the offeree to demonstrate the offer was unreasonable or was not made in good faith. (*Smalley v. Subaru of America, Inc.* (2022) 87 Cal.App.5th 450, 458 [citation omitted]; *Licudine v. Cedars-Sinai Medical Center* (2019) 30 Cal.App.5th 918, 926.) Only settlement offers made in good faith are effective under section 998. (*Licudine,* 30 Cal.App.5th at 924.) If the actual

judgment is more favorable to the offeror than was the offer, it is prima facie evidence of the offer's reasonableness." (*Covert v. FCA USA, LLC* (2022) 73 Cal.App.5th 821, 834.)

An offer is made in good faith only if the offer " ' "carr[ies] with it some reasonable prospect of acceptance." ' " (*Licudine,* 30 Cal.App.5th at 924.) "Whether a section 998 offer has a reasonable prospect of acceptance is a function of two considerations, both to be evaluated in light of the circumstances ' "at the time of the offer" ' and ' "not by virtue of hindsight." ' [Citations.] First, was the 998 offer within the 'range of reasonably possible results' at trial, considering all of the information the offeror knew or reasonably should have known? [Citation.] Second, did the offeror know that the offeree had sufficient information, based on what the offeree knew or reasonably should have known, to assess whether the 'offer [was] a reasonable one,' such that the offeree had a 'fair opportunity to intelligently evaluate the offer'?" (*Id*. at 924-925.)

Based on the record, as applied to the applicable law, the court concludes that Defendants' section 998 offer was within the "range of reasonably possible results" at trial. The jury's defense verdict constitutes prima facie evidence of such. (*See Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102, 117 ["Where ... the offeror obtains a judgment more favorable than its offer, the judgment constitutes prima facie evidence showing the offer was reasonable and the offeror is eligible for costs as specified in section 998."])

In assessing whether the 998 offeror knew that the offeree had sufficient information to evaluate the offer, cases have identified a number of specific circumstances to be examined: (1) how far into the litigation was the 998 offer made; (2) what information bearing on the reasonableness of the 998 offer was available to the offeree prior to the offer's expiration; and (3) whether the party receiving the 998 offer alerted the offeror that it lacked sufficient information to evaluate the offer and, if so, how did the offeror respond. (*Licudine,* 30 Cal.App.5th at 925–926.)

Defendant's section 998 offer was made in good faith and was "realistically reasonable under the circumstances of the particular case" (*Wear v. Calderon* (1981) 121 Cal.App.3d 818, 821). Plaintiff has not met her burden of showing that Defendant's offer was a token offer made in bad faith. Accordingly, Plaintiff's motion to strike Defendant's claimed expert costs is denied.

Tax of Specific Costs

A prevailing party is entitled as a matter of right to recover costs in any action or proceeding. (Code Civ. Proc, § 1032, subd. (b).) Code of Civil Procedure section 1033.5 sets forth the costs that are recoverable by the prevailing party in a civil action. (See Code Civ. Proc, §§ 1032(b), 1033.5.) It enumerates specific costs that are recoverable, but also provides that the court may award costs not expressly described in the statute for expenses that are "reasonably necessary to the conduct of the litigation" and are "reasonable in amount." (Code Civ. Proc, § 1033.5, subd. (c)(2)-(4).)

Items listed in a verified memorandum of costs that appear to be proper charges are prima facie evidence that the items were necessarily incurred, and the burden is on the party seeking to tax costs to show that they were not reasonable or necessary. (*Ladas v. Cal. State Auto. Ass'n* (1993) 19 Cal.App.4th 761, 774.) Although the burden shifts to the party claiming the costs upon an objection in a motion to strike or tax costs, this burden is met by providing sufficient detail as to the reasonableness of the costs incurred. (See *Thon v. Thompson* (1994) 29 Cal.App.4th 1546, 1548-1549.) The trial court's allowance of costs is reviewed for abuse of discretion. (*Puppo v. Larosa* (1924) 194 Cal. 721, 723.)

Line Item No. 4: Deposition Fees

Plaintiff objects to Defendant's claimed costs for deposition fees, but has not provided any evidence to show why the depositions were not reasonable or necessary to the litigation. The motion to tax deposition fees is denied.

Line Item No. 8.b.: Expert Fees

Plaintiff objects to Defendant's claimed costs for Invoice #INV57131, dated September 6, 2022. Because these costs were incurred before Defendants made their November 23, 2022, offer, the motion to tax expert fees in the amount of $1,900.00 is granted. Defendant did not address these costs and failed to show that they were reasonable.

Line Item No. 11: Court Reporter Fees

Although Plaintiff argues that all costs should be stricken or taxed except for court filing fees and jury fees, Plaintiff did not address

why the court reporter fees were not reasonable or necessary. The motion to tax court reporter fees is denied.

Plaintiff's Ability to Pay

Courts do not have discretion to deny Code of Civil Procedure section 1033.5 costs based on the losing party's lack of resources. (See *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 129 [concluding that there is no "discretion to consider a party's ability to pay" under section 1032 of the Code of Civil Procedure]; see also *Alfaro v. Colgate-Palmolive (LAUD Asbestos Cases*) (2018) 25 Cal.App.5th 1116, 1124-1125 [finding "no authority ... for the court to analyze whether costs are reasonable based on the losing party's ability to pay" under section 1033.5 of the Code of Civil Procedure].)

In contrast to the restrictions in sections 1032 and 1033.5, courts have interpreted the discretionary authority in section 998 to allow the consideration of a party's ability to pay when determining the appropriate recovery under that statute. (See *Nelson, supra*, 72 Cal.App.4th at p. 129; *Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102, 125, fn. 7 ["Section 998 ... permits the trial court, via exercise of discretion, to consider a party's ability to pay costs."]; see also *Seever v. Copley Press, Inc*. (2006) 141 Cal.App.4th 1550, 1561–1562 ["If the goal of ... section 998 is to encourage fair and reasonable settlements—and not settlements at any cost—trial courts in exercising their discretion must ensure the incentives to settle are balanced between the two parties. Otherwise less affluent parties will be pressured into accepting unreasonable offers just to avoid the risk of a financial penalty they can't afford."].)

Although there is some evidence in the record regarding Plaintiff's limited income, there is insufficient evidence for the court to determine that Plaintiff lacks the ability to pay any cost award. Plaintiff declares that she is "currently unemployed and [has] no source of income other than that which is provided by [her] boyfriend." (Solis Decl. ¶ 2.) Plaintiff did not provide any information about her assets or the income provided by her boyfriend. (See *Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1204, 73 Cal.Rptr.3d 343 [plaintiff must provide evidence of inability to pay, such as "a declaration setting forth his gross income, his net income, his monthly expenses, his assets, or any other information which ... would lend support to his position"].) Plaintiff did not provide sufficient evidence to support

		a finding of her inability to pay. Accordingly, the court declines to reduce Defendant's claimed expert costs on this basis. Defendant to give notice.
9	White vs. Athenix Body Sculpting Institute	**TENTATIVE RULING:** Plaintiff Florence White moves for leave to amend her complaint. For the following reasons, the motion is DENIED without prejudice. Code of Civil Procedure Section 1005, subdivision (b), requires that "all moving and supporting papers shall be served and filed at least 16 court days before the hearing." In addition, A proof of service of moving papers must be filed five court days before the hearing. (Cal. Rules Ct., Rule 3.1300(c).) At the February 21, 2024, initial hearing on the motion, the court noted that the "court record shows no proof of service of the moving papers." [Minute Order, dated February 21, 2024]. As such, the court continued the hearing on the motion to April 24, 2024. The court instructed that "[n]o later than five (5) court days prior to the continued hearing date, Plaintiff shall file and serve proof of timely service of all moving and supporting papers." On March 5, 2024, Plaintiff filed a proof of service of the notice of motion for leave to file first amended complaint only on Nicholas Vendemia, M.D. [ROA #37]. The court record does not indicate that Defendants Athenix Body Sculpting Institute, Athenix Physician Group, Inc., and Shain Arnold Cuber, MD (Doe 1) were timely served. The court finds that the motion is procedurally defective, despite the court's attempt to give Plaintiff an additional opportunity to correct past procedural defects. The motion is DENIED without prejudice. Defendant to give notice.
10	Safari Coast, LLC vs. Wood	**TENTATIVE RULING:** For the reasons set forth below, Defendants Ryan Wood, R.L. Wood, LLC and Halcyon Advisory Partners' Motion for Summary Judgment or, in the Alternative, Summary Adjudication, is DENIED.

Statement of Law

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) "A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." (Code Civ. Proc., § 437c, subd. (a)(1).) "The motion for summary judgment 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. In determining if the papers show that there is no triable issue as to any material fact, the court shall consider all of the evidence set forth in the papers, except the evidence to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence if contradicted by other inferences or evidence that raise a triable issue as to any material fact." (Code Civ. Proc., § 437c, subd. (c).)

"A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if the party contends that the cause of action has no merit, that there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to any cause of action, that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code Civ. Proc., § 437c, subd. (f)(1); *R.J. Land & Associates Construction Co. v. Kiewit-Shea* (1999) 69 Cal.App.4th 416, 424.) "A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment." (Code Civ. Proc., § 437c, subd. (f)(2).)

"If a motion for summary adjudication is granted, at the trial of the action, the cause or causes of action within the action, affirmative defense or defenses, claim for damages, or issue or issues of duty

		as to the motion that has been granted shall be deemed to be established and the action shall proceed as to the cause or causes of action, affirmative defense or defenses, claim for damages, or issue or issues of duty remaining." (Code Civ. Proc., § 437c, subd. (n)(1).) For purposes of a motion for summary adjudication, "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. The plaintiff or cross-complainant shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(2).) "First, and generally, from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar, supra*, 25 Cal.4th at p. 850.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid*.) "Second, and generally, 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; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar, supra*, 25 Cal.4th at p. 850; Code Civ. Proc., § 437c, subd. (p)(1) [plaintiff meets its burden by proving each element of its cause of action].) Unless the moving party meets its initial burden, summary judgment cannot be ordered, even if the opposing party has not responded sufficiently, or at all. (*Vesely v. Sager* (1971) 5 Cal.3d 153, 169-170, superseded by statute on another point, as noted in *Ennabe v. Manosa* (2014) 58 Cal.4th 697, 701, 707; *FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 73, fn. 4.)

		The moving party's evidence is strictly construed, while the opposing party's evidence is liberally construed, and any doubts as to whether summary judgment should be granted must be resolved in favor of the opposing party. (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64; accord, *Atkins v. St. Cecilia Catholic School* (2023) 90 Cal.App.5th 1328, 1344-1345; *Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1143.) "The court focuses on finding issues of fact; it does not resolve them. The court seeks to find contradictions in the evidence or inferences reasonably deducible from the evidence that raise a triable issue of material fact. [Citation.]" (*Trop, supra,* 129 Cal.App.4th 1133, 1143-1144.) **Defendants' Requests for Judicial Notice** With their MSJ, Defendants ask the Court to take judicial notice of: (1) the First Amended Complaint, and (2) Defendants' Answer to the First Amended Complaint. The Court grants the requests for judicial notice, as it can take judicial notice of its own records, including pleadings such as the First Amended Complaint and Defendants' Answer to same. (Evid. Code, § 452, subd. (d); see *AL Holding Co. v. O'Brien & Hicks, Inc.* (1999) 75 Cal.App.4th 1310, 1313, fn. 2 [complaint and answer proper subjects of judicial notice where they were relevant to the ground for the underlying motion].) **Defendants' Evidentiary Objections** With their Reply, Defendants object to paragraphs 13-15, 17-18, 20, 22, and 24-25 of the Annoni Declaration. As discussed, *infra*, Defendants did not meet their initial burden. Thus, Annoni's Declaration is inconsequential, as it is not "pertinent to the disposition of the summary judgment motion," and it is not "critical in resolving the summary judgment motion." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532-533; accord, *Cohen v. Kabbalah Centre Internat., Inc.* (2019) 35 Cal.App.5th 13, 20-21; see *Tate v. Fratt* (1896) 112 Cal. 613, 619 [no error in overruling the objection to remarks that were inconsequential].) Thus, the Court overrules Defendants' evidentiary objections.

Whether the Subject Contract is Contrary to Public Policy, Illegal, and Unenforceable is a Question of Fact

Defendants move for summary judgment of both causes of action, arguing the subject contract is contrary to public policy, illegal, and unenforceable.

"Whether a contract is contrary to public policy is a question of law to be determined from the circumstances of the particular case." (*Bovard v. American Horse Enterprises, Inc.* (1988) 201 Cal.App.3d 832, 838.)

> The question whether a contract violates public policy necessarily involves a degree of subjectivity. Therefore, "... courts have been cautious in blithely applying public policy reasons to nullify otherwise enforceable contracts. This concern has been graphically articulated by the California Supreme Court as follows: 'It has been well said that public policy is an unruly horse, astride of which you are carried into unknown and uncertain paths, ... While contracts opposed to morality or law should not be allowed to show themselves in courts of justice, yet public policy requires and encourages the making of contracts by competent parties upon all valid and lawful considerations, and courts so recognizing have allowed parties the widest latitude in this regard; and, unless it is entirely plain that a contract is violative of sound public policy, a court will never so declare. "The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt." [Citation.] ... "No court ought to refuse its aid to enforce a contract on doubtful and uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled public policy of this state, or injurious to the morals of its people." [Citation.]' " [Citations.]

(*Bovard, supra*, 201 Cal.App.3d at pp. 838–839; see *Dunkin v. Boskey* (2000) 82 Cal.App.4th 171, 195 ["Even an illegal contract may be enforced to avoid unjust enrichment or unconscionable injury"].)

		In *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, Tenzer was a board member for Superscope. In that capacity, Tenzer learned Superscope was attempting to sell its corporate headquarters due to cashflow problems. (*Tenzer, supra*, 39 Cal.3d at p. 22.) Tenzer located a potential buyer, and Tushinsky, Superscope's president, orally agreed to pay Tenzer a 10% finder's fee. (*Id*. at p. 23.) While Tenzer advised Superscope's board he was entitled to a finder's fee, he did not reveal the amount to which Tushinsky had agreed. (*Ibid*.) Tenzer was never paid his finder's fee. (*Tenzer, supra,* 39 Cal.3d at p. 23.) The trial court granted Superscope's MSJ to Tenzer's complaint. (*Tenzer, supra*, 39 Cal.3d 18, 24.) On appeal, Superscope argued that, in light of Tenzer's fiduciary obligations as a corporate director, his reliance on Tushinsky's promise was unreasonable as a matter of law. (*Id.* at p. 31.) The California Supreme Court explained, "[w]ell-established principles of corporations law hold that a 'director cannot, by reason of his position, drive a harsh and unfair bargain with the corporation he is supposed to represent.' [Citation.] '[Directors'] dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director ... not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. [Citation.] The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. [Fn. omitted.] If it does not, equity will set it aside.' [Citation.] '[T]ransactions that are unfair and unreasonable to the corporation may be avoided.' [Citations.]" (*Tenzer, supra*, 39 Cal.3d 18, 31-32.) However, "[e]stablishing whether Tenzer's agreement with Superscope was fair and reasonable involves determination of the particular factual circumstances of the agreement, and application of the standards of fairness and good faith required of a fiduciary to these facts. These are functions mainly for the trier of facts. [Citations.]" (*Tenzer, supra,* 39 Cal.3d at p. 32.) Defendants' motion for summary judgment is based on the notion that the subject fee-splitting contract is contrary to public policy, and it is illegal and unenforceable, because it "tends to induce" a violation of Plaintiffs' fiduciary duties to CSI. (*Agam v. Gavra* (2015) 236 Cal.App.4th 91, 112.) However, as in *Tenzer*, establishing whether the contract was fair and reasonable to CSI,

		and whether the contract tended to induce a violation of Plaintiffs' fiduciary duties, "involves determination of the particular factual circumstances of the agreement, and application of the standards of fairness and good faith required of a fiduciary to these facts. These are functions mainly for the trier of fact." (*Tenzer, supra*, 39 Cal.3d at p. 32.) Given the foregoing, Defendants have not met their initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; Code Civ. Proc., § 437c, subd. (p)(2) [defendant meets its burden of showing a cause of action has no merit if the party has shown there is a complete defense to the cause of action]; see Code Civ. Proc., § 437c, subd. (o)(2) [a cause of action has no merit if the defendant establishes an affirmative defense to that cause of action].) Since Defendants have not met their initial burden, summary adjudication cannot be ordered. (*FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 73, fn. 4.) **The Statute of Frauds Does Not Apply** Defendants next argue the first cause of action violates the statute of frauds because the contract could not be performed within a year of formation, and because the alleged writing was missing essential terms. "The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent: … An agreement that by its terms is not to be performed within a year from the making thereof." (Civ. Code, § 1624, subd. (a)(1).) "The statute of frauds does not require a written contract; a 'note or memorandum ... subscribed by the party to be charged' is adequate. [Citation.]" (*Sterling v. Taylor* (2007) 40 Cal.4th 757, 765.) "A memorandum satisfies the statute of frauds if it identifies the subject of the parties' agreement, shows that they made a contract, and states the essential contract terms with reasonable certainty. [Citations.] 'Only the essential terms must be stated, " 'details or particulars' need not [be]. What is essential depends on the agreement and its context and also on the subsequent conduct of the parties...." [Citation.]' [Citations.]" (*Id.* at p. 766.)

		Under the Uniform Electronic Transactions Act, an email is a valid writing, and an email that contains the name of a party to the contract constitutes a signature to satisfy the statute of frauds. (Civ. Code, § 1633.7; see *Piveg, Inc. v. General Star Indemnity Company* (S.D. Cal. 2016) 193 F.Supp.3d 1138, 1146 [“ ‘under California law, several [emails] may collectively constitute a memorandum that satisfies the statute of frauds’ ”].) Here, Exhibit A to the First Amended Complaint includes e-mail communications, dated September 4 and 5 of 2021, and between Plaintiff Joe Annoni and Defendant Ryan Wood, wherein the parties agreed they would split the finder’s fee if CSI and Revolent closed the deal. (Exhibit 1 to Request for Judicial Notice; see also Exhibit A to Lee Declaration [131:19-132:5 – contract was entered into in September 2021]; see also Exhibit B to Lee Declaration [113:4-113:10 – Annoni testified that the oral agreement was confirmed in writing] .) In Wood’s reply to Annoni, he provided details that the amount of that commission would depend on the total acquisition price. (Exhibit 1 to Request for Judicial Notice.) For example, Revolent, the company acquiring CSI, agreed to pay Defendants “1% of the Total Acquisition Price in excess of US $4 million.” According to the terms between Wood and Revolent, the transaction “shall be paid to Consultant in U.S. funds on the closing date of the Acquisition (the ‘Closing Date’).” (Exhibit 1 to Request for Judicial Notice; see also Exhibit 1 to Wood Declaration [Finder’s Fee Agreement].) Defendants admit Revolent acquired CSI on December 31, 2021 (Wood Declaration, ¶ 9), although he states he did not receive the commission until January 2022 and June 2023 (Wood Declaration, ¶ 10). Since the oral contract between Plaintiffs and Defendants was reduced to “some note or memorandum thereof,” and since the memorandum included the essential contract terms with reasonable certainty, the Statute of Frauds does not apply. The Court finds “details and particulars,” such as Plaintiffs’ obligations to: (1) introduce Revolent to CSI, (2) participate in the due diligence process, (3) provide Defendants with information about what other deals CSI was considering, (4) talk with CSI about why CSI should consider selling to Revolent, or (5) negotiating the EBITDA of CSI, do not constitute “essential contract terms.” (*Sterling, supra*, 40 Cal.4th at p. 766.)

		Defendants contend the oral agreement did not include most of the material terms, as the commission was paid over a course of more than a year, and because it included contingent or deferred payments. However, the e-mail between Annoni and Wood is clear that Defendants' commission would be a percentage of the total acquisition price, and that Plaintiffs would receive 50% of Defendants' commission. The e-mail further makes clear the transaction commission would be paid at the closing of the acquisition unless the total acquisition price included contingent or deferred payments. If the total acquisition price included such contingent or deferred payments, then the commission relating to this portion of the payment would be paid at a later date. Nothing in the emails between Annoni and Wood clearly indicated the commission would be paid over a course of more than a year, and the *possibility* of contingent or deferred payments neither establishes the contract could not be performed within a year, nor would it support Defendants' claim that the email lacked the material terms of the agreement. Defendants have not met their initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact. Thus, summary adjudication cannot be ordered. Plaintiffs to give notice.
11	Edmundson vs. Bonilla	**FINAL/TENTATIVE RULINGS:** **I. <u>Final Ruling on Remittitur re Attorneys' Fees</u>** Before entry of judgment, Plaintiffs filed a motion for contractual attorney fees and for sanctions against Bonilla and his attorney for their alleged failure to comply with court rules. [ROA ## 852, 854, 856, 857, 858, 862]. Plaintiffs sought a minimum of $699,799.35 in attorney fees. Bonilla opposed the motion on the grounds no party had prevailed and the amount of fees sought was unreasonable. The trial court concluded that Plaintiffs were entitled to recover attorney fees, but awarded only $198,445. Plaintiffs appealed, and the court of appeal reversed the order on Plaintiffs' motion for attorney fees for three reasons. The court of appeal held: "First, the court erred by concluding that not all Plaintiffs were entitled to recover fees. Second, the court set an hourly rate for Plaintiffs' lead counsel that was far lower than the market rate. Third, the trial court did not have a reasonable basis for its dramatic reduction in the number of hours for which Plaintiffs

could recover fees." [Remittitur at 2]. Specifically, the court of appeal found that "the trial court erred by concluding the Edmundsons were not entitled to recover attorney fees, setting a below-market hourly rate for Plaintiffs' lead counsel, and cutting an unreasonably high number of hours of counsel's time." (Id. at pp.24-25.)

On remand, this court addresses each of these three issues as instructed by the court of appeal. The parties agree that all briefing for this issue has been closed and shall be based on the parties' prior briefing on the underlying motion. [See ROA ## 852, 854, 856, 857, 858, 862, 1020, 1022, 1024, 1026].

A. The Edmundsons' Entitlement to Attorney Fees

Whether the Edmundsons are entitled to recover attorney fees depends upon the meaning and scope of the Tryal Contracts, the Osbelia Contracts, and their oral contracts with Bonilla.

Rules for contract interpretation are as follows: "The basic goal of contract interpretation is to give effect to the parties' mutual intent at the time of contracting. When a contract is reduced to writing, the parties' intention is determined from the writing alone, if possible. [Citation.] 'The words of a contract are to be understood in their ordinary and popular sense.'" (*Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944 p. 955.) "In determining whether a contract contains an applicable attorney fees provision, courts have 'construe[d] together several documents concerning the same subject and made as part of the same transaction [citations] even though the documents were not executed contemporaneously [citation] and do not refer to each other.'" (*Mountain Air Enterprises, LLC v. Sundowner Towers,* LLC (2017) 3 Cal.5th 744, 759.)

To determine the entitlement to fees, the court of appeal held that it was necessary for the trial court to construe the oral agreements between Bonilla and the Edmunsons together with the Tryal and Osbelia Contracts because they are all part of the same transaction. (Remittitur, at p. 27.) The court of appeal found that the trial court's "conclusion that the Tryal and Osbelia Contracts on their face do not relate to the same matters as the oral agreements is erroneous." (*Id*.)

As the court of appeal explained, the Tryal Contracts expressly state, "On various dates between 2008 and 2010, Payee [Tryal] invested various amounts of money to Makers to eventually amount to a 5½% (five and one half percent) stake in the net profits of El Toro

		Market." The Tryal Contracts restate and confirm the terms of the oral agreements by reciting Bonilla's promise to pay the specified sums based on Tryal's 5.5 percent "ongoing interest" in the Market. The Osbelia Contracts likewise confirm the terms of the oral agreement by reciting Bonilla's promise to pay the specified sums based on Osbelia's two percent "ongoing interest" in the Market. A significant way in which the Tryal Contracts and the Osbelia Contracts relate to and incorporate the terms of the oral contracts is the recitation in each of them that "[a]dditional amounts shall be added to the total amount due dependent upon the Payee's continued . . . ongoing interest in the Business." (*Id.* at p. 27). As such the court of appeals construed this sentence to mean "the parties intended that future sums owed by Bonilla to the Edmundsons as their respective shares of the Market's net profits would be added and become subject to the Tryal and Osbelia Contracts." (*Id.*). According to the court of appeal, this construction of the "Tryal and Osbelia Contracts has two significant implications. First, the net profits from the Market that were owed to the Edmundsons from 2012 onward were added to the Tryal and Osbelia Contracts and became subject to their attorney fees provisions. Second, the jury verdicts, which awarded only an amount of damages equal to the Edmundsons' share of the Market's net profits from 2012 onward, were not inconsistent with the Tryal and Osbelia Contracts and did not preclude an award of attorney fees pursuant to their attorney fees provisions." (*Id.* at p. 28.) The court of appeal reviewed the underlying jury award in which the jury: "awarded Plaintiffs' damages precisely in the amount of their respective percentage interests in the Market's net profits from 2012 forward, less payments received from Bonilla. The jury declined to award as damages the face amounts of the Tryal and Osbelia Contracts, which were for net profits from 2008-2011 (Tryal) and 2010-2011 (Osbelia). The trial court found those verdicts showed that the jury rejected Tryal's testimony that the written contracts superseded the oral ones. But if the written contracts did not supersede the oral ones, then the jury would have awarded damages based on the net profits for the years 2008 through 2011 for breach of the oral contracts. It is also possible, as Plaintiffs claim, that the jury awarded damages for breach of the written contracts but was not persuaded by the rough estimates of net profits for 2008 through 2011 in comparison

to the precise calculations for 2012 through 2021." (*Id*. at p. 28).

In interpreting the jury verdict, the court of appeal held: "We believe the most reasonable interpretation of the jury verdicts in the present case is that the jury awarded the Edmundsons damages for breach of the Tryal and Osbelia Contracts and declined to award damages for net profits from before 2012 on the ground (partly mistaken) that those arose from breach of the oral contracts or due to the state of evidence on those damages." (*Id*.) As such, the court of appeal concluded that "the Edmundsons were entitled to recover attorney fees pursuant to the attorney fee provisions in the Tryal and Osbelia Contracts." (*Id*. at p. 29.)

The court of appeal instructed the trial court, on remand, to "award Plaintiffs attorney fees in an amount that conforms to the principles and guidelines set forth in this opinion."

In line with the court of appeal's principles and guidelines on this issue, this trial court finds that the Edmundsons were entitled to recover attorney fees pursuant to the attorney fee provision in the Tryal and Osbelia Contracts. The portion of the trial court's original order finding that the Edmundson's were not entitled to attorneys' fees [ROA #1037] is, therefore, amended to conform to this ruling.

B. The Hourly Rate Set by Trial Counsel

Lodestar is the presumptive method for calculating the amount of an attorney fees award. (*Ketchum v. Moses* (2001) 24 Ca1.4th 1122, 1132.) "[T]he lodestar is the basic fee for comparable legal services in the community." (*Ibid*.) Lodestar has two components: (1) the number of hours reasonably expended and (2) the reasonable hourly rate of the legal professional. Lodestar is the "the number of hours reasonably expended multiplied by the reasonable hourly rate." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 (*PLCM*) [listing lodestar factors].) The lodestar figure may then be adjusted, based on a consideration of various factors, "to fix the fee at the fair market value for the legal services provided." (*Ibid.*)

The reasonable hourly rate for an attorney's service is the market rate, that is, the hourly rate "prevailing in the community for similar work." (*PLCM, supra*, 22 Cal.4th at p. 1095.) In making its calculation, the court should consider the experience, skill, and reputation of the attorney requesting fees. (*Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 1009.) The hourly rate set by the trial court must be "within the range of

		reasonable rates charged by and judicially awarded comparable attorneys for comparable work." (*Children's Hospital & Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 783.) Under this standard, the court of appeal found that the trial court's prior order setting Sutherland's hourly rate at $345 did not "fall[] within the permissible range of options set by the legal criteria" and was not "supported by substantial evidence." Sutherland's hourly rate of $345 is the rate at which she billed clients. The court of appeal, however, found that it was the attorney's *market* rate, not the rate charged to the client, that controls in determining the amount of the lodestar. (*PLCM, supra*, 22 Cal.4th at p. 1096; *Pasternak v. McCullough* (2021) 65 Cal.App.5th 1050, 1055-1056; *Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, 702-703 ["[t]here is no requirement that the reasonable market rate mirror the *actual* rate billed"].) The court of appeal held that no "evidence was presented to support a finding that $345 was within the range of market rates." (Remittitur at p. 30.) To the contrary, the court of appeal found that "Plaintiffs submitted unrebutted evidence establishing the $345 was far below the market range of rates. In support of their motion for attorney fees, Plaintiffs submitted a detailed declaration from Sutherland. She declared that she had been a practicing attorney for 26 years, and, before becoming an attorney, worked for six years as a legal secretary followed by eight years as a paralegal. She attended Whittier Law School while working and graduated in 1996. She has handled numerous trials and evidentiary hearings in family law matters and candidly described her jury trial experience as "limited, yet noteworthy." Sutherland explained that following a seven-week jury trial in 2011 she obtained a $4.9 million jury verdict on behalf of her client against the Orange County Social Services Agency." (*Id.* at 30-31.) In response, "Bonilla submitted no evidence to counter Plaintiffs' evidence regarding reasonable hourly rate." (I*d.* at p. 31). Further, "Sutherland submitted the *Laffey* Matrix which, though not binding, is evidence supporting the rate she had requested. (See, e.g., *Syers Properties III, Inc. v. Rankin, supra,* 226 Cal.App.4th at p. 702 [finding no abuse of discretion in employing *Laffey* matrix in San Francisco litigation].)" (Remittitur at p. 31). "The *Laffey* Matrix is a United States Department of Justice billing matrix that provides billing rates for attorneys at various experience levels in the Washington, D.C., area and can be adjusted to establish comparable billing rates in other areas using data from the United States Bureau of Labor Statistics." (*Pasternack v. McCullough* (2021) 65

Cal.App.5th 1050, 1057, fn. 5.) As the court of appeal found, "[a]ccording to the *Laffey* Matrix, the reasonable hourly rate for the period of June 1, 2021, through May 31, 2022, for an attorney, such as Sutherland, who has been out of law school for 20 or more years was $919." (Remittitur at p. 32.) "Sutherland requested that her hourly rate be set at $724.50, nearly two hundred dollars lower than the Laffey Matrix rate." (*Id*.) " Rates for civil litigators in Orange County handling complex business litigation might not be as high as the rates for their counterparts in Washington D.C., but Orange County is now a large and sophisticated metropolitan area with litigation and litigation attorneys on par with those in the largest cities." (*Id*.)

The court of appeal held that because "an attorney's skill is a factor in fixing a reasonable hourly rate, and the trial court, who observed Sutherland try this case, is deemed to be better able than we are to assess her skill," the court of appeal remanded the issue of Sutherland's hourly rate to the trial court to determine.

Guided by the opinion of the court of appeal, a reading of the trial transcripts, and the record on this motion, this court finds that a reasonable hourly rate for Sutherland was $724.50, as requested by Plaintiffs. This finding is supported by Sutherland's detailed declaration regarding her experience and the results she received, the Laffey Matrix showing a reasonable hourly rate for the period of June 1, 2021, through May 31, 2023, for an attorney such as Sutherland to be $919, Sutherland obtaining a jury verdict for her clients of $980,988.83, and the fact that Sutherland, by defeating Bonilla's claims that the investment contracts were loans, opened up the potential for hundreds of thousands of dollars in payments out of the Market's future profits.

The portion of the trial court's original order finding that Sutherland's hourly rate be set to $345 shall be modified to $724.50 to conform to this ruling.

C. The Reasonable Number of Hours

The court of appeal found that the trial court cut an unreasonably large amount of counsel's time. The trial court previously allowed recovery for 475.8 hours of Sutherland's time. Plaintiffs requests recovery for 721.7 hours plus half of unbilled hours (hours Sutherland spent, but did not bill Plaintiffs), for a total of 881.7 hours.

		The court of appeal disagreed with the trial court's findings, and found that Sutherland's declaration and billing entries were "not convoluted, confusing, or difficult to follow." (Remittitur, at p. 33). The court of appeal found that the "description of tasks performed are more than adequate." (*Id*.) The court of appeal "also disagree[d] with the trial court's conclusion regarding block billing. (See *Mountjoy v. Bank of America, N.A.* (2016) 245 Cal.App.4th 266, 279 [Court of Appeal disagreed with trial court's finding that attorneys had block billed their time].)" (Remittitur at p. 34.) Block billing occurs when "a block of time [is assigned] to multiple tasks rather than itemizing the time spent on each task." (*Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 1010.) The court of appeal held that "the block billing in this case presents no such problem since there were all claims presented to the jury which were subject to the attorney fees provisions." The trial court identified three tasks which, it concluded, were not reasonable or necessary for the litigation: (1) "time spent on motions in limine that were never filed"; (2) "tendering the Cross-Complaint to Plaintiffs' liability insurer"; and (3) "monitoring a different case." (Remittitur at p. 34.) The court of appeal disagreed and held that "[a]ll of those tasks were reasonable and/or necessary." (*Id*.) "In civil litigation, preparation for trial often includes performing tasks, such as preparing motions in limine, that ultimately might become unnecessary. (See *Vargas v. Howell* (9th Cir. 2020) 949 F.3d 1188, 1194, 1198 [fees awardable for "dead ends" and unfiled motions].)" (*Id*.) "Bonilla filed a cross-complaint against Plaintiffs; tendering that cross-complaint to their insurer is a necessary task." (*Id*.) "The "different case" that was being monitored was Bonilla's lawsuit against his brothers, which is directly related and relevant to this case." (*Id*.) Next, the court of appeal discussed the number of large conferences and emails among attorneys, clients, and the receiver. The court of appeal held: "Communications between attorney and client are not only reasonable and necessary, its required. Keeping clients informed should be rewarded, not punished." (Remittitur at p. 35.) "The time billed for each of these conferences and e-mails was nearly always just one tenth of an hour. Thus, the number of conferences and e-mails, even if excessive, did not support the court's dramatic cut in the number of compensable hours." (Id.) "There was some duplication of work and inefficiency too. But a haircut was in order, not a decapitation." (Id.)

The court of appeal held that:

> "Although Plaintiffs' counsel did spend a lot of time litigating this matter, the appellate record shows this to have been a fairly difficult and hard-fought case, and it culminated in an eight-day jury trial. As Plaintiffs point out, Bonilla's litigation tactics drove up the attorney fees. Bonilla forced Plaintiffs to defend a cross-complaint and to litigate 28 affirmative defenses and then withdrew them at trial. Nearly every effort, action, and motion made by Plaintiffs was vigorously and often viciously opposed. The record shows that Bonilla made a calculated decision to go to trial rather than pursue settlement. Plaintiffs won: The jury awarded them damages totaling $980,988.83 and by defeating Bonilla's claim that the investment contracts were loans, may receive hundreds of thousands of dollars in payments out of the Market's future net profits. (See *Moreno v. City of Sacramento* (9th Cir. 2008) 534 F.3d 1106, 1111 ["By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker"].) Just eyeballing the appellate record and the jury verdicts indicates the amount of attorney fees awarded was unreasonably low."

With these principles in mind, this court reexamined Exhibit B of Sutherland's moving declaration and the objections that Defendant made to the fees. Defendant objected to:

- Block billed entries: The court overrules these objections. The court finds that the blocked billed entries did not pose an issue in this case since all claims presented to the jury were subject to the attorneys' fees provision. The court will not reduce any hours based on any purported block billed entries.

- Fees unrelated to this lawsuit: The court finds that the fees Plaintiffs incurred were reasonable and necessary for litigation. "Bonilla filed a cross-complaint against Plaintiffs; tendering that cross-complaint to their insurer is a necessary task." (*Id*.) "The "different case" that was being monitored was Bonilla's lawsuit against his brothers, which is directly related and relevant to this case." (*Id*.)

- Other objections to "padded" billings: Defendants also

object to fees related to Plaintiff's (1) unsuccessful attempts to attach Defendant's partnership interest; (2) drafting ten motions *in limine*, which were denied or not filed; (3) unsuccessfully filing a request for judicial notice claiming Plaintiffs' trial arguments were "undisputed" facts; (4) preparing CACI jury instructions with undisclosed modifications; (5) preparing notices of intention to read Estela Bonilla's deposition testimony; (6) opposing remote depositions; and (7) preparing a prolix "wish list" of irrelevant "facts." The court overrules these objections and finds that no reductions are necessitated on these grounds. "By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker." *Moreno v. City of Sacramento* (9th Cir. 2008) 534 F.3d 1106, 1111. At the end of the day, the litigation tactics that Plaintiffs' counsel utilized won the trial and by defeating Defendant's claim that the investment contracts were loans, Plaintiffs may continue to receive hundreds of thousands of dollars in payments out of the Market's future net profits. The court is not going to second guess every decision Plaintiffs' counsel made. Even if some were not successful, these fees were reasonable and necessary in proceeding with the litigation.

- Communications and conferences: The court of appeal noted that the number of conferences and e-mails, even if excessive, did not support the court's dramatic cut in the number of compensable hours." (Id.) "There was some duplication of work and inefficiency too. But a haircut was in order, not a decapitation." (Id.) The court has reexamined Exhibit B. While there is some duplication of work and efficiency, the court also notes that Plaintiffs have reduced their request of recoverable hours from the actual amount of 1,041 hours worked to 881.7 hours—for a reduction of 159.3 hours. The court finds that reducing the 19.3 paralegal hours that Plaintiffs' counsel spent would account for any duplication or inefficiency in any communications or conferences in Plaintiffs' counsel's billing statements.

D. The Lodestar

The court finds the following lodestar:

- Law Offices of Bill Parks: $400/hr (reasonable hourly rate)

x 103 hours (reasonable hours)= $41,200

- Law Offices of Robert Binion: $400/hr (reasonable hourly rate) x 400 (reasonable hours) = $16,160
- Law Offices of Sondra S. Sutherland, APC: $724.50/hr (reasonable hourly rate) x 859.95 hrs = $623,033.77

The court declines to award a multiplier. As such, the total amount of attorneys' fees awarded to Plaintiffs and against Bonilla is $680,393.77.

II. Tentative Ruling on Plaintiffs' Motion for Appellate Attorneys' Fees

Plaintiffs Tryal B. Edmundson, Osbelia G. Edmundson, and Daniel Perales seek post-remand relief for appellate attorneys' fees. Plaintiffs seek a total award of $248,115 in appellate attorney fees ($209,115 for services performed by Sondra Sutherland and $39,000 for services performed by Kathryn E. Karcher).

The court has reviewed and considered Defendants objections to the Sutherland and Karcher Declarations. The objections are overruled.

A. Prevailing Party

Defendant first argues that Plaintiffs are not the prevailing parties and are not entitled to attorneys' fees because the appeal resulted in a mixed outcome. Further, because the court of appeal remanded, rather than deciding in Plaintiffs' favor, Defendant argues that Plaintiffs have not won anything. Further, Defendant argues that Plaintiff did not prevail on contract-related issues.

"[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 [defendants were entitled to attorneys' fees as a matter of law where they prevailed on the only contract claim between the parties by successfully defending against plaintiffs' claim for specific performance].) A party's failure "to obtain its preferred litigation objective [] does not mean that the other party is *ipso facto* the prevailing party." (*Marina Pacifica Homeowners Assn. v. Southern California Financial Corp.* (2018) 20 Cal.App.5th 191, 205 [trial court acted within its discretion in finding there was no prevailing party on contract where both sides obtained some form

		of recovery "other than monetary relief"].) Rather, the rule is: "If neither party achieves a complete victory on all the contract claims, it is within the discretion of the trial court to determine which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees." (*Id.* at 205–206, citations omitted [noting that "*Hsu* directs us to 'respect substance rather than form' in determining litigation success"]; accord *Scott Co. of California v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109 [although plaintiff was "not automatically a party prevailing on the contract for purposes of section 1717," where plaintiff sought to prove more than $2 million in damages but succeeded in establishing only about $440,000 in damages, trial court did not abuse its discretion in implicitly concluding that plaintiff prevailed, on balance, for purposes of section 1717].) However, the trial court may abuse its discretion in finding there is no prevailing party, if, under an abuse of discretion standard, the results are "so lopsided" that it is unreasonable to say one side was not the prevailing party. (*de la Cuesta v. Benham* (2011) 193 Cal.App.4th 1287, 1290 [holding that, although landlord did not obtain a "complete victory" and, thus, was not "entitled" to fees under section 1717, the trial court abused its discretion in failing to find that the landlord was the prevailing party where it obtained 70% of its claimed damages and tenant recovered nothing on her fraud claim].) The court finds that under this standard, Plaintiffs were the prevailing parties on appeal. While the result was a mixed outcome, on balance, Plaintiffs recovered greater relief than Defendant and met Plaintiffs' litigation objective. While Defendant contends that the court of appeal did not hold that Plaintiffs were entitled to future profits from the Market—i.e., Plaintiffs' litigation objective, the court disagrees. Plaintiffs were able to obtain a reversal (and at least a second look) on three important matters: (1) declaratory relief, which was originally denied, but which, on remand, gave Plaintiffs a second chance to have this court determine whether or not Plaintiffs were entitled to future profits from the Market, (2) a modification in the charging order, which increased Plaintiffs' rights of collecting under the contracts at issue, and (3) whether or not Plaintiffs were entitled to attorneys' fees and, if yes, how much—which also required interpretation of the parties' contract. The court of appeal's opinion heavily implied the prevailing parties on appeal: "Plaintiffs won: The jury awarded them damages totaling $980,988.83 and by defeating Bonilla's claim that the investment contracts were loans, may receive hundreds of thousands of dollars in payments out of the Market's future net profits." (Remittitur at p. 35; See also Remittitur at p. 32 ["We do note that Sutherland

obtained a jury verdict for her clients of $980,988.83 and, by defeating Bonilla's claim that the investment contracts were loans, opened up the potential for hundreds of thousands of dollars in payments out of the Market's future net profits."]

Reviewing the court of appeal's decision as a whole, on balance, the court finds that Plaintiffs are the prevailing party and are entitled to attorneys' fees as the issues on appeal were on the contract. As the court of appeal found, "the parties intended that future sums owed by Bonilla to the Edmundsons as their respective shares of the Market's net profits would be added and become subject to the Tryal and Osbelia Contracts." The issues on appeal concerned the sums owed by Bonilla to the Edmundson's regarding their respective shares of net profits with very directed instructions on how this trial court should decide these issues on remand.

B. Reasonable Hourly Rates

Defendant argues that Plaintiffs' counsel is not entitled to the rates outlined in the Laffey Matrix and Plaintiffs' counsel's rates are too high. Defendant argues that counsel cannot have it both ways by simultaneously stating that she has expertise and incurred extraordinary results while also stating that she required appellate counsel to assist in the appeal.

Plaintiffs' counsel seeks an award based on an hourly rate of $900 for Sutherland's services and an hourly rate of $1,000 for Karcher's services. Sutherland billed Plaintiffs $345 per hour in 2022, $375 per hour in 2023, and $415 per hour in 2024. Karcher billed Plaintiffs at a rate of $400 per hour.

Plaintiffs justify their request for a $900/$1000 per hour billing rate based on the number of years of experience of counsel, the Laffey Matrix, and an increased adjustment to the Laffey Matrix for counsel in Los Angeles, California. However, to do so, Plaintiffs used the percentage difference in locality pay between attorneys in the Los Angeles area and the Washington, Baltimore, Arlington areas. (See Mvg. Sutherland Decl., Ex. 11). There is no explanation how the difference in pay reflects the average hourly rate that attorneys in these locales charge.

The Laffey matrix is "an inflation-adjusted grid of hourly rates for lawyers of varying levels [i.e., years] of experience in Washington D.C." published by the Department of Justice. (*Prison Legal News v. Schwarzenegger* (9th Cir. 2010) 608 F.3d 446, 454.) The Ninth Circuit has questioned whether the Laffey matrix is a reliable

		indicator of hourly rates for lawyers practicing outside Washington D.C. (*Ibid*. ["[J]ust because the Laffey matrix has been accepted in the District of Columbia does not mean that it is a sound basis for determining rates elsewhere"]). The Laffey matrix assumes that the only relevant consideration in establishing an attorney's reasonable hourly rate is the number of years an attorney has been practicing. (See *In re HPL Techs., Inc., Secs. Litig.* (2005) 366 F.Supp.2d 912, 921-922.) Generally, "[t]he 'experienced trial judge is the best judge of the value of professional services rendered in his court . . . .'" (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49.) Both Sutherland and Karcher provide a detailed declaration of their experience, their accomplishments, and achievements. Karcher provides a presumably expert opinion that both Sutherland's and Karcher's requested rates were reasonable. In part, Karcher testifies that, in addition to years of experience and achievements, she based her "opinion about Ms. Sutherland's rate on other rates with which I am familiar. In 2011, a judge found that Ms. Sutherland's rate of $700 was reasonable. When I left DLA Piper in 2007, my rate was $580. In 2011, a trial judge awarded my $580 rate which became $870 after applying a 1.5 multiplier. Factoring in inflation, these 2007 and 2011 rates support the rate Ms. Sutherland (and I, see below) are requesting for this appeal." (Karcher Decl., ¶ 6(c)). The bases appears rooted in isolated decisions that were made over 10 years ago and then "factoring inflation." What is missing from the declaration is any analysis or explanation of the market rate for attorney's in Orange County as a whole. What the court finds missing from both Sutherland's and Karcher's declarations is admissible evidence showing the market rates in Orange County. Rather, these declarations discuss market rates in Washington D.C., local *pay rates* of counsel in Los Angeles (i.e. what attorneys in Los Angeles make per year rather than the market rate they charge), and their own belief that their rates are reasonable given their experience. In this court's own experience, it is rare for this court to encounter an attorney who charges over $800/hr in Orange County, California on a case similar to Plaintiffs. While the court appreciates Sutherland's and Karcher's experience and achievements, the rates set forth in the Laffey Matrix and the rates requested by Sutherland and Karcher are higher than the market rate for counsel in Orange County with similar experience in a similar case. Rather, the court finds that the reasonable rate for Sutherland is $796.50/hr, which

takes into account an annual increase of approximately 10% from the $724.50 which the court found was a reasonable rate for Sutherland's work in 2022. As for Karcher, given her niche expertise and specialty in appellate work, the court finds that the reasonable market rate for Karcher is $875/hr. The court is unaware of any evidence in the record that shows that rates for civil litigators and/or appellate counsel in Orange County is as high as the rates for their counterparts in Washington D.C.

C. Reasonable Hours

Defendant argues that the number of hours spent by Plaintiffs' counsel was excessive.

Defendant contends that many of the billing entries contained block billing. Defendant argues because the appeal involved both contract claims and non-contract issues—i.e., the issue of the trial court's denial of leave to amend to conform to proof to add a tort claim—the purported block billing combines both contract claims (which would be compensable under the attorneys' fees clauses in the contracts) and tort claims (which would not fall under the parties' attorneys' fees clauses). Because Plaintiffs do not "apportion" time spent between contract and tort claims, the purported block billing (e.g., entering time working on the opening brief that includes both tort and contract claims), Defendant argues that all blocked billed entries over 0.5 hours should not be awarded. However, reviewing the record and the opinion on appeal, the court finds that the majority of the issues raised in the appeal are contract related claims. Approximately 10% of the issues raised related to tort claims. As such, a reduction of 10% of time in each of Sutherland's hours and Karcher's hours should adequately address this. Otherwise, the court does not find that Sutherland's or Karcher's time entries are so block billed that the court cannot decipher the work performed.

Defendant also takes issue with the fact that Plaintiffs seek half of unbilled time—that is, time counsel spent on the appeal, but did not bill to Plaintiffs. As the court of appeals explained, an attorney award is not based on the amount that was billed to the client, but the market rate for services performed. (Remittitur at p. 30) "Counsel's voluntary reduction in hours should be lauded, not punished." (Remittitur at p. 34). Here, the court finds that Plaintiffs' seeking recovery for half of the time that Plaintiff's counsel actually spent litigating the appeal, but did not bill to Plaintiffs, is reasonable.

		As such, having reviewed the billing entries for Sutherland and Karcher, the court finds that the following number of hours were reasonably expended on the appeal: • Sutherland: 208 hours • Karcher: 34 hours **D. Lodestar** Based on the court's analysis above, the court's Lodestar calculation is as follows: • Sutherland: $796.50 (reasonable hourly rate) x 208 hrs (reasonable number of hours spent) = $165,672 • Karcher: $875 (reasonable hourly rate) x 34 (reasonable number of hours spent) = $29,750 Plaintiffs are awarded a total of $195,422 in attorneys' fees relating to the appeal.
12	Gillespie vs. Ford Motor Company	**OFF CALENDAR** **CMC REMAINS**
13	Nickel vs. The State of California	**DEMURRER OFF CALENDAR** **CMC REMAINS**
14	Williams vs. The Shops At Mission Viejo	**OFF CALENDAR**