1. CARDINAL HEATH v. NGUYEN 22CV0226

Judgment Debtor Examination.

The judgment debtor appeared at the initial debtor examination on May 20, 2022. The judgment creditor's counsel was unable to appear and counsel requested a continuance by phone call. The court was advised the judgment debtor would be out of the country until the end of July and requested a continuance to August. The court continued the matter to 8:30 a.m. on Friday, July 29, 2022 in Department Nine. The May 20, 2022 minute order was served by mail to the judgment debtor and judgment creditor's counsel on May 20, 2022.

On May 23, 2022 the judgment creditor's counsel filed a notice of continuance of the examination, which was declared to have been served by mail on the judgment debtor on May 20, 2022. The notice incorrectly states that at the May 20, 2022 hearing the court continued the examination to June 24, 2022. At the hearing on June 24, 2022 the court confirmed the hearing was set for 8:30 a.m. on July 29, 2022.

TENTATIVE RULING # 1: PERSONAL APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, JULY 29, 2022 IN DEPARTMENT NINE.

2. MATTER OF MUSIAL 22CV0702

OSC Re: Name Change.

The mandated CLETS report is not in the court's file. (See Code of Civil Procedure, § 1279.5(f).)

TENTATIVE RULING # 2: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, JULY 29, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

3. MATTER OF DEBORD 22CV0769

OSC Re: Name Change.

TENTATIVE RULING # 3: THE PETITION IS GRANTED.

4. HIGH HILL RANCH, LLC v. COUNTY OF EL DORADO 21CV0178

Review Hearing Re: Receipt of Administrative Record.

High Hill Ranch appeals from the administrative decision in a code enforcement case. Plaintiff lodged the purported administrative record on May 26, 2022.

The matter was continued from June 10, 2022 to June 24, 2022 by agreement of the parties. At the June 24, 2022 hearing counsel for defendant was unable to appear due to illness. Plaintiff's counsel stated that defense counsel will stipulate to correct the administrative record. The court requested counsel to sign a stipulation as to the record within two weeks and continued the hearing to 8:30 a.m. on Friday, July 29, 2022 in Department Nine.

The court is unable to find any certification of the purported record by the County in the court's file.

As request was made to continue the hearing again due to illness.

TENTATIVE RULING # 4: THIS MATTER IS CONTINUED TO 8:30 A.M. ON FRIDAY, SEPTEMBER 9, 2022 IN DEPARTMENT NINE.

5. SEELEY v. SISSON PC-20210290

Motion to be Relieved as Counsel of Record for Plaintiff.

It appears that the initial papers, including the notice of hearing, filed on June 17, 2022 stated that the hearing was to take place at 8:30 a.m. on July 22, 2022 in Department Ten and was corrected by the clerk at the time the papers were filed to state the hearing would take place at 8:30 a.m. on July 29, 2022 in Department Nine.

The proof of service declares that on an unspecified date plaintiff and defense counsel were served notice of the hearing and the supporting papers by mail. The court is unable to ascertain whether the notice and moving papers were served after the clerk corrected the date and location of the hearing.

The proof of service is defective and the date of service needs to be clarified. Without proof of adequate notice, the court can not rule on the merits of the motion.

TENTATIVE RULING # 5: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, JULY 29, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

6. BASKINS v. TWIN RIVERS PC-20210529

Motion to be Relieved as Counsel of Record for Plaintiff.

TENTATIVE RULING # 6: THE MOTION IS GRANTED. WITHDRAWAL WILL BE EFFECTIVE AS OF THE DATE OF FILING PROOF OF SERVICE OF THE FORMAL, SIGNED ORDER UPON THE CLIENT. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldoradocourt.org/onlineservices/vcourt.html. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON

THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, JULY 29, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

7. DELAGOSTINO v. WHITE PC-20210323

Motion for Leave to File 1st Amended Complaint.

Plaintiff moves for leave to amend the complaint to add the plaintiff's spouse as a party plaintiff, to add allegations related to a claim for damages for loss of consortium, and to add Lloyd Oneto as a party defendant. Plaintiff contends that since the filing of the complaint damages in the form of loss of consortium have arisen in connection with the injuries plaintiff allegedly suffered from the alleged attack by a bull; and that discovery suggests that Lloyd Oneto may own the bull involved in the subject incident. A proposed amended complaint has been submitted.

The proof of service in the court's file declares that on June 22, 2022 notice of the hearing and copies of the moving papers were served by mail on counsel for defendant White. There was no opposition to the motion in the court's file at the time this ruling was prepared.

"The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code." (Code of Civil Procedure, § 473(a)(1).)

There is a general policy in this state of great liberality in allowing amendment of pleadings at any stage of the litigation to allow cases to be decided on their merits. (Kittredge Sports Co. v. Superior Court (1989) 213 Cal.App.3d 1045, 1047.) "…it is a rare case in which 'a court will be justified in refusing a party leave to amend his pleadings so that he may properly present

his case.' (Citations omitted.) If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion. (Citations omitted.)" (Morgan v. Superior Court (1959) 172 Cal.App.2d 527, 530.) "…absent a showing of prejudice to the adverse party, the rule of great liberality in allowing amendment of pleadings will prevail. (*Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564, 176 Cal.Rptr. 704.)" (Board of Trustees of Leland Stanford Jr. University v. Superior Court (2007) 149 Cal.App.4th 1154, 1163.)

It is irrelevant that new legal theories are introduced in the proposed amended pleading as long as the proposed amendments relate to the same general set of facts in the pleading that will be superseded. (Kittredge Sports Co. v. Superior Court (1989) 213 Cal.App.3d 1045, 1048.)

Absent opposition, it appears appropriate to grant the motion.

TENTATIVE RULING # 7: THE MOTION FOR LEAVE TO FILE A 1ST AMENDED COMPLAINT IS GRANTED. THE 1ST AMENDED COMPLAINT IS DEEMED SERVED ON DEFENDANT AMY WHITE. PLAINTIFFS ARE TO FILE AN ORIGINAL, EXECUTED 1ST AMENDED COMPLAINT AND SERVE A SUMMONS AND 1ST AMENDED COMPLAINT ON THE NEWLY NAMED DEFENDANT, LLOYD ONETO. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR

MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, JULY 29, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

8. AUSTIN v. COUNTY OF EL DORADO PC-20150633

(1) Defendant's Motion to Dismiss Claims Regarding TIM Fees Zones 1-7 and 8 for Failure to Join Indispensable Parties.

(2) Defendant's Motion to Bifurcate Briefing.

Defendant's Motion to Dismiss Action for Failure to Join Indispensable Parties.

Defendants County of El Dorado and County of El Dorado Community Development Agency, Development Services Division (County) move to dismiss plaintiffs' claims for reimbursement of funds held in Traffic Impact Mitigation Fee Zones 1-7 and 8 on the following grounds: indispensable party developers West Valley, LLC, Silver Springs, LLC, and Lennar Winncrest, LLC though named as parties to the litigation, have not appeared due to plaintiffs' allowing those defendants an open-ended, wrongful extension of time to respond; developer Sunset Tartesso, LLC who entered into a development agreement with the County in 2019, after the 2nd amended complaint was filed is an indispensable party that has not been added to this case; the proofs of service on indispensable party developers West Valley, LLC and Silver Springs, LLC were not filed until more than four years after they were served in violation of Code of Civil Procedure, § 583.210; although indispensable party developer Lennar Winncrest, LLC has been named in the 2nd amended complaint, that indispensable party is not properly a party to this action due to plaintiffs' improper extension of time for that party to respond, the expiration of the statute of limitations prior to adding it as a defendant, and defects in service of a request to enter default against Lennar Winncrest, LLC, therefore the court must dismiss the claim related to TIM Fees Zones 1-7 and 8; even though the County entered into a developer contract with Sunset Tartesso, LLC after the 2nd amended complaint was filed, it is an indispensable party related to TIM Fees Zone 8 who is not named in this action and the action

can not be maintained against this unnamed indispensable party, because if added to the action Sunset Tartesso, LLC could not be served within three years of the filing of the complaint and the action asserted against Sunset Tartesso, LLC would be subject to mandatory dismissal pursuant to the provisions of Code of Civil Procedure, § 583.250.

Plaintiffs oppose the motion on the following grounds: Sunset Tartesso, LLC, Lennar Winncrest, LLC, West Valley, LLC and Silver Springs, LLC are not indispensable parties, because the projected collections of funds for the subject TIM Zones exceeds the amounts plaintiffs claim as refunds plus the amounts these developer defendants will claim from the TIM funds under the respective contracts with the County; even if the four parties are indispensable parties, the court may in equity and good conscience exercise its discretion to allow the action to proceed; the county's argument regarding the statute of limitations lacks merit, because the County does not have standing to assert that affirmative defense on behalf of these four parties; there are no facts, law or evidence before the court that establishes that each of these four other parties have the same one-year statute of limitations as the local agency defendant; the court has the discretion to apply the relation back doctrine even though the indispensable parties were not substituted for DOE defendants; Sunset Tartesso, LLC is not an indispensable party, because it did not enter its agreement with the County until 2019, long after this action was filed, and the subject agreement contained a clause which informed it of the pending litigation challenging the TIM Fee program and making payment strictly contingent of availability of funds from the uncommitted TIM fund; for the same reason, defendant Lennar Winncrest, LLC can not be an indispensable party, because it entered into its agreement with the County in 2020; and the three year limitation to serve a defendant does not apply to Sunset Tartesso, LLC under the circumstances presented.

Defendants replied: the four developers are indispensable parties who can not be brought into the case due to the statute of limitations and plaintiffs' procedural failures; the court is mandated by statute to dismiss the case, because plaintiffs failed to return the service on the developer defendants within three years and 60 days; since the four developer defendants must be dismissed and they are indispensable parties, the action against the remaining defendants must be dismissed.

At the hearing on June 24, 2022 the court continued the matter to July 29, 2022 with the tentative ruling to be posted on the 8:30 a.m. calendar and the parties to appear for long cause oral argument at 2:30 p.m. on Friday, July 29, 2022.

On July 8, 2022 the court granted plaintiffs' ex parte application to allow live testimony at the July 29, 2022 hearing as evidentiary support in opposition to the County's motion to dismiss claims. The court also ordered County Auditor/Controller Joe Harn and Deputy Chief Administrative Officer Laura Schwartz to appear at 2:30 p.m. on July 29, 2022 in Department Nine to testify in this matter and, if subpoenaed, to produce the documents pursuant to said subpoena.

Plaintiff's Objections to Declaration of Laura Swartz in Support of Motion

Objection numbers 1-4 are overruled.

Defendant's Objections to Evidence Submitted in Opposition to the Motion

- Declaration of Mark Leonardo in Opposition to Motion

Mark Leonardo declares in opposition to the motion: attached as Exhibit A accompanying the plaintiffs' request for judicial notice is a true and correct copy of Attachment C, which is the cash statement as of June 13, 2021, which he obtained from the County's website for the County Board's December 7, 2021 Board meeting in connection with Agenda Item number 31 regarding the annual mitigation reports for fiscal year 2020-2021; the email FOIA request and

response is attached as Exhibit B to the plaintiffs' request for judicial notice; and the responsive documents produced by Joe Harn in response to the FOIA request is attached as Exhibits C-1 through C-4 to the plaintiffs' requests for judicial notice.

Objection 1(a) is overruled.

Objection numbers 2(a) and 3(a) are sustained.

Objection numbers 1(b), 1(c), 2(b), 2(c), 3(b), and 3(c) will be addressed in the court's final ruling on the objections to the requests for judicial notice, which will be reserved until after the court's hearing of the live testimony of County Auditor/Controller Joe Harn and Deputy Chief Administrative Officer Laura Schwartz at the hearing on July 29, 2022.

- Declaration of Kathleen Miller Signed on June 18, 2022

The declaration of Kathleen Miller in opposition to the motion was filed on June 20, 2022. Kathleen Miller declares: on June 10, 2022 she sent an email to County Auditor/Controller Joe Harn which was a FOIA request for specified information concerning the TIM Fee zones 1-7 and 8 mitigation fee fund balances; on June 13, 2022 she received the response to the FOIA request from Joe Harn as set forth in Exhibit B attached to the declaration, which is the exact same email communications document submitted as Plaintiff's Request for Judicial Notice, Exhibit B; attached as Exhibit C to the declaration are the collective documents Mr. Harn provided her in the June 13, 2022 email sent to her; and the documents attached as Exhibit C to the declaration are the exact same documents that are attached to the Plaintiffs' Request for Judicial Notice, Exhibits C-1 through C-4. (Declaration of Kathleen Miller in Opposition, paragraphs 2-5; and attached Exhibits B and C.)

"No paper shall be rejected for filing on the ground that it was untimely submitted for filing. If the court, in its discretion, refuses to consider a late filed paper, the minutes or order shall so indicate." (Rules of Court, Rule 3.1300(d).)

The court has discretion to consider late filed documents. The hearing of oral argument and evidentiary hearing with live testimony regarding the documents concerning the Traffic Impact Mitigation fee funds' financial data was set for hearing on July 29, 2022, which is over one month from the original date of the hearing on this matter. There is no showing of prejudice to defendants in that they will have a full and fair opportunity to cross-examine the witnesses concerning the financial data documents at issue. The court will consider the declaration of Kathleen Miller.

Objection numbers 1, 2(a), 3(a), and 4(a) are overruled.

Objection numbers 2(b), 3(b)-3(e), and 4(b)-4(e), will be addressed in the court's final ruling on the objections to the requests for judicial notice, which will be reserved until after the court's hearing of the live testimony of County Auditor/Controller Joe Harn and Deputy Chief Administrative Officer Laura Schwartz at the hearing on July 29, 2022.

- Request for Judicial Notice – Public Notice of Impact Fee Accounts Posted on County Website

Defendants object to the court taking judicial notice of Public Notice of Impact Fee Accounts Posted on County Website (Plaintiffs' Request for Judicial Notice, Exhibit A.) on the following grounds: the posting on the County website does not mean it is not reasonably subject to dispute; plaintiffs did not provide any authority for the proposition that the court may take judicial notice of the truth of the contents of a document found on the County website; and the court may not take judicial notice of the truth of the contents of that document.

The court may take judicial notice of official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States. (Evidence Code, § 452(c).)

"The Evidence Code also expressly provides for judicial notice of a public entity's legislative enactments (Evid.Code, § 452, subd. (b)) and official acts (*id.,* subd. (c)). Thus, we may take notice of local ordinances (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 24, 157 Cal.Rptr. 706, 598 P.2d 866) and the official resolutions, reports, and other official acts of a city (*Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 907, 117 Cal.Rptr.2d 631)." (Trinity Park, L.P. v. City of Sunnyvale (2011) 193 Cal.App.4th 1014, 1027.)

"Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451: ¶ * * * (h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Emphasis added.) (Evidence Code, § 452(h).)

"The trial court shall take judicial notice of any matter specified in Section 452 if a party requests it and: ¶ (a) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and ¶ (b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter." (Evidence Code, § 453.)

Citing Jolley v. Chase Home Finance, LLC (2013) 213 Cal.App.4th 872, 889 defendants argue that the court can not take judicial notice of defendant County's documents posted on its official website consisting of Board meeting minutes, resolutions, ordinances, reports and other pertinent documents, because posting information on a government website does not mean it is not reasonably subject to dispute.

The First District Court of Appeal in Jolley v. Chase Home Finance, LLC (2013) 213 Cal.App.4th 872 held that a declaration submitted in opposition to defendant's motion for summary judgment that stated he had read the Purchase and Assignment Agreement between the FDIC and JP Morgan Chase Bank and that the PAA submitted for the court to take judicial

notice in support of the motion for summary judgment was not the entire agreement was sufficient to challenge the authenticity of the shorter PAA submitted for judicial notice and that judicial notice was not properly taken of the content of the PAA. (Jolley v. Chase Home Finance, LLC (2013) 213 Cal.App.4th 872, 889.) The First District stated: "As described above, Jolley's opposition included a declaration from Thorne, who had been a "senior construction loan consultant" with WaMu until July of 2006, having been in charge of construction lending in 38 states since May 2005. He was an "asset manager for the FDIC" at the time he signed the declaration (October 2011), and was "intimately familiar with the procedures for taking over a failed bank." And he testified: "Pursuant to the public part of the agreement with the FDIC, of which were approximately 36 pages, the balance of the contract and the complete agreement with the FDIC and Chase bank is 118 pages long which has not been made public. I am familiar with this agreement, I read it." Though somewhat ungrammatical, the declaration fairly clearly recites the existence of a nonpublic agreement (or portion of an agreement) that could affect the outcome of this case. In short, Thorne testified that the P & A Agreement submitted by Chase was not the full agreement entered between Chase and the FDIC, but rather a longer version exists, the terms of which are different from the version of which the court below took judicial notice." Jolley v. Chase Home Finance, LLC (2013) 213 Cal.App.4th 872, 889-890.) The appellate court further stated: "We may agree with Chase for purposes of argument that Thorne's statements about the contents of the longer agreement were not admissible. But we need not credit those statements in order to conclude that a factual issue has been raised. The judgment in this case rests squarely on the terms of a much shorter, disputed version of the P & A Agreement submitted by Chase. This was wrong. Since Jolley has presented evidence that a longer agreement exists, the court below resolved a disputed issue of fact by resting its decision on the terms of the shorter agreement. Put otherwise, the court did not view

the evidence favorably to Jolley. (See *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1145–1146, 37 Cal.Rptr.2d 718 [existence of a written contract could not be judicially noticed where the opposing party claimed that an oral contract governed the relationship].) ¶ It may be true that in some extreme circumstances "a trial court may weigh the credibility of a declaration submitted in opposition to a summary judgment motion and grant the motion 'where the declaration is facially so incredible as a matter of law that the moving party otherwise would be entitled to summary judgment.' " (*People v. Schlimbach* (2011) 193 Cal.App.4th 1132, 1142, fn. 9, 122 Cal.Rptr.3d 804, quoting *Estate of Housley* (1997) 56 Cal.App.4th 342, 359–360, 65 Cal.Rptr.2d 628.) This is not such a case. ¶ Thorne's declaration certainly raises significant issues *vis a vis* Chase and the FDIC, with testimony that is hardly run of the mill. But that testimony is not so incredible that it could be ignored or rejected as untruthful on summary judgment, especially given the FDIC's response here, which not only did not deny the existence of the longer agreement, but suggested there were documents to be produced if there were a confidentiality agreement." (Emphasis added.) (Jolley v. Chase Home Finance, LLC (2013) 213 Cal.App.4th 872, 891.)

Jolley, supra, does not hold that the information posted is necessarily reasonably subject to dispute. The First District in Jolley, supra, premised its decision on the ground that judicial notice was improper because there was admissible evidence submitted in opposition to the motion for summary judgment that when viewed favorably to the party opposing the motion, Jolley, there was an issue as to the authenticity of the shorter PAA.

On the other hand, "A court may take judicial notice of documents in its own records and those reflecting the official acts of local and state agencies, including resolutions, minutes, and agendas. (Evid. Code, § 452, subds. (c), (d), (h); see *Associated Builders & Contractors, Inc. v. San Francisco Airports Commission* (1999) 21 Cal.4th 352, 375, fn. 4, 87 Cal.Rptr.2d 654, 981

P.2d 499; *Trinity Park L.P. v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014, 1027, 124 Cal.Rptr.3d 26 [court may judicially notice a city's resolutions, reports, and other official acts], disapproved on other grounds in *Sterling Park, L.P. v. City of Palo Alto* (2013) 57 Cal.4th 1193, 1210, 163 Cal.Rptr.3d 2, 310 P.3d 925; *Social Services Union v. City and County of San Francisco* (1991) 234 Cal.App.3d 1093, 1098, fn. 3, 285 Cal.Rptr. 905 [minutes of city commission meeting "are clearly a matter of which we can take judicial notice"].) ¶ The District does not challenge these general rules or argue the court could not properly take judicial notice of these documents' existence. Instead, it argues the court could not rely on facts in the documents for the truth of the matters asserted. ¶ We agree a court generally may not take judicial notice of the truth of facts asserted within documents. (See *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375, 127 Cal.Rptr.3d 362.) But this rule is inapplicable here because the judicially noticed documents were not admitted or relied upon for the truth of particular facts contained in the documents. ¶ At most, the trial court took judicial notice of the dates and nature of the official acts. This is permissible. In taking judicial notice of an official document, a court may take notice not only of the fact of the document but also facts that can be deduced, and/or clearly derived from, its legal effect, such as the names and dates contained in the document, and the legal consequences of the document. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 754-755, 154 Cal.Rptr.3d 394; *Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117-1118, 62 Cal.Rptr.3d 59; see *Arnold v. Universal Oil Land Co.* (1941) 45 Cal.App.2d 522, 528-530, 114 P.2d 408 (*Arnold*); see also *White v. Davis* (2003) 30 Cal.4th 528, 553, fn. 11, 133 Cal.Rptr.2d 648, 68 P.3d 74.) This is different from taking judicial notice of the truth of specific factual representations within a document. (*Poseidon*, at pp. 1117-1118, 62 Cal.Rptr.3d 59; see *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063-

1065, 31 Cal.Rptr.2d 358, 875 P.2d 73 [court could not take judicial notice of truth of conclusions in a Surgeon General report about the health effects of smoking or of matters reported in a newspaper article], overruled on other grounds in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276, 63 Cal.Rptr.3d 418, 163 P.3d 106.) ¶ Under these principles, the court did not err in taking judicial notice of the documents prepared by LAFCO, County, and the District, including the dates and the legal effect of the statements contained in the documents. Neither the trial court, nor this court, has taken judicial notice of the truth of any specific disputed facts contained in these documents." (Emphasis added.) (Julian Volunteer Fire Co. Assn. v. Julian-Cuyamaca Fire Protection Dist. (2021) 62 Cal.App.5th 583, 599-600.)

Defendants have not submitted any evidence to the court showing that the documents posted are not what they purport to be, a public financial notice of the funds on deposit in the TIM funds by zone, or that the accuracy of the County generated document is in dispute, therefore, it has not been established that the amounts the County admits in its mandated public financial notice are reasonably subject to dispute.

Furthermore, defendant County's mere assertion that defendant County's documents posted on its official website consisting of Board meeting minutes, resolutions, ordinances, reports and other pertinent documents concerning the public notice of the impact fee account cash statement for fiscal year 2020-2021 is reasonably subject to dispute could be construed as an assertion/acknowledgement that the public notice of the fund balances of the TIM fee zones for the fiscal year are inaccurate and can not be trusted. Such would be an admission that the County has not executed its statutorily mandated duty regarding the annual reports concerning the TIM funds held by the County.

"(a) If a local agency requires the payment of a fee specified in subdivision (c) in connection with the approval of a development project, the local agency receiving the fee shall deposit it

with the other fees for the improvement in a separate capital facilities account or fund in a manner to avoid any commingling of the fees with other revenues and funds of the local agency, except for temporary investments, and expend those fees solely for the purpose for which the fee was collected. Any interest income earned by moneys in the capital facilities account or fund shall also be deposited in that account or fund and shall be expended only for the purpose for which the fee was originally collected. ¶ (b)(1) For each separate account or fund established pursuant to subdivision (a), the local agency shall, within 180 days after the last day of each fiscal year, make available to the public the following information for the fiscal year: ¶ (A) A brief description of the type of fee in the account or fund. ¶ (B) The amount of the fee. ¶ (C) The beginning and ending balance of the account or fund. ¶ (D) The amount of the fees collected and the interest earned.(E) An identification of each public improvement on which fees were expended and the amount of the expenditures on each improvement, including the total percentage of the cost of the public improvement that was funded with fees. ¶ (F) An identification of an approximate date by which the construction of the public improvement will commence if the local agency determines that sufficient funds have been collected to complete financing on an incomplete public improvement, as identified in paragraph (2) of subdivision (a) of Section 66001, and the public improvement remains incomplete. ¶ (G) A description of each interfund transfer or loan made from the account or fund, including the public improvement on which the transferred or loaned fees will be expended, and, in the case of an interfund loan, the date on which the loan will be repaid, and the rate of interest that the account or fund will receive on the loan. ¶ (H) The amount of refunds made pursuant to subdivision (e) of Section 66001 and any allocations pursuant to subdivision (f) of Section 66001. ¶ (2) The local agency shall review the information made available to the public pursuant to paragraph (1) at the next regularly scheduled public meeting

not less than 15 days after this information is made available to the public, as required by this subdivision. Notice of the time and place of the meeting, including the address where this information may be reviewed, shall be mailed, at least 15 days prior to the meeting, to any interested party who files a written request with the local agency for mailed notice of the meeting. Any written request for mailed notices shall be valid for one year from the date on which it is filed unless a renewal request is filed. Renewal requests for mailed notices shall be filed on or before April 1 of each year. The legislative body may establish a reasonable annual charge for sending notices based on the estimated cost of providing the service…" (Emphasis added.) (Government Code, §§ 66006(a) and 66006(b).)

The court takes judicial notice that Agenda Item Number 31 for the December 7, 2021 Board meeting, which the Board took action on, was the annual mitigation reports for fiscal year 2020-2021 for the TIM fee program in compliance with Government Code, § 66006. The court further takes judicial notice of the Board's official act of approval of the reports by unanimous vote of the Board of Supervisors.

The court can take judicial notice of the legal effect of the Board's approval of the public TIM fund financial report for fiscal year 2020-2021, which is that the County Board acknowledged and admitted that those amounts stated to be in each TIM zone fund account were on deposit at the conclusion of the fiscal year in compliance with its statutory mandate.

The final ruling on the objections to the declarations authenticating the public notice of impact fee accounts posted on county website and the judicial notice of that document will be reserved until after the court's hearing of the live testimony of County Auditor/Controller Joe Harn and Deputy Chief Administrative Officer Laura Schwartz at the hearing on July 29, 2022.

- Requests for Judicial Notice – County Responses to Freedom of Information Act (FOIA) Request

Defendants object that the email exchange related to the FOIA request sent to Joe Harn by declarant Miller is inadmissible hearsay (Plaintiffs' Requests for Judicial Notice, Exhibit B.); there is no foundation or personal knowledge concerning the TIM fee fund zones general ledgers produced by the County Auditor/Controller in response to a FOIA request (Plaintiffs' Requests for Judicial Notice, Exhibits C-1 through C-4.); judicial notice of the ledgers is improper; and the court can not take as true the amounts reflected in the ledgers that were produced by the County Auditor/Controller in response to a FOIA request;

The court may take judicial notice of official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States. (Evidence Code, § 452(c).)

"The Evidence Code also expressly provides for judicial notice of a public entity's legislative enactments (Evid.Code, § 452, subd. (b)) and official acts (id., subd. (c)). Thus, we may take notice of local ordinances (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 24, 157 Cal.Rptr. 706, 598 P.2d 866) and the official resolutions, reports, and other official acts of a city (*Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 907, 117 Cal.Rptr.2d 631)." (Trinity Park, L.P. v. City of Sunnyvale (2011) 193 Cal.App.4th 1014, 1027.)

"Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451: ¶ * * * (h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Emphasis added.) (Evidence Code, § 452(h).)

"The trial court shall take judicial notice of any matter specified in Section 452 if a party requests it and: ¶ (a) Gives each adverse party sufficient notice of the request, through the

pleadings or otherwise, to enable such adverse party to prepare to meet the request; and ¶ (b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter." (Evidence Code, § 453.)

"Plaintiffs assert that the court should judicially notice these documents because they show that ICE made certain "findings" regarding American Apparel's hiring of unauthorized workers. Defendants oppose the request to the extent plaintiffs rely on the documents for the truth of the assertions they contain. [Footnote omitted.] Because plaintiffs obtained the documents by making a FOIA request, the court will take judicial notice of them as matters of public record. See *Silverstrand Investments v. AMAG Pharmaceuticals, Inc.,* Civil Action No. 10–10470–NMG, 2011 WL 3566990, *4 (D.Mass. Aug. 11, 2011) (taking judicial notice of "FDA Meeting Minutes and [an] accompanying FOIA Letter")." (In re American Apparel, Inc. Shareholder Litigation (C.D. Cal. 2012) 855 F.Supp.2d 1043, 1064.)

Defendants have not submitted any evidence to the court that the TIM fee fund zones general ledgers produced by the County Auditor/Controller in response to a FOIA request are not what they purport to be, a public financial record of the funds on deposit in the TIM funds by zone, or the accuracy of the County generated document is in dispute, therefore, it has not been established that the amounts are reasonably subject to dispute. Furthermore, defendant County's mere assertion that defendant County's records/ledgers concerning the TIM funds is reasonably subject to dispute may be construed as an assertion/acknowledgement that the TIM fee records/ledgers maintained by the County are inaccurate and can not be trusted.

The final ruling on the objections to the declarations authenticating the TIM fee fund zones general ledgers produced by the County Auditor/Controller in response to a FOIA request (Plaintiffs' Requests for Judicial Notice, Exhibits C-1 through C-4.) and the judicial notice of those documents will be reserved until after the court's hearing of the live testimony of County

Auditor/Controller Joe Harn and Deputy Chief Administrative Officer Laura Schwartz at the hearing on July 29, 2022.

Statute of Limitations

Defendant County argues that while West Valley, LLC, Silver Springs, LLC, and Lennar Winncrest, LLC are necessary parties named in the second amended complaint filed on January 2, 2018, they were not named as DOE defendants, the 2nd amended complaint did not relate back, and the action against them is barred by the one year statute of limitation that expired on November 15, 2017. Therefore, they can not be parties in this action and as they are indispensable parties and the action as it relates to TIM Fees Zones 1-7 and 8 must be dismissed from the action.

Plaintiffs argue in opposition that defendant County has no standing to assert the statute of limitation affirmative defense on behalf of other defendants.

""[T]he statute of limitations is a personal privilege which is waived unless asserted at the proper time and in the proper manner, whether it be a general statute of limitations or one relating to a special proceeding." (*Bohn v. Watson*, *supra*, 130 Cal.App.2d at p. 36, 278 P.2d 454.)" (Emphasis added.) (Chaplin v. State Personnel Board (2020) 54 Cal.App.5th 1104, 1118.)

A defendant has no right to assert an affirmative defense of the statute of limitation on behalf of co-defendants that they could conceivably raise in response to a 2nd amended complaint, because only those co-defendants have standing to raise such defenses.

Therefore, the statute of limitations defense of other co-defendants is not an appropriate ground upon which defendant County can obtain a dismissal of the action for purported failure to timely file an amendment adding co-defendants to the case.

The court need not and does not make any determination as to whether the action against any of the developer defendants are barred by the applicable statute of limitations.

Open-Ended Extension of Time to Respond to 2nd Amended Complaint

Defendant County argues that plaintiffs' violation of Local Rule 7.12.07A. by providing developer defendants West Valley, LLC, Silver Springs, LLC, and Lennar Winncrest, LLC an open ended extension to respond amounting to four years after they were served is grounds to dismiss the claims for refund of TIM Fees for Zones 1-7 and 8.

"TIMING OF RESPONSIVE PLEADINGS. The parties shall file and serve responsive pleadings within the time permitted by law; provided, however, that the parties may stipulate without leave of court to one 15 day extension of the time for filing responsive pleadings." (Local Rule 7.12.07A.)

The court notes that it has long been held that noncompliance with court rules, to which no penalty was attached, does not prevent the court from hearing and disposing of motions. (See Johnson v. Sun Realty Co. (1934) 138 Cal.App. 296, 299.)

"Local court policies are generally enforceable as court rules, which have the effect of procedural statutes so long as they are not contrary to higher law. (*Wisniewski v. Clary* (1975) 46 Cal.App.3d 499, 504-505, 120 Cal.Rptr. 176.) A court may, however, suspend its own rules or except a particular case from their operation whenever the purposes of justice so require. (*Adams v. Sharp* (1964) 61 Cal.2d 775, 777, 40 Cal.Rptr. 255, 394 P.2d 943.)" (Estate of Cattalini (1979) 97 Cal.App.3d 366, 371.)

Local Rule 7.12.07A. does not mandate the court to dismiss an action against a defendant where the plaintiff has granted lengthy extensions of time to respond to a complaint beyond 15 days after the time the response is due by statute.

The court exercises its discretion to refuse to dismiss this case merely because indispensable parties who are still parties to the action have not responded to the operative pleading due to a lengthy extension to respond being granted by the plaintiffs.

Time to File Proof of Service

Defendant County argues that failure to file proofs of service on developer defendants within 60 days after service of the 2nd amended complaint on them mandates dismissal of the claims for refund of the funds held for TIM Fees Zones 1-7 and 8.

"The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant. For the purpose of this subdivision, an action is commenced at the time the complaint is filed." (Emphasis added.) (Code of Civil Procedure, § 583.210(a).)

"Proof of service of the summons shall be filed within 60 days after the time the summons and complaint must be served upon a defendant." (Code of Civil Procedure, § 583.210(b).)

"As used in this chapter, unless the provision or context otherwise requires: ¶ * * * (f) "Service" includes return of summons." (Code of Civil Procedure, § 583.110(f).)

"If service is not made in an action within the time prescribed in this article: ¶ (1) The action shall not be further prosecuted and no further proceedings shall be held in the action. ¶ (2) The action shall be dismissed by the court on its own motion or on motion of any person interested in the action, whether named as a party or not, after notice to the parties." (Emphasis added.) (Code of Civil Procedure, § 583.250(a).)

The court is not statutorily mandated to dismiss an action where the proof of service is belatedly filed. (Emphasis the court's.)

Purported Improper Request to Enter Default

Defendant County asserts that Lennar Winncrest, LLC entered into a credit and reimbursement agreement to construct a road realignment in January 2020, which made it an indispensable party regarding its claims against the funds held for TIM Fees Zone 1-7 and 8. (See Memorandum of Posits and Authorities in Support of Motion page 15, line 27 to page 16, line 17.) Defendant County also asserts that the request to enter default is fatally defective, because it was mailed to the wrong address for Lennar Winncrest, LLC, therefore, the claims must be dismissed as the court can not enter a default judgment against Lennar Winncrest, LLC.

Assuming for the sake of argument only that the service of the request for entry of default was not mailed to the proper address, the plaintiffs are not barred from remedying any defect in service and then obtain entry of default against defendant Lennar Winncrest, LLC.

The court rejects the argument that a purported ineffective service of a request to enter default against a single defendant mandates dismissal of the action seeking refund of funds held in the TIM Fees Zones 1-7 and 8 accounts.

Three Year Limitation to Serve Defendants

Defendant County asserts that developer Sunset Tartesso, LLC is an indispensable party and could never be added to this case, because it can not be served within three years of the filing of this action.

"The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant. For the purpose of this subdivision, an action is commenced at the time the complaint is filed." (Code of Civil Procedure, § 583.210(a).)

"If service is not made in an action within the time prescribed in this article: ¶ (1) The action shall not be further prosecuted and no further proceedings shall be held in the action. ¶ (2) The

action shall be dismissed by the court on its own motion or on motion of any person interested in the action, whether named as a party or not, after notice to the parties." (Code of Civil Procedure, § 583.250(a).)

"The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute." (Code of Civil Procedure, § 583.250(b).)

Section 583.210 applies to fictitiously named defendants and the three year limitation commences to run on the date of filing of the original complaint. (Gray v. Firthe (1987) 194 Cal.App.3d 202, 209.) However, where the defendants are not designated as fictitiously named defendants by amendment, an amended complaint is filed naming these new defendants, and the original complaint did not state a cause of action against these defendants even if they were designated as fictitiously named defendants, then the three year limitation to serve those defendants commences with the filing of the amended complaint wherein they are first named in the action and which sufficiently states a cause of action against them. (See Gray v. Firthe (1987) 194 Cal.App.3d 202, 209-210.)

Sunset Tartesso, LLC is not named in the operative 2nd amended complaint, the amended complaint or the initial complaint, therefore, the three year limitation to serve Sunset Tartesso, LLC has not commenced to run and serves no basis for the court to dismiss the claim regarding TIM Fees Zone 8 funds.

Whether Sunset Tartesso, LLC is an Indispensable Party

"A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect

that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party." (Code of Civil Procedure, § 389(a).)

"If a person as described in paragraph (1) or (2) of subdivision (a) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder." (Code of Civil Procedure, § 389(b).)

"…"[a] person is an indispensable party [only] when the judgment to be rendered necessarily must affect his rights." *Hartman Ranch Co. v. Associated Oil Co.* (1937) 10 Cal.2d 232, 262, 73 P.2d 1163.)" (Olszewski v. Scripps Health (2003) 30 Cal.4th 798, 808-809.) and in determining if a party is an indispensible party due to the inability to provide complete relief in the action, the focus is on whether complete relief can be afforded the parties named in the action. (Deltakeeper v. Oakdale Irrigation Dist. (2001) 94 Cal.App.4th 1092, 1101.)

The Third District Court of Appeal has stated: "The first clause, the "complete relief" clause, focuses not on whether complete relief can be afforded all possible parties to the action, but on whether complete relief can be afforded the parties named in the action. (*Countrywide Home*

Loans, Inc. v. Superior Court, supra, 69 Cal.App.4th at pp. 793-794, 82 Cal.Rptr.2d 63.)" (Deltakeeper v. Oakdale Irrigation Dist. (2001) 94 Cal.App.4th 1092, 1101.)

The Third District also stated: "Under subdivision (b) of section 389 we must determine whether a necessary party to the action is indispensable. ¶ A party is indispensable only in the "conclusory sense that in [its] absence, the court has decided the action should be dismissed. Where the decision is to proceed the court has the power to make a legally binding adjudication between the parties properly before it." (Cal. Law Revision Com. com., 14 West's Ann.Code Civ. Proc. (1973 ed.) foll. § 389, p. 222.) The Supreme Court has warned that courts must " 'be careful to avoid converting [section 389 from] a discretionary power or a rule of fairness ... into an arbitrary and burdensome requirement which may thwart rather than accomplish justice.' [Citation.]" (*Countrywide Home Loans, Inc. v. Superior Court*, supra, 69 Cal.App.4th at p. 793, 82 Cal.Rptr.2d 63, quoting *Bank of California v. Superior Court* (1940) 16 Cal.2d 516, 521, 106 P.2d 879.)" (Deltakeeper v. Oakdale Irrigation Dist. (2001) 94 Cal.App.4th 1092, 1105.)

The Supreme Court has stated with regards to indispensable parties: "Thus, "[a] person is an indispensable party [only] when the judgment to be rendered necessarily must affect his rights." *Hartman Ranch Co. v. Associated Oil Co.* (1937) 10 Cal.2d 232, 262, 73 P.2d 1163.)" (Olszewski v. Scripps Health (2003) 30 Cal.4th 798, 808-809.)

On November 15, 2016 the County Board adopted five year findings for the TIM fee accounts that are the subject of this action. (Defendant's Request for Judicial Notice, Exhibit 11 – County Board Resolution 186-2016.)

Assuming for the sake of argument only that plaintiffs prevail in this action on its merits, the one year limitation only allows plaintiffs to recover the fees collected from December 20, 2014, one year prior to the filing of this action, to November 15, 2016 when the County made the

appropriate five year analysis (See County of El Dorado v. Superior Court (2019) 42 Cal.App.5th 620, 628.) Therefore, assuming for the sake of argument only that the plaintiffs prevail on the merits of this litigation, plaintiffs are not entitled to a judgment requiring refund of funds flowing into the TIM zone account after the five year analysis was approved on November 16, 2016 to the present and not entitled to recover fees deposited prior to December 20, 2014 that remain on deposit.

Sunset Tartesso, LLC contracted with the County in 2019 and will be paid from the TIM funds for services after the date of the contract.

Defendants submitted as evidence in support of the motion the contract between County and Sunset Tartesso, LLC (Defense Exhibit 19 - Credit and Reimbursement Agreement for Construction of Saratoga Way Between the County and Sunset Tartesso, LLC.)

The agreement expressly states with respect to reimbursement and the potential impact of three pending litigations, Including the instant litigation: "Developer acknowledges and agrees that the sole source of funds that Developer shall look to for the reimbursement shall be the Uncommitted EDH TIM and that the County shall not be obligated to fund the reimbursement from any other funds or revenues, including but not limited to, the County General Fund. Developer further acknowledges that it is aware of the pending actions challenging the County's TIM fee Program (Austin v. El Dorado County, Sheetz. El Dorado County, and Lunsmann v. El Dorado County) and that the outcome of those actions could adversely affect the County's ability to reimburse the Developer from the Uncommitted EDH TIM. If any given year there are insufficient funds in the Uncommitted EDH TIM to make payment, any unpaid residual shall bear interest at the Treasurer's pooled rate of funds computed annually from the due date of the next regularly scheduled payment to a maximum of ten (10) years." (Emphasis

added.) (Defense Exhibit 19 - Credit and Reimbursement Agreement for Construction of Saratoga Way Between the County and Sunset Tartesso, LLC, Article II, paragraph D.)

Sunset Tartesso, LLC has expressly agreed in its contract with the County that it can not be expected to be reimbursed from any funds other than the Uncommitted EDH TIM funds and acknowledges and essential assumes the risk that the instant action could adversely affect the County's ability to reimburse the Developer from the Uncommitted EDH TIM and that potential adverse effect of insufficient funds in the Uncommitted EDH TIM to make payment is addressed by providing that any unpaid residual shall bear interest at the Treasurer's pooled rate of funds computed annually from the due date of the next regularly scheduled payment to a maximum of ten (10) years. These contractual provisions clearly anticipate that additional Uncommitted EDH TIM funds will be available to reimburse Sunset Tartesso, LLC even where the Uncommitted EDH TIM funds are insufficient for timely reimbursement. Having expressly acknowledged in the agreement the potential adverse impact of the subject litigation and essentially assumed that risk of late or no reimbursement under the terms of the agreement, it could be said that any judgment to be rendered in this case must not necessarily affect Sunset Tartesso, LLC's rights under the express terms of subject agreement since it knew about the reimbursement problem and it does not have a right to expect payment if there are no funds to reimburse it should any one or all of the three described court cases affect the County's ability to reimburse it.

The final ruling on the objections to the declarations authenticating the public notice of impact fee accounts posted on county website, the email exchange regarding the FOIA request, the exhibits declared to have been produced in response to the FOIA request, and the judicial notice of those documents will be reserved until after the court's hearing of the live

testimony of County Auditor/Controller Joe Harn and Deputy Chief Administrative Officer Laura Schwartz at the hearing on July 29, 2022.

Defendant's request for judicial notice Exhibit 13 and plaintiffs request for judicial notice Exhibits A and C, if admitted over defendant's objections, would establish that sufficient funds remain available to reimburse/pay Sunset Tartesso, LLC pursuant to the contract from the TIM fees remaining on deposit and reasonably projected to be collected during the time of the contract even if the fees claimed in this action are ordered to be refunded.

The final ruling on those evidentiary objections being reserved, the court also reserves its final ruling on the issue of whether the admissible evidence establishes that sufficient funds remain available to reimburse/pay Sunset Tartesso, LLC pursuant to the contract from the TIM fees remaining on deposit and reasonably projected to be collected during the time of the contract even if the fees claimed in this action are ordered to be refunded; and whether Sunset Tartesso, LLC is an indispensable party.

Defendant County's Motion to Bifurcate Briefing.

The action will be determined by the parties' oral argument at a court trial that is estimated to take not more than one day and that trial is set for November 10, 2022 with the opening brief due August 10, 2022, opposition brief due September 9, 2022, and reply due on October 10, 2022. (Court's May 9, 2022 Minute Order After Trial Setting Conference.)

Defendant County moves to bifurcate/trifurcate the briefs into three parts: the parties first briefs are to be directed only to defendant's/respondent's affirmative defenses (Part One); after the court decides what claims may remain after application of the affirmative defenses, the court then directs the parties to file briefs on the merits of the plaintiffs' claim of liability for refund of the TIM fees (Part Two); and if the court determines after the trial on the merits of the liability claims that County is liable to refund fees collected, a third set if briefs will be filed

addressing the issues of refund remedies and he County Board's discretion to determine how refunds are made under Government Code, § 66001(c) (Part Three). Defendant County argues that the court should order the bifurcation/trifurcation by exercising its discretion under Code of Civil Procedure, §§ 598 and 1048(b) to bifurcate/sever trials of issues for the following reasons: to avoid a waste of time in litigating the issue of whether defendant County is liable to reimburse funds held in the subject TIM fee accounts where the affirmative defenses, if determined in defendant County's favor, will dispose of the action without a trial on the issue of liability and refund damages; to further convenience or to avoid prejudice; and the separate briefings/trials will be conducive to expedition and economy.

Plaintiffs oppose the motion on the following grounds: there is no reason to disrupt the normal order of presentation of argument in the briefs; there is no legal support for this manner of briefing; County wants to reargue the defense of Government Code, § 65010, which was already addressed in the appellate decision in this case (County of El Dorado v. Superior Court (2019) 42 Cal.App.5th 620, 628-629.) and to argue the defense of substantial compliance that was previously address in Walker v. San Clement (2105) 239 Cal.App. 4th 1350; there is no need for the additional briefing pages as plaintiffs have previously briefed these same issues and defenses in another matter in less than 50 pages and there is no need for 35 pages of opening and opposing briefs solely dedicated to defenses; and defendants have not demonstrated that good, solid grounds exist to bifurcate, therefore, the court should deny the motion. However, plaintiffs agree to separate briefing to address the application of the remedies sought in the event they prevail.

Defendants replied: case law allows affirmative defenses to be briefed first; the standing issues as to TIM fee zone claims should be bifurcated requiring plaintiffs to establish standing

as to each of the alleged fee zones; other remaining issues will require extensive briefing; and plaintiffs have misrepresented the extent of briefing of the issues in another case.

When the convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation would be promoted, the court, after notice and hearing, may make an order, no later than the close of pretrial conference in cases in which such pretrial conference is to be held, or, in other cases, no later than 30 days before the trial date, or on its own motion at any time, that the trial of any issue or any part thereof shall precede the trial of any other issue or any part thereof in the case, except for special defenses which may be tried first pursuant to Sections 597 and 597.5. (Code of Civil Procedure, § 598.) The principal reason for Section 598 providing for the trial of liability before the trial of damages is to avoid the waste of time and money caused by the unnecessary trial of damage questions in cases where the liability issue is resolved against the plaintiff. (Horton v. Jones (1972) 26 Cal.App.3d 952, 954-955.)

"(b) The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross-complaint, or of any separate issue or of any number of causes of action or issues, preserving the right of trial by jury required by the Constitution or a statute of this state or of the United States." (Code of Civil Procedure, § 1048(b).)

"The trial court had ample authority to make this discretionary decision. Aside from the language in Code of Civil Procedure section 598, which concerns pretrial motions, Evidence Code section 320 provides that "[e]xcept as otherwise provided by law, the court in its discretion shall regulate the order of proof." Similarly, Code of Civil Procedure section 1048, subdivision (b) states that a trial court, "in furtherance of convenience or to avoid prejudice, or

when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action ... or of any separate issue or of any number of causes of action or issues...." Under these provisions, trial courts have broad discretion to determine the order of proof in the interests of judicial economy. (*Buran Equipment Co. v. H & C Investment Co.* (1983) 142 Cal.App.3d 338, 343-344, 190 Cal.Rptr. 878.)" (Grappo v. Coventry Financial Corp. (1991) 235 Cal.App.3d 496, 504.)

The proposed three part briefing will only delay the proceedings of the trial in this action and result in 120 pages of briefings by defendant County and 135 pages of briefings by plaintiffs. What should be determined in one day by a single set of briefings and oral argument will be strung out into multiple days of trial and cause delay in order to allow time for the proposed two additional briefing cycles and then set aside two additional days for oral arguments.

A single set of briefs should be sufficient and the projected one day court trial will not unduly burden or prejudice the parties if the issues of liability, refund remedies, damages, and affirmative defenses are decided after oral argument during that one proceeding.

The motion is denied.

TENTATIVE RULING # 8: DEFENDANT COUNTY'S MOTION TO BIFURCATE BRIEFING IS DENIED. THE COURT RESERVES RULING ON THE MOTION TO DISMISS CLAIMS UNTIL AFTER HEARING LIVE TESTIMONY AND ORAL ARGUMENT AT THE HEARING. APPEARANCES ARE REQUIRED AT 2:30 P.M. ON FRIDAY, JULY 29, 2022 IN DEPARTMENT NINE REGARDING THE HEARING OF LIVE TESTIMONY ON THE MOTION TO DISMISS CLAIMS AND FOR ORAL ARGUMENT ON THE TWO MOTIONS. . IF A PARTY OR PARTIES WISH TO APPEAR REMOTELY THEY MUST APPEAR BY ZOOM.

9. SA v. EL DORADO IRRIGATION DIST. PC-20200137

Defendants' Motion for Summary Judgment.

On March 6, 2020 plaintiff filed an action against defendants El Dorado Irrigation District and Current Adventures d.b.a. Sly Park Paddle Rentals asserting causes of action for general negligence and negligent premises liability for injuries allegedly sustained when she disembarked from a rented boat, lost her footing, and fell on her elbow causing it to break, which allegedly resulted in extensive damage to the nearby and connected tissue.

Defendants move for entry of summary judgment in their favor on the following grounds: plaintiff assumed the natural and inherent dangers of canoeing and recreational boating and was injured by such an inherent risk; plaintiff can not maintain a negligence cause of action against defendants, because she can not show that defendant Current Adventures proximately caused her injuries.

Plaintiff opposes the motion on the following grounds: defendant Current Adventure owed plaintiff a duty of due care while she was boarding and exiting the rented canoe; and there remains a triable issue of material fact concerning defendants' negligence because defendant A Current Adventure did not explain to plaintiff the proper procedures for entering and exiting the canoe, she did not execute any waivers of their duty, when plaintiff asked if she could exit, defendant's employee stated "yes", and a prudent person would have assisted an elderly lady, like plaintiff, out of an unstable canoe.

At the time this ruling was prepared, there was no reply in the court's file.

<u>Motion for Summary Judgment Principles</u>

"For purposes of motions for summary judgment and summary adjudication: ¶ * * * (2) A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that 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 that 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 that cause of action or a defense thereto. The plaintiff or cross-complainant may not rely upon the mere 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 that cause of action or a defense thereto." (Code of Civil Procedure, § 437c(p)(2).)

"The purpose of summary judgment is to penetrate through pleadings to ascertain, by means of affidavits, the presence or absence of triable issues of material fact. (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107 [252 Cal.Rptr. 122, 762 P.2d 46].) The trial judge determines whether triable issues of fact exist by examining the affidavits and evidence, including any reasonable inferences which may be drawn from the facts. (*People v. Rath Packing Co.* (1974) 44 Cal.App.3d 56, 61-64 [118 Cal.Rptr. 438].) The evidence of the moving party is strictly construed and the evidence of the opposing party liberally construed. Doubts as to the propriety of granting the motion must be resolved in favor of the party resisting the motion. (*Stationers Corp. v. Dun & Bradstreet, Inc*. (1965) 62 Cal.2d 412, 417 [42 Cal.Rptr. 449, 398 P.2d 785].)" (Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal.App.4th 1509, 1524.)

"In ruling on the motion, the court must "consider all of the evidence" and "all" of the "inferences" reasonably drawn therefrom (id., § 437c, subd. (c)), and must view such evidence (e.g., *Molko v. Holy Spirit Assn.*, supra, 46 Cal.3d at p. 1107, 252 Cal.Rptr. 122, 762 P.2d 46; *Stationers Corp. v. Dun & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 417, 42 Cal.Rptr. 449, 398 P.2d 785) and such inferences (see, e.g., *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1520, 80 Cal.Rptr.2d 94 [review on appeal]; *Ales-Peratis Foods Internat.,*

Inc. v. American Can Co. (1985) 164 Cal.App.3d 277, 280, 209 Cal.Rptr. 917, fn. * [same]), in the light most favorable to the opposing party." (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843.)

"A moving party defendant is entitled to summary judgment if it establishes a complete defense to the plaintiff's causes of action, or shows that one or more elements of each cause of action cannot be established. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 849, 107 Cal.Rptr.2d 841, 24 P.3d 493.)" (Eriksson v. Nunnink (2011) 191 Cal.App.4th 826, 847.)

"The pleadings determine the issues to be addressed by a summary judgment motion. (*Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848, 885, 164 Cal.Rptr. 510, 610 P.2d 407, revd. on other grounds *Metromedia, Inc. v. San Diego* (1981) 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800.)" (Oakland Raiders v. National Football League (2005) 131 Cal.App.4th 621, 629.)

"To create a triable issue of material fact, the opposition evidence must be directed to issues raised by the pleadings. (*Zavala v. Arce*, supra, 58 Cal.App.4th at p. 926, 68 Cal.Rptr.2d 571.) If the opposing party's evidence would show some factual assertion, legal theory, defense or claim not yet pleaded, that party should seek leave to amend the pleadings before the hearing on the summary judgment motion. (See *580 Folsom Associates v. Prometheus Development Co.* (1990) 223 Cal.App.3d 1, 18, 272 Cal.Rptr. 227*; City of Hope Nat. Medical Center v. Superior Court* (1992) 8 Cal.App.4th 633, 639, 10 Cal.Rptr.2d 465; & Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2000) ¶¶ 10:257 & 10:257.2, pp. 10-96 & 10-97 (rev.# 1, 2000).)" (Distefano v. Forester (2001) 85 Cal.App.4th 1249, 1264-1265.)

"…[I]t is axiomatic that the party opposing summary judgment " 'must produce admissible evidence raising a triable issue of fact. [Citation.]' [Citation.]" (*Dollinger,supra,* 199 Cal.App.4th

at pp. 1144–1145, 131 Cal.Rptr.3d 596.) This requirement is black letter law (Code Civ. Proc., § 437c, subd. (p)(2)) that applies whether the alleged cause of action is statutory or under the common law." (All Towing Services LLC v. City of Orange (2013) 220 Cal.App.4th 946, 960.)

With the above-cited legal principles in mind, the court will rule on defendants' motion for summary judgment.

Primary Assumption of the Risk

Defendants argue: that falling from a boat is an inherent risk of canoeing, which is a hazardous recreational activity, plaintiff admitted in her deposition testimony that she understood there was some risk involved in canoeing, such as falling into the water; while she might not have appreciated that entering and exiting the canoe has the same risks as riding in a canoe, she clearly understood and voluntarily assumed the risks with participating in canoeing activities when getting into and out of the canoe; and defendants did nothing to increase the inherent risk of canoeing.

"" 'Although persons generally owe a duty of due care not to cause an unreasonable risk of harm to others ... , some activities ... are inherently dangerous," such that "[i]mposing a duty to mitigate those inherent dangers could alter the nature of the activity or inhibit vigorous participation.' " (*Nalwa*, *supra*, 55 Cal.4th at p. 1154, 150 Cal.Rptr.3d 551, 290 P.3d 1158.) Primary assumption of risk is a doctrine of limited duty "developed to avoid such a chilling effect." (*Ibid.*) If it applies, the operator is not obligated to protect its customers from the "inherent risks" of the activity. (*Id.* at p. 1162, 150 Cal.Rptr.3d 551, 290 P.3d 1158.) ¶ " 'Primary assumption of risk is merely another way of saying no duty of care is owed as to risks inherent in a given sport or activity. The overriding consideration in the application of this principle is to avoid imposing a duty which might chill vigorous participation in the sport and thereby alter its fundamental nature.' " (*Jimenez v. Roseville City School Dist.* (2016) 247 Cal.App.4th 594,

601, 202 Cal.Rptr.3d 536.) "Although the doctrine is often applied as between sports coparticipants, it defines the duty owed as between persons engaged in any activity involving inherent risks." (*Ibid.*) The doctrine applies to any activity "done for enjoyment or thrill ... [that] involves a challenge containing a potential risk of injury." (*Record v. Reason* (1999) 73 Cal.App.4th 472, 482, 86 Cal.Rptr.2d 547; see *Beninati v. Black Rock City, LLC* (2009) 175 Cal.App.4th 650, 658, 96 Cal.Rptr.3d 105 [by attending Burning Man festival plaintiff assumed risk of being burned during ritual burning of eponymous effigy].) ¶ The test is whether the activity " 'involv[es] an inherent risk of injury to voluntary participants ... where the risk cannot be eliminated without altering the fundamental nature of the activity.' " (*Nalwa*, *supra*, 55 Cal.4th at p. 1156, 150 Cal.Rptr.3d 551, 290 P.3d 1158.)" (Emphasis added.) (Grotheer v. Escape Adventures, Inc. (2017) 14 Cal.App.5th 1283, 1297.)

"Whether a defendant owes a duty not to increase an activity's inherent risks is a determination ultimately guided by the policy goals underlying the primary assumption of risk doctrine. "The primary assumption of risk doctrine articulates what kind of duty is owed and to whom." (*Shin, supra,* 42 Cal.4th at p. 499, 64 Cal.Rptr.3d 803, 165 P.3d 581, italics omitted.) " 'The overriding consideration in the application of primary assumption of risk is to avoid imposing a duty which might chill vigorous participation in the implicated activity and thereby alter its fundamental nature.' " (*Childs, supra,* 115 Cal.App.4th at p. 70, 8 Cal.Rptr.3d 823.) Thus, courts consider a given defendant's role in the activity and relationship to the plaintiff to determine whether imposition of a duty would further the policy underlying the primary assumption of risk doctrine." (Williams v. County of Sonoma (2020) 55 Cal.App.5th 125, 130–131.)

"While our subsequent decisions applying the doctrine to recreation have, like *Knight,* involved sports, [Footnote omitted.] two Court of Appeal decisions have found the

doctrine applicable to recreational activities not considered sports. (See *Amezcua v. Los Angeles Harley–Davidson, Inc.* (2011) 200 Cal.App.4th 217, 231–232, 132 Cal.Rptr.3d 567 [organized, noncompetitive group motorcycle ride]; *Beninati v. Black Rock City, LLC* (2009) 175 Cal.App.4th 650, 661, 96 Cal.Rptr.3d 105 [participation in fire ritual at Burning Man festival].) Other courts have reached the same result by applying a broad definition of "sport" to include physical but noncompetitive recreational activities (see *Moser v. Ratinoff* (2003) 105 Cal.App.4th 1211, 1221, 130 Cal.Rptr.2d 198 [organized, noncompetitive group bicycle ride]; *Record v. Reason* (1999) 73 Cal.App.4th 472, 482, 86 Cal.Rptr.2d 547 ["tubing," i.e., riding an inner tube towed by a motor boat]) or by assessing the nature of a recreational activity without attempting to classify it as a sport or nonsport (see *Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 253–254, 38 Cal.Rptr.2d 65 [riding in commercially operated river raft].) ¶ In contrast, a few courts have, like the appellate court below, cited the nonsport character of an activity as one ground for not bringing it within the primary assumption of risk doctrine. (*Kindrich v. Long Beach Yacht Club* (2008) 167 Cal.App.4th 1252, 1258, 1262, 84 Cal.Rptr.3d 824 ([passenger who broke leg jumping from boat to dock was not engaged in an active sport]; *Shannon v. Rhodes* (2001) 92 Cal.App.4th 792, 800, 112 Cal.Rptr.2d 217 [boat ride on lake not a " 'sport' within any understanding of the word"]; *Bush v. Parents Without Partners* (1993) 17 Cal.App.4th 322, 328, 21 Cal.Rptr.2d 178 ["recreational dancing ... not a sport within the ambit of *Knight* "].) ¶ We agree with the dissenting justice below, and the court in *Beninati,* that the primary assumption of risk doctrine is not limited to activities classified as sports, but applies as well to other recreational activities "involving an inherent risk of injury to voluntary participants ... where the risk cannot be eliminated without altering the fundamental nature of the activity." (*Beninati v. Black Rock City, LLC, supra,* 175 Cal.App.4th at p. 658, 96

Cal.Rptr.3d 105.)" (Emphasis added.) (Nalwa v. Cedar Fair, L.P. (2012) 55 Cal.4th 1148, 1155–1156.)

Being a mere passenger in a rented canoe is not equivalent to being a participant in a recreational activity with inherent risks.

. "…The application of the affirmative defense of primary assumption of risk requires a legal conclusion that "by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury." (*Knight, supra,* 3 Cal.4th at p. 314–315, 11 Cal.Rptr.2d 2, 834 P.2d 696.) Thus, the existence and scope of a defendant's duty of care is determined by the court, and determination of the elements upon which the basis for the duty depends must be resolved as a matter of law by the court. Issues of law are reviewed by this court de novo. (*Staten v. Superior Court* (1996) 45 Cal.App.4th 1628, 1635, 53 Cal.Rptr.2d 657; *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 385, 243 Cal.Rptr. 627 ["The issue whether a duty exists is a question of law to be determined by the court, and is reviewable de novo."].) Accordingly, like the trial court, we analyze the nature of the boating activity engaged in here and both Rhodes's and Haley's relationship to that activity in order to determine whether, "as a matter of public policy, the defendant should owe the plaintiffs a duty of care." (*Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 541, 34 Cal.Rptr.2d 630, 882 P.2d 347.) ¶ **B. The Nature of the Activity ¶** Appellants contend that the trial court erred because the primary assumption of risk doctrine should not apply to bar the claim of a passenger in a ski boat being used for a ride around a lake. Appellants argue that a passenger riding in a boat simply is not engaged in the type of activity the *Knight* court intended to reach with the doctrine of primary assumption of risk. Respondent contends that recreational boating is a "sport" within the

meaning of *Knight.* We conclude appellant has the better view." (Emphasis added.) (Shannon v. Rhodes (2001) 92 Cal.App.4th 792, 795–796.)

"In *Record v. Reason* (1999) 73 Cal.App.4th 472, 86 Cal.Rptr.2d 547 (*Record*), the Second District explicitly considered the issue of whether a particular activity was a "sport" such that primary assumption of risk should apply to bar plaintiff's negligence claim. In *Record* the court considered the activity of "tubing" behind a motorboat. After extensively reviewing cases applying primary assumption of risk to a variety of activities, the court generally surmised that "[c]ompiling all of the distinguishing factors, it appears that an activity falls within the meaning of 'sport' if the activity is done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury." (*Id.* at p. 482, 86 Cal.Rptr.2d 547.) The court concluded that holding on to a tube being pulled behind a boat involved "[c]ombining centrifugal force with a white-knuckled grip" and therefore fell within the meaning of "sport." (*Ibid.*) We agree with the basic criteria set forth by the *Record* court, and simply add that our review of *Knight* and subsequent cases leads us to conclude "sport" as intended by the *Knight* court necessarily entails some pitting of physical prowess (be it strength based [i.e., weight lifting], or skill based, [i.e., golf]) against another competitor or against some venue. The issue, of course, is whether a passenger in a ski boat falls within this range of activity. Appellants rely on the standard set forth in *Record* to argue that recreational boating is not a sport and therefore assumption of risk should not apply to bar Haley's claim. They argue that being a passenger in a ski boat involves no challenge nor any potential risk of injury, and that because there is "no physical exertion" nor skill level involved in merely riding in a ski boat, it is not the type of activity encompassed by *Knight.* Respondent counters that many authorities consider "non-competitive recreational activities" to be subject to the doctrine of assumption of risk. In any event, respondent argues that even if the *Record* test were

appropriate, "recreational boating arguably fits within its parameters."[FN 3.] As explained below, we agree with appellants' characterization that being a passenger in a boat under these circumstances is too benign to be subject to *Knight* and find respondent's case authority distinguishable. ¶ FN 3. Respondent emphasizes that boating involves speed, rapid acceleration, sharp turns, choppy waters and other potential hazards and obvious risks, including the risk of falling overboard. However, regardless of the "risks" that may be inherent in riding in a boat, the existence of risk does not automatically call for the application of the doctrine of assumption of risk. Rather, unless being a passenger in a boat is considered by this court as the equivalent of being a participant in a sporting or recreational activity covered by *Knight,* then assumption of risk simply does not apply and the inherent "risks" of the activity play no part in the question of whether a defendant can be liable for his negligent activity. Likewise, respondent's reliance on spectator cases is similarly distinguishable because, once we conclude an activity is not a sport to which the doctrine applies, the rationale of the "no duty" analysis as applied to, for example, spectators at a baseball game, is simply inapplicable. (See *Knight, supra,* 3 Cal.4th at p. 317, 11 Cal.Rptr.2d 2, 834 P.2d 696 [analyzing prior Court of Appeal baseball spectator case under "no duty" analysis set forth in *Knight*].) ¶ **2. Other Boating Cases and Out of State Authority** ¶ Respondent relies on *Ford, supra,* to argue that the Supreme Court has explicitly considered boating a "sport." In *Ford,* however, the court explicitly used the language "noncompetitive *but active* sports activity" in applying the doctrine to waterskiing. (*Ford, supra,* 3 Cal.4th at p. 345, 11 Cal.Rptr.2d 30, 834 P.2d 724, italics added.) A review of the reasoning set forth in *Ford* makes clear that the court focused on the physical skill and risk involved in the waterskiing itself to conclude that the activity of waterskiing was a sport, and the boat driver a coparticipant in that sport. (*Ford, supra,* 3 Cal.4th at 345, 11 Cal.Rptr.2d 30, 834 P.2d 724 [noting "the skier has undertaken vigorous,

athletic activity, and the ski boat driver operates the boat in a manner that is consistent with, and enhances, the excitement and challenge of the active nature of the sport"].) The same certainly cannot be said of a mere passenger in a boat, particularly when the boat is simply a pleasurable means of transportation. To conclude otherwise would mean that because a car can be used in a race, that riding in a car is participation in a sport. We perceive the categorization as a sport to turn not just on the thing used (in this case a boat) but also on the manner of use. ¶ The other California authorities relied on by respondent to assert that courts have applied the doctrine to cases in which plaintiff was a passenger in a recreational boat are likewise distinguishable. In *Stimson v. Carlson, supra,* 11 Cal.App.4th 1201, 14 Cal.Rptr.2d 670, the plaintiff was an active crewmember on a sailboat participating in sailing, not a mere passenger. In *Mosca v. Lichtenwalter, supra*, 58 Cal.App.4th 551, 68 Cal.Rptr.2d 58, the plaintiff was a fisherman on a fishing boat, injured by the sporting activity he was engaged in (the hook of another fisherman), not by any alleged negligence on the part of the boat's operator. ¶ In *Ferrari v. Grand Canyon Dories, supra,* 32 Cal.App.4th 248, 38 Cal.Rptr.2d 65, plaintiff was part of a river rafting excursion, an activity necessarily involving physical participation of those in the raft in order to navigate the river. Respondent points us to no case, and we have found none, that applies the doctrine of primary assumption of risk to bar the claim of a passenger of a boat whose only participation is being in the boat. ¶ Similarly distinguishable is out of state authority respondent points to in which the participants are clearly engaging in activity of a physical sort or where the court applies the assumption of risk doctrine based on the plaintiff's subjective knowledge of the risk involved, which is not the duty-based doctrine applied in California. (See *Marchetti v. Kalish* (1990) 53 Ohio St.3d 95, 559 N.E.2d 699 [doctrine applied to game of "kick the can"]; *Bennett v. Town of Brookhaven* (1996) 233 A.D.2d 356, 650

N.Y.S.2d 752 [doctrine applied where plaintiff chose to remain on boat after it was being pulled into dock even though it was obvious the ramp had no bulkheading and the boat could tip]; *Havens v. Kling* (2000) 277 A.D.2d 1017, 715 N.Y.S.2d 812 [11 year-old plaintiff struck in head by golf ball while waiting to tee off]; *Ritchie–Gamester v. City of Berkley* (1999) 461 Mich. 73, 597 N.W.2d 517 [doctrine applied to skaters in skating rink].) In sum, the authority relied on by respondent does not persuade us that a passenger in a boat must be considered a participant in a sporting activity simply because the injury involves a boat. ¶ **3. Chilling Effect** ¶ We next address respondent's vehement assertion that recreational boating would be seriously curtailed if primary assumption of risk were not available to those engaged in the activity of boating. We agree that whether the application of the assumption of risk doctrine will have a chilling effect on the vigorous involvement in the activity is one of the factors our Supreme Court has instructed us to consider, and we must point out that we do not hold that primary assumption of risk will *never* be applicable in the boating context. (*Knight, supra,* 3 Cal.4th at pp. 318–319, 11 Cal.Rptr.2d 2, 834 P.2d 696.) Under the facts of this case, however, we do not agree that imposing a duty of care on respondent will create a "chilling" effect on the activity of recreational boating. In *Ford, supra,* 3 Cal.4th at page 345, 11 Cal.Rptr.2d 30, 834 P.2d 724, the court reasoned, for example: ¶ "Imposition of legal liability on a ski boat driver for ordinary negligence in making too sharp a turn, for example, or in pulling the skier too rapidly or too slowly, likely would have the same kind of undesirable chilling effect on the driver's conduct that the courts in other cases feared would inhibit ordinary conduct in various sports. As a result, holding ski boat drivers liable for their ordinary negligence might well have a generally deleterious effect on the nature of the sport of waterskiing as a whole. Additionally, imposing such liability might well deter friends from voluntarily assisting one another in such potentially risky sports." ¶ In this case, however, even if there were some

"chilling effect" to the extent a ski boat operator drives his boat more cautiously, or, for example, takes extra measures to ensure his passengers are seated properly, that will not change the nature of the activity of "recreational" boating. There is nothing inherent in the activity of recreational boating that requires the driver to "throw caution to the wind" in order to enjoy the activity. The policy behind application of the doctrine of primary assumption of risk in sporting cases is "that vigorous participation in the sport likely would be chilled, and, as a result, the nature of the sport likely would be altered, in the event legal liability were to be imposed on a sports participant for ordinary careless conduct." (*Ford, supra,* 3 Cal.4th at p. 345, 11 Cal.Rptr.2d 30, 834 P.2d 724.) It simply cannot be said that the "nature" of the activity of recreational boating will be altered if boat drivers are required to exercise due care, especially when, as here, they have small children on board. To the contrary, in our view the activity is more likely to be *enhanced* if all boaters are under a duty to not engage in negligent or careless conduct. Additionally, *Ford* relied on the fact that "the ski boat driver operates the boat in a manner that is consistent with, and enhances, the excitement and challenge of the active conduct of the sport [waterskiing]." (*Ford, supra,* 3 Cal.4th at p. 345, 11 Cal.Rptr.2d 30, 834 P.2d 724.) The same cannot be said of a recreational boat driver's goal (and duty) in relation to passengers on his boat. ¶ Moreover, on a common sense level, we simply cannot conclude that the use of the boat in this case reasonably implicates a "sport" within any understanding of the word. There is nothing in this record to indicate the boat here was anything more than a mode of transportation. Nothing about the type of boating engaged in here required participation by the passengers, there is nothing competitive or physically challenging about riding in the boat, and it certainly requires no special skill nor physical prowess to do so. Just because the means of the activity (the boat) may at other times be used for sporting purposes does not automatically transform the boat itself into a "sporting activity."

Certainly no one would consider being a passenger in a car on the way to work a "sport," and yet we could all agree that stock car racing is a sport. Both involve cars; one is a sport, one is not. Nor are we convinced, as respondent implies, that the fact some activity is done "for pleasure" automatically transforms it into qualifying for the protections of the doctrine of primary assumption of risk. Rather, as we previously explained, whether a sport or activity qualifies for the protections of the doctrine of assumption of risk requires a more thorough analysis than merely deeming it "recreational" or "pleasurable." ¶ We therefore conclude, under the facts of this case, that where a driver of a boat takes passengers out on his boat for a simple ride around a lake, the nature of the activity is not one that brings it within the *Knight* rule and therefore the doctrine of primary assumption of risk does not apply. [FN 4.] ¶ FN 4. Because we conclude the boating at issue here is not a "sport," we need not address appellants' argument that primary assumption of risk cannot be applied to a six-year old child. We also recognize that Rhodes contends that Haley's mother was actually responsible for ensuring Haley did not fall overboard. That may be so; but that is a factual decision left to the trier of fact to sort out under comparative fault principles." (Emphasis added.) (Shannon v. Rhodes (2001) 92 Cal.App.4th 792, 797–801.)

"*Stimson v. Carlson* (1992) 11 Cal.App.4th 1201, 1205, 14 Cal.Rptr.2d 670 applied primary assumption of risk to sailing where the plaintiff was one of the crew operating the boat; the court noted that sailing involves swinging booms and physical participation of crew. But in our case, plaintiff was not a participant in the "sport" of boating or in any "active sport." He was a passenger. Thus this activity does not fall within the test set out in *Knight,* i.e., that to hold defendants owed no duty to plaintiffs would "alter fundamentally the nature of [a] sport by deterring participants from vigorous participation." (*Knight v. Jewett, supra,* 3 Cal.4th at p. 319, 11 Cal.Rptr.2d 2, 834 P.2d 696.) ¶ This case is more analogous to *Shannon v. Rhodes* (2001)

92 Cal.App.4th 792, 112 Cal.Rptr.2d 217. There a six-year-old child and her siblings sued the owner and operator of a ski boat for negligence arising from injuries sustained by the child when she fell from the boat into the boat's propeller. The Court of Appeal reversed summary judgment, holding that primary assumption of risk did not apply. The court noted, "Our analysis begins by examining with what activity the *Knight* court was concerned. In *Knight,* the court came to the commonsense conclusion that when two people are playing a sport together one should not be liable to the other for injuries sustained while playing that sport absent some recklessness or intentional misconduct. [Citation.] The parties in *Knight* were engaged in a recreational game of football, clearly a physical activity and 'sport' within any common understanding of the word." (*Id.* at p. 796, 112 Cal.Rptr.2d 217.) *Shannon* held that the defense did not apply where the plaintiff was merely a passenger in the ski boat. (*Id.* at p. 801, 112 Cal.Rptr.2d 217.) ¶ *Shannon* distinguished *Ford v. Gouin, supra,* the waterskiing case, by noting that in *Ford,* our Supreme Court "explicitly used the language 'noncompetitive *but active* sports activity' in applying the doctrine to waterskiing. [Citation.] A review of the reasoning set forth in *Ford* makes clear that the court focused on the physical skill and risk involved in the waterskiing itself to conclude that the activity of waterskiing was a sport, and the boat driver a coparticipant in that sport. [Citation.] The same certainly cannot be said of a mere passenger in a boat...." (*Id.* at p. 798, 112 Cal.Rptr.2d 217.) ¶ Here, the trial court characterized the activity in which plaintiff engaged as "jumping" rather than boating. We disagree that we must surgically separate an activity's constituent parts apart from the general activity in which the plaintiff was engaged. Carl was engaged in boating, not in jumping. If he had been a jumper, in the sense of one who competes in athletic events, our conclusion would be different. But he was disembarking from the boat; his method of doing so, be it leaping, jumping, stepping off, or walking the gangplank, did not turn his activity into an "active sport." ¶

We therefore conclude that the doctrine of primary assumption of risk does not bar plaintiffs' action." (Emphasis added) (Kindrich v. Long Beach Yacht Club (2008) 167 Cal.App.4th 1252, 1261–1263.)

While Plaintiff acknowledged there were certain risks going on a canoe ride, such as being responsible for their own safety while on the water, such as falling into the water, and that there was some risk in renting a canoe (Emphasis added.) (Defense Exhibit B – Transcript of Plaintiff's Deposition Testimony, page 28, lines 12-15 and ones 21-24.), plaintiff has also declared in opposition to the motion for summary judgment to the following: on July 4, 2019 plaintiff was invited to go to Sly Park Recreation Area with a co-worker who thought a ride in a canoe would be fun; plaintiff had never been in a canoe before, but agreed to try it; plaintiff was not present when the co-worker made arrangements to get the canoe; plaintiff later learned that the co-worker signed paperwork including a release of liability; plaintiff did not see or sign anything on July 4, 2019 and was not asked to sign anything; the co-worker is not plaintiff's spouse or relative and he did not have plaintiff's permission to sign anything on her behalf; plaintiff was brought to the loading area and told to enter the canoe; they went around the lake for some time and returned to the same area of departure; plaintiff stood up and asked defendant's employee if she could get out; he said yes; when plaintiff attempted to step out, plaintiff's foot slipped, plaintiff landed hard on plaintiff's elbow, which was in excruciating pain, and plaintiff did not know what to do; plaintiff went to the emergency room, found out plaintiff had a bad fracture that required surgery, and metal plates and screws were inserted; and to this day plaintiff still suffers some lasting consequences of the surgery. (Plaintiff's Declaration in Opposition, paragraphs 2-10.)

There is evidence that plaintiff did not execute a written release of liability or authorize anyone else to execute such a release on plaintiff's behalf; that plaintiff was only invited to ride

in the canoe; and plaintiff and the co-worker went around the lake. Only recreational activities involving an inherent risk of injury to voluntary participants where the risk cannot be eliminated without altering the fundamental nature of the activity qualify for application of the doctrine of primary assumption of the risk. (Emphasis the court's.)

The above-cited evidence raises a triable issues of material fact concerning the applicability of the doctrine of primary assumption of the risk concerning whether plaintiff was a mere passenger on a canoe ride with plaintiff's co-worker; and/or whether a canoe ride on a lake is a participatory recreational activity that has an inherent risk of falling while disembarking from the canoe onto a dock where the risk of falling while disembarking can not be altered without altering the fundamental nature of canoe riding.

Strictly construing the moving party's evidence, liberally construing the evidence submitted in opposition to the motion, resolving doubts as to the propriety of granting the motion in favor of the party resisting the motion, and considering all of the evidence and all of the inferences reasonably drawn therefrom in the light most favorable to the opposing party (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843; and Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal.App.4th 1509, 1524.), the court finds there remains triable issues of material fact concerning the applicability of the doctrine of primary assumption of the risk..

The motion for summary judgment on the ground that the doctrine of primary assumption of the risk bars the action is denied.

Negligence – Proximate Causation

Defendants argue that because plaintiff testified at her deposition that she did not know why she fell, there is no triable issue of material fact as to whether defendants' employees conduct proximately caused her to fall.

Plaintiff essentially argues there remains a triable issue of material fact concerning whether defendants proximately caused the plaintiff's injuries, because defendant's employee failed to explain to her the proper procedures for entering and exiting the canoe; when she asked if she could exit, defendant said yes; and a prudent person would have assisted an elderly lady, like plaintiff, out of an unstable canoe.

""[T]he well-known elements of any negligence cause of action [are] duty, breach of duty, proximate cause and damages. [Citations.]" (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 614, 76 Cal.Rptr.2d 479, 957 P.2d 1313.)" (Berkley v. Dowds (2007) 152 Cal.App.4th 518, 526.)

""In California, the causation element of negligence is satisfied when the plaintiff establishes (1) that the defendant's breach of duty (his negligent act or omission) was a substantial factor in bringing about the plaintiff's harm and (2) that there is no rule of law relieving the defendant of liability." (*Leslie G.*, supra, 43 Cal.App.4th at p. 481, 50 Cal.Rptr.2d 785; accord *Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal.App.4th 1225, 1235, 32 Cal.Rptr.2d 136; Nola M., supra, 16 Cal.App.4th at p. 427, 20 Cal.Rptr.2d 97.)" (Sandoval v. Bank of America (2002) 94 Cal.App.4th 1378, 1385.)

"To maintain an action for damages based on the wrongful act or neglect of another, a plaintiff must allege the wrongful act was a direct and proximate cause of the injury. "It is reasonably well settled ... that the causation inquiry has two facets: whether the defendant's conduct was the 'cause in fact' of the injury; and, if so, whether as a matter of social policy the defendant should be held legally responsible for the injury." (*Osborn v. Irwin Memorial Blood*

Bank (1992) 5 Cal.App.4th 234, 252, 7 Cal.Rptr.2d 101.) To determine causation in fact, California has adopted the substantial factor test set forth in the Restatement Second of Torts, section 431. (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1052, 1 Cal.Rptr.2d 913, 819 P.2d 872; Rest.2d. Torts, § 431 [negligent conduct is a legal cause of harm if it is a substantial factor in bringing about the harm].) An event will be considered a substantial factor in bringing about harm if it is "recognizable as having an appreciable effect in bringing it about." (Rest.2d Torts, § 433, com. (d).) ¶ An event that enables harm ultimately to occur need not necessarily be a substantial factor in bringing about the harm. "[C]are must be taken to avoid confusing two elements which are separate and distinct, namely, that which causes the injury, and that without which the injury would not have happened. For the former the defendant may be liable, but for the latter he may not; that is to say, in order to make a defendant liable his wrongful act must be the *causa causans* [(immediate cause)], and not merely the *causa sine qua non* [(necessary antecedent)] [citation]." (*Johnson v. Union Furniture Co.* (1939) 31 Cal.App.2d 234, 237, 87 P.2d 917.) "In a philosophical sense the causes of any accident or event go back to the birth of the parties and the discovery of America; but any attempt to impose responsibility upon such a basis would result in infinite liability, and would 'set society on edge and fill the courts with endless litigation.' As a matter of practical necessity, legal responsibility must be limited to those causes which are so close to the result, or of such significance as causes, that the law is justified in making the defendant pay." (Prosser, *Proximate Cause in California* (1950) 38 Cal. L.Rev. 369, 375, fn. omitted.) ¶ The question of proximate cause is "an issue of whether the defendant is under any duty to the plaintiff, or whether his duty includes protection against such consequences." (Prosser, Torts (4th ed.1971) § 42, p. 244).) There is thus an element of foreseeability in the inquiry, and a defendant owes no duty to prevent a harm that was not a reasonably foreseeable result of his negligent conduct. (*Cabral*

v. Ralphs Grocery Co. (2011) 51 Cal.4th 764, 779, 122 Cal.Rptr.3d 313, 248 P.3d 1170 ["the question of 'the closeness of the connection between the defendant's conduct and the injury suffered' [citation] is strongly related to the question of foreseeability itself"].) The court's task "is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed." (*Id.* at p. 772, 122 Cal.Rptr.3d 313, 248 P.3d 1170.) " '[F]oreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct.' " (*Bigbee v. Pacific Telephone & Telegraph Co.* (1983) 34 Cal.3d 49, 57, 192 Cal.Rptr. 857, 665 P.2d 947.) Causation in fact is thus ultimately "a matter of probability and common sense." (*Osborn v. Irwin Memorial Blood Bank, supra,* 5 Cal.App.4th at p. 253, 7 Cal.Rptr.2d 101.) "If, as a matter of ordinary experience, a particular act or omission might be expected to produce a particular result, and if that result has in fact followed, the conclusion may be justified that the causal relation exists. In drawing that conclusion, the triers of fact are permitted to draw upon ordinary human experience as to the probabilities of the case." (Rest.2d Torts, § 433B, *com. b*, p. 443.) ¶ Ordinarily, foreseeability is a question of fact for the finder of fact, but it may be decided as a question of law if under the undisputed facts there is no room for a reasonable difference of opinion. (*Cicone v. URS Corp.* (1986) 183 Cal.App.3d 194, 206, 227 Cal.Rptr. 887; *Basin Oil Co. v. Baash–Ross Tool Co.* (1954) 125 Cal.App.2d 578, 603, 271 P.2d 122.)" (Kumaraperu v. Feldsted (2015) 237 Cal.App.4th 60, 68–69.)

The following facts are undisputed: On July 4, 2019 plaintiff and her companion, Jonathan Prince, visited a rental pier at Stonebreaker Landing operated by defendant for the purpose of

renting a canoe; Jonathan Prince is experienced in renting and operating canoes or similar watercrafts; Jonathan Prince spoke to defendant's employee Nick Carlson about renting a canoe; Prince spoke with Carlson about renting a canoe; Carlson remained in a sitting position with his legs in the canoe holding the near side while also holding the far gunwale with his hands to stabilize the canoe while plaintiff and Prince got into the canoe; Prince testified there were no issues getting into the canoe; after boarding, plaintiff and Prince paddled around the lake for approximately one to two hours with no issues with the equipment defendant provided; upon return from their canoe ride, Carlson came out and directed Prince to the nearest pier to the rental shed to disembark, and they did so; Carlson steadied the canoe against the pier as he had done earlier; plaintiff was holding an open umbrella and a handbag around her shoulder; plaintiff never voiced any concern about the pier or entering the canoe; and plaintiff does not know exactly what caused her fall. (Plaintiff's Response to Defendants' Separate Statement of Undisputed Material Facts, Defendant Fact Numbers 1, 3, 4, 7, 8, 9, 10, 11, 12, 16, and 19.)

Jonathan Prince testified at his deposition: the attendant did not instruct him how to get out of the canoe; he can't recall him specifically saying anything; plaintiff was holding her umbrella open when they arrived back; plaintiff got out of the canoe first; she stepped out of the canoe onto the dock one foot at a time; before she got out of the canoe he suggested she put down her umbrella, because it is not good to have something in your hand when getting out of a canoe that can be unstable; she didn't put down the umbrella; he did not hear the attendant say anything to the plaintiff and he was holding the boat to keep it steady; plaintiff was still holding her open umbrella with one hand when she was stepping out; she also had a bag, but he could not say whether she was holding the bag or it was on her shoulder; it was obvious to him that plaintiff lost her balance getting out and fell; and the primary reason she lost her

balance was the instability of the boat when she was getting out which tends to move when you get out because you are shifting weight out of the boat onto the deck; and so it appeared to him that it was likely that the cause of her losing her balance was some movement of the boat in the water when she was getting out. (Emphasis added.) (Defense Exhibit C – Transcript of Deposition Testimony of Jonathan Prince, page 33, line 3 to page 34, line 22 page 35, lines 6 to 10; page 35, lines 12-22; page 36, lines 8 to 17; page 38, lines 22-23; and page 39, lines 3-15.)

Employee Nick Carlson testified to the following at his deposition: when plaintiff attempted to disembark from the canoe on July 4, 2019, she was carrying an umbrella in her right hand and was also carrying a handbag; he instructed her how to disembark the canoe by keeping a low center of gravity, squish your butt over to the dock, and you'll need to put down the umbrella; he instructed plaintiff to keep a low center of gravity and put down the umbrella; her paddling partner told her over and over to put down the umbrella; plaintiff stood up like stepping off a train, pushed the canoe away with her one foot, and stepped and fell against the dock; and one foot stayed in the canoe and the other went into the water. (Defense Exhibit D – Transcript of Deposition of Nick Carlson, page 24, lines 10-15; page 24, line 24 to page 25, line 9; page 25, lines 13-19; and page 27, lines 9-22.)

Defendant submitted an expert declaration, which stated that the expert was of the following opinion: that defendants provided a safe point of ingress and egress from the canoe and Mr. Carlson used the correct method to stabilize the canoe, thereby employing every reasonable means to steady the canoe in accordance with proper canoeing procedures to prevent plaintiff's fall; Mr. Carlson provided clear, adequate and correct instructions for the proper method to enter and exit the canoe; and there is overwhelming evidence that plaintiff clearly and knowingly failed to conform her behavior to the instructions that were demonstrated by

insisting on holding her open umbrella while exiting. (Declaration of Alison Olinsky in Support of Motion, paragraphs 5, 6, 8, 9, and 10.)

Plaintiff testified to the following during her deposition: when they got back to the dock plaintiff asked whether she could get on shore while he was sitting there holding the canoe; she asked for permission to exit; there was nothing for her to hold on, so she asked for permission to get off; she started with her right leg; plaintiff was not given any instructions on how to get out of the canoe; she was holding an open umbrella while trying to get out of the canoe; she was not instructed to put the umbrella down; she does not remember/does not know if her companion told her to put the umbrella down; she was listening to Nick; she asked him if she could get out and he said yes, nothing else; she waited for his instructions giving her permission to get off; she first stepped out with her right leg, stepped on a big rock and for one to two seconds struggled to maintain her balance; in the end, she was unable to keep her balance; she did not see the rock on the deck before she got out of the canoe; she was holding the open umbrella in her right hand; she fell and then screamed, because of extreme pain; according to her statement in the report submitted to defendant El Dorado Irrigation District plaintiff said she lost her footing without mentioning the rock; Mr. Carlson helped by steadying the canoe to prevent movement; after she stepped out with her right foot, she fell; she does not know what caused the fall; and Nick did not cause the fall, but he did not instruct her how to get out. (Plaintiff's Exhibit A – Transcript of Deposition of Plaintiff, page 36, lines 11-17; page 36, lines 22 to 37, line 19; page 38, line 7 to page 39, line 23; and page 49, line 20 to page 50, line 14.)

Plaintiff contends that the canoe rental employee should have given her help getting out of the canoe, since she had never been in a canoe before and he should have known that an older woman such as her would need help getting out of an unstable canoe. She also declares

that she later learned that there were ladders that would have prevented the subject incident had she been told to exit using the ladder. (Plaintiff's Declaration in Opposition, paragraph 11.)

Strictly construing the moving party's evidence, liberally construing the evidence submitted in opposition to the motion, resolving doubts as to the propriety of granting the motion in favor of the party resisting the motion, and considering all of the evidence and all of the inferences reasonably drawn therefrom in the light most favorable to the opposing party (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843; and Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal.App.4th 1509, 1524.), the court finds the above cited undisputed facts and evidence and previously cited evidence raise a triable issue of material fact as to whether defendant A Current Adventure's employee Nick Carlson proximately caused the subject accident when plaintiff disembarked from the canoe.

The motion for summary judgment is denied.

TENTATIVE RULING # 9: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IS DENIED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE

MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, JULY 29, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

10. HART v. FEDERAL HOME LOAN MORTGAGE CORP. 22CV0286

(1) Demurrer to Complaint.

(2) Motion to Strike Portions of Complaint.

TENTATIVE RULING # 11: THIS MATTER IS CONTINUED TO 8:30 A.M. ON FRIDAY, SEPTEMBER 16, 2022 IN DEPARTMENT NINE.

11. BAUGH v. GREENVIEW ASSETS PC-20190436

(1) Plaintiffs' Motion to Compel Compliance with Deposition Subpoena of Non-Party and for Sanctions.

(2) Defendants'/Cross-Complainants' Motion for Protective Order to Prevent Deposition and for Sanctions.

Plaintiffs' Motion to Compel Compliance with Deposition Subpoena of Non-Party and for Sanctions.

Plaintiffs subpoenaed Frank Watson to be deposed on April 11, 2022. Defendants served an objection to the deposition on March 17, 2022 asserting that Frank Watson was their counsel in relation to this action, he is opposing counsel, and therefore, any attempt to depose him is presumptively improper and requires a showing of extremely good cause; and on March 21, 2022 Mr. Watson joined in the objection. On April 4, 2022 defendants filed a motion for protective order to prevent the taking of the deposition. Mr. Watson did not appear for the April 11, 2022 deposition. On April 13, 2022 plaintiffs filed this motion to compel his deposition and seeking an award of $2,620 in sanctions payable by Mr. Watson.

Plaintiffs seek an order compelling Mr. Watson to testify at a deposition on the following grounds: he failed to timely move to seek to quash the subpoena; and the case law relied on to claim he is defendants' counsel in this litigation that can not be deposed has no application to the present case, because he is not counsel of record and not trial counsel.

Defendants and Mr. Watson oppose the motion on the following grounds: Mr. Watson is defendants' current and active counsel representing defendants in this matter; plaintiffs failed to engage in good faith meet and confer efforts, because they refused to accept the defendants' assertion that Mr. Watson was defendants' attorney; the motion relies on a perjurious statement in Mr. Mollica's declaration wherein he declared Mr. Watson demanded

and took possession of a witness fee when served with the subpoena as established by the proof of service, when, in fact, the proof of service attached to the declaration expressly stated that Mr. Watson neither demanded nor was paid a witness fee (Declaration of Terry Mollica, paragraph 5 and Exhibit B.); plaintiffs have failed to overcome the presumption against deposing defendants' counsel, Mr. Watson; and plaintiffs should be required to pay $2,400 in monetary sanctions for failure to reasonably meet and confer and await the court's decision on the motion for protective order.

Defendants also objected to portions of the Declaration of Terry Mollica.

Plaintiffs replied and objected to portions of Katheryn Kaufman's declaration

Defendants' and Mr. Watson's Objections to Declaration of Terry Mollica in Support of Motion to Compel Deposition

Objection numbers 4 and 6 are overruled.

Objection numbers 1 and 3 are sustained

Objection number 2 is sustained as the allegations of the 1st amended complaint are not facts that plaintiffs' counsel can declare as true and correct.

Objection number 5 is sustained in part and overruled in part. The court sustains the objection to the portion of paragraph 8 of the declaration wherein it is declared "presumably on the basis that they relied upon the "advice of counsel" in taking the actions they took" and overruled as to the remainder of the objected to portion of that paragraph.

Plaintiffs' Objections to Declaration of Kathryn Kaufman

Objection numbers 1-3 to paragraph 3 of the declaration are sustained.

Objection numbers 1 and 2 to paragraph 4 of the declaration are overruled.

General Motion to Compel Deposition Subpoena Principles

"Any party may obtain discovery within the scope delimited by Chapter 2 (commencing with Section 2017.010), and subject to the restrictions set forth in Chapter 5 (commencing with Section 2019.010), by taking in California the oral deposition of any person, including any party to the action. The person deposed may be a natural person, an organization such as a public or private corporation, a partnership, an association, or a governmental agency." (Code of Civil Procedure, § 2025.010.)

"The service of a deposition notice under Section 2025.240 is effective to require any deponent who is a party to the action or an officer, director, managing agent, or employee of a party to attend and to testify, as well as to produce any document or tangible thing for inspection and copying." (Code of Civil Procedure, § 2025.280(a).)

"The attendance and testimony of any other deponent, as well as the production by the deponent of any document or tangible thing for inspection and copying, requires the service on the deponent of a deposition subpoena under Chapter 6 (commencing with Section 2020.010)." (Code of Civil Procedure, § 2025.280(b).)

"(a) Any of the following methods may be used to obtain discovery within the state from a person who is not a party to the action in which the discovery is sought: ¶ (1) An oral deposition under Chapter 9 (commencing with Section 2025.010). ¶ (2) A written deposition under Chapter 11 (commencing with Section 2028.010). ¶ (3) A deposition for production of business records and things under Article 4 (commencing with Section 2020.410) or Article 5 (commencing with Section 2020.510). ¶ (b) Except as provided in subdivision (a) of Section 2025.280, the process by which a nonparty is required to provide discovery is a deposition subpoena." (Code Civil Procedure, § 2020.010.)

With the above-cited provisions in mind, the court will rule on the motion to compel deposition.

Meet and Confer Requirement

"It is a central precept to the Civil Discovery Act of 1986 (Code Civ.Proc., § 2016 et seq.) (hereinafter "Discovery Act") that civil discovery be essentially self-executing. (*Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1111, 1 Cal.Rptr.2d 222.) The Discovery Act requires that, prior to the initiation of a motion to compel, the moving party declare that he or she has made a serious attempt to obtain "an informal resolution of each issue." (§ 2025, subd. (o); *DeBlase v. Superior Court* (1996) 41 Cal.App.4th 1279, 1284, 49 Cal.Rptr.2d 229.) This rule is designed "to encourage the parties to work out their differences informally so as to avoid the necessity for a formal order...." (*McElhaney v. Cessna Aircraft Co.* (1982) 134 Cal.App.3d 285, 289, 184 Cal.Rptr. 547.) This, in turn, will lessen the burden on the court and reduce the unnecessary expenditure of resources by litigants through promotion of informal, extrajudicial resolution of discovery disputes. (*DeBlase v. Superior Court*, supra, 41 Cal.App.4th 1279, 1284, 49 Cal.Rptr.2d 229; see also *Volkswagenwerk Aktiengesellschaft v. Superior Court* (1981) 122 Cal.App.3d 326, 330, 175 Cal.Rptr. 888.)" (Townsend v. Superior Court (1998) 61 Cal.App.4th 1431, 1434-1435.) "A determination of whether an attempt at informal resolution is adequate also involves the exercise of discretion. The level of effort at informal resolution which satisfies the 'reasonable and good faith attempt' standard depends upon the circumstances. In a larger, more complex discovery context, a greater effort at informal resolution may be warranted. In a simpler, or more narrowly focused case, a more modest effort may suffice. The history of the litigation, the nature of the interaction between counsel, the nature of the issues, the type and scope of discovery requested, the prospects for success and other similar factors can be relevant. Judges have broad powers and responsibilities to determine what measures and

procedures are appropriate in varying circumstances. (See, e.g., Gov.Code, § 68607 [judge has responsibility to manage litigation]; Code Civ. Proc., § 128, subd. (a)(5) [judge has power to control conduct of judicial proceeding in furtherance of justice].) Judges also have broad discretion in controlling the course of discovery and in making the various decisions necessitated by discovery proceedings. (Citations omitted.)" (Obregon v. Superior Court (1998) 67 Cal.App.4th 424, 431.) "Although some effort is required in all instances (see, e.g., *Townsend*, supra, 61 Cal.App.4th at p. 1438, 72 Cal.Rptr.2d 333 [no exception based on speculation that prospects for informal resolution may be bleak]), the level of effort that is reasonable is different in different circumstances, and may vary with the prospects for success. These are considerations entrusted to the trial court's discretion and judgment, with due regard for all relevant circumstances." (Obregon, supra at pages 432-433.)

The court finds that under the totality of circumstances presented the meet and confer activity was sufficient.

Failure to File Motion to Quash Subpoena

"If a subpoena requires the attendance of a witness or the production of books, documents, or other things before a court, or at the trial of an issue therein, or at the taking of a deposition, the court, upon motion reasonably made by any person described in subdivision (b), or upon the court's own motion after giving counsel notice and an opportunity to be heard, may make an order quashing the subpoena entirely, modifying it, or directing compliance with it upon those terms or conditions as the court shall declare, including protective orders. In addition, the court may make any other order as may be appropriate to protect the person from unreasonable or oppressive demands, including unreasonable violations of the right of privacy of the person." (Code of Civil Procedure, § 1987.1(a).)

When served with the deposition subpoena defendants and Mr. Watson objected to the subpoena and then four days before the scheduled deposition they filed and served by email a motion for protective order. Defendants and Mr. Watson were not mandated to file a motion to quash. They had the option to move for a protective order, which they did. The contention that a failure to move to quash the subpoena is grounds to grant the motion to compel the deposition lacks merit.

Deposition of Attorney

"Depositions of opposing counsel are presumptively improper, severely restricted, and require "extremely" good cause—a high standard. (*Spectra–Physics, Inc. v. Superior Court* (1988) 198 Cal.App.3d 1487, 1493, 244 Cal.Rptr. 258 (*Spectra–Physics*); see also *Trade Center Properties, Inc. v. Superior Court* (1960) 185 Cal.App.2d 409, 411, 8 Cal.Rptr. 345 (*Trade Center*).) [FN 1] ¶ FN 1. This is a variant of the Restatement's test: "A tribunal should not permit a lawyer to call opposing trial counsel as a witness unless there is a compelling need for the lawyer's testimony." (Rest.3d, Law Governing Lawyers, § 108(4).) ¶ There are strong policy considerations against deposing an opposing counsel. The practice runs counter to the adversarial process and to the state's public policy to "[p]revent attorneys from taking undue advantage of their adversary's industry and efforts." (Code Civ. Proc., § 2018.020, subd. (b).) " 'Discovery was hardly intended to enable a learned profession to perform its functions ... on wits borrowed from the adversary.' " (*Spectra–Physics, supra,* 198 Cal.App.3d at p. 1494, 244 Cal.Rptr. 258, quoting *Hickman v. Taylor* (1947) 329 U.S. 495, 516, 67 S.Ct. 385, 91 L.Ed. 451 (conc. opn. of Jackson, J.).) ¶ Attorney depositions are disruptive, and add to the length and expense of litigation. Rather than preparing the clients' case for trial, counsel must be prepared (often by retaining additional counsel) to place himself or herself in the witness box, being a responsive witness while remaining a partisan advocate. "There is a

reason there are so few successful player-coaches—it's hard to do two things well at the same time.... We speak from painful experience: Lawyers make the absolute worse deposition witnesses." (Solovy & Byman, *Discovery: Opponent Deponents* 23 Nat'l L.J. (Jan. 8, 2001) p. A17.) The parties get sidetracked into endless collateral disputes about which attorney statements are protected and which are not, and it increases the possibility that the lawyer may be called as a witness at trial. "It is not hard to imagine additional pretrial delays to resolve work-product and attorney-client objections, as well as delays to resolve collateral issues raised by the attorney's testimony." (*Spectra–Physics, supra,* 198 Cal.App.3d at p. 1494, 244 Cal.Rptr. 258.) ¶ Attorney depositions chill the attorney-client relationship, impede civility and easily lend themselves to gamesmanship and abuse. "Counsel should be free to devote his or her time and efforts to preparing the client's case without fear of being interrogated by his or her opponent." (*Spectra–Physics, supra,* 198 Cal.App.3d at p. 1494, 244 Cal.Rptr. 258.) "[I]n the highly charged atmosphere of litigation, attorney depositions may serve as a potent tool to harass an opponent." (Flynn, Jr., *On 'Borrowed Wits': A Proposed Rule for Attorney Depositions* (1993) 93 Colum. L.Rev.1956, 1965 (hereafter Flynn, Jr.).) ¶ To effectuate these policy concerns, California applies a three-prong test in considering the propriety of attorney depositions. First, does the proponent have other practicable means to obtain the information? Second, is the information crucial to the preparation of the case? Third, is the information subject to a privilege? (*Spectra–Physics, supra,* 198 Cal.App.3d at pp. 1494–1495, 1496, 244 Cal.Rptr. 258; see also *Estate of Ruchti* (1993) 12 Cal.App.4th 1593, 1601, 16 Cal.Rptr.2d 151 [affirming protective order against deposition of opposing counsel].) ¶ Each of these prongs poses an independent hurdle to deposing an adversary's counsel; any one of them may be sufficient to defeat the attempted attorney deposition. ¶ Without question, the proponent has the burden of proof to establish the predicate circumstances for the first two prongs. But

California has not directly addressed the issue of which party has the burden of proof to establish the third prong, that the deposition would (or would not) impinge upon privileged information. One federal court, in implementing the three-prong test, has placed the burden of establishing the applicability of the attorney-client privilege and the work product doctrine on the party opposing discovery. "[T]he one asserting the work-product and attorney-client privileges has the burden of demonstrating the applicability of those privileges to the specific items which he claims are not subject to discovery." (*First Sec. Sav. v. Kansas Bankers Sur. Co.* (D.Neb.1987) 115 F.R.D. 181, 182.) ¶ We agree. Parties claiming the benefit of the work product rule have the burden to show preliminary facts to support its applicability. (*Fellows v. Superior Court* (1980) 108 Cal.App.3d 55, 67, 166 Cal.Rptr. 274.) "The fact that an attorney is the subject of the discovery request does not warrant reallocating the burden of proof, because then the party asserting the privilege could effectively decide the question for itself. The facts supporting the claim of privilege are uniquely and solely within the control of the party asserting it...." (Flynn, Jr., *supra,* 93 Colum. L.Rev. at pp. 1979–1980.)" (Carehouse Convalescent Hospital v. Superior Court (2006) 143 Cal.App.4th 1558, 1562–1564.)

"What petitioner here seeks is the right to take the deposition of his adversary's attorney upon matters pertaining to the latter's preparation for trial. Whether to protect the work product of that attorney or to restrict the picking of his brains, the court clearly should bar such a proceeding except upon a showing of extremely good cause. No such showing is here made. On the contrary, it is clear that Files has responded freely to interviews by petitioner's counsel, and remains available for further interview, or for deposition if required. Lacking strong elements of good cause, it would seem an abuse of discretion for the trial court to refuse an order that the deposition not be taken." (Trade Center Properties, Inc. v. Superior Court In and For City and County of San Francisco (1960) 185 Cal.App.2d 409, 411.)

On the other hand there is authority for the proposition that general rule against deposing opposing counsel and three prong test to depose a party's counsel does not apply to former opposing counsel in a different case, which is not binding authority as it is stated in a U.S. District court case. "The burden shifts to the party seeking to overcome the privilege by its proposal to take the deposition of opposing counsel. *Carehouse Convalescent Hosp. v. Superior Court,* (2006) 143 Cal.App.4th 1558, 156 3, 50 Cal.Rptr.3d 129. In this case, the proposed deposition is not of opposing counsel, but of former opposing counsel in a different case, so the normal burden applies. Defendants cite *Carehouse* and *Spectra-Physics, Inc. v. Superior Court,* 198 Cal.App.3d 1487, 244 Cal.Rptr. 258 (1988), both of which apply to depositions of current opposing counsel, not former opposing counsel in a different case, and are therefore not on point. The burden is on Defendants to establish the existence of the privilege they claim. *Munoz, Id.* at 1128." (Nemirofsky v. Seok Ki Kim (N.D. Cal. 2007) 523 F.Supp.2d 998, 1000–1001.)

There is also authority for the proposition that in limited circumstances in insurance bad faith cases, the opposing attorney is susceptible of being deposed where the counsel for the insurer was the sole, or principal, negotiator and in which bad faith is alleged and punitive damages are sought.

"While the practice of taking the deposition of opposing counsel should be severely restricted, and permitted only upon showing of extremely good cause (*Trade Center Properties, Inc. v. Superior Court*, supra) in those cases in which an attorney for a party is the sole, or principal, negotiator and in which bad faith is alleged and punitive damages are sought based upon that allegation of bad faith, then we think the facts fall outside attorney-client privilege, and outside the work produce rule, and the deposition of the attorney may be taken,

subject to all proper objections." (Fireman's Fund Ins. Co. v. Superior Court (1977) 72 Cal.App.3d 786, 790.)

"However, even where depositions are permitted in insurance bad faith litigation, the attorney-client privilege nevertheless applies and limits the questions which may be asked of counsel, unless the insurer directly relies on advice of counsel as a defense to the bad faith charge. (*Transamerica Title Ins. Co. v. Superior Court* (1987) 188 Cal.App.3d 1047, 233 Cal.Rptr. 825.)" (Spectra-Physics, Inc. v. Superior Court (1988) 198 Cal.App.3d 1487, 1494.)

There does not appear to be any authority for applying the limited exception to the general rule against deposing opposing counsel in actions that fall outside of insurance bad faith actions.

"Outside the area of insurance bad faith actions, counsel for Teledyne provides no authorities permitting trial counsel to be deposed. On the contrary, the decisions express the same strong policy considerations against such discovery as does the *Fireman's Fund* case." (Spectra-Physics, Inc. v. Superior Court (1988) 198 Cal.App.3d 1487, 1494.)

The appellate opinion in Fireman's Fund Ins. Co., supra, does not hold that outside the limited factual situation where the insurer's attorney has engaged in the bad faith conduct that supports the insurance bad faith action an opposing counsel is subject to being deposed merely because the attorney provided legal services on behalf of the client during the underlying dispute between plaintiffs and defendants.

"Cases do not stand for propositions that were never considered by the court. (*Tosco Corp. v. General Ins. Co.* (2000) 85 Cal.App.4th 1016, 1021, 102 Cal.Rptr.2d 657.)" (Mares v. Baughman (2001) 92 Cal.App.4th 672, 679.)

"An opinion is not authority for a point not raised, considered, or resolved therein. (E.g., *People v. Castellanos* (1999) 21 Cal.4th 785, 799, fn. 9, 88 Cal.Rptr.2d 346, 982 P.2d 211;

San Diego Gas & Elec. Co. v. Superior Court (1996) 13 Cal.4th 893, 943, 55 Cal.Rptr.2d 724, 920 P.2d 669.)" (Styne v. Stevens (2001) 26 Cal.4th 42, 57-58.)

This action is not an insurance bad faith action, therefore, plaintiffs must meet the strict requirements for deposing an opposing counsel even when the plaintiffs want to depose counsel about counsel's conduct during legal services provided to defendants concerning the dispute at issue in this action that occurred prior to the filing of the complaint.

While plaintiffs argue that no reported case has applied the rule to attorneys who are not trial counsel or counsel of record (Plaintiff's Memorandum of Points and Authorities in Support of Motion to Compel Deposition, page 7, lines 20-21.), the cases do hold that opposing counsels to which the rule applies does not include counsels who did the preparatory legal work prior to the filing of the litigation at issue and/or who provided legal counsel to the opposing party concerning the litigation at issue during the litigation, though counsel did not appear as attorney of record.

"Cases do not stand for propositions that were never considered by the court. (*Tosco Corp. v. General Ins. Co.* (2000) 85 Cal.App.4th 1016, 1021, 102 Cal.Rptr.2d 657.)" (Mares v. Baughman (2001) 92 Cal.App.4th 672, 679.)

"An opinion is not authority for a point not raised, considered, or resolved therein. (E.g., *People v. Castellanos* (1999) 21 Cal.4th 785, 799, fn. 9, 88 Cal.Rptr.2d 346, 982 P.2d 211; *San Diego Gas & Elec. Co. v. Superior Court* (1996) 13 Cal.4th 893, 943, 55 Cal.Rptr.2d 724, 920 P.2d 669.)" (Styne v. Stevens (2001) 26 Cal.4th 42, 57-58.)

The court rejects plaintiffs' argument that the general rule that depositions of opposing counsel are presumptively improper, severely restricted, and require "extremely" good cause in order to direct such depositions only applies where the attorney is the attorney of record and appeared in the action on behalf of the party. "Opposing counsel" reasonably includes counsel

who did the preliminary legal work concerning the dispute leading up to the filing of the instant litigation and/or has acted as legal counsel for the party during the instant litigation even though counsel is not the trial attorney, attorney of record, and did not make a formal appearance for the party. Under such circumstances, the attorney is still providing legal services and advice to the opposing party in the instant litigation.

- Proof of the First Two Prongs.

Plaintiffs' counsel declares in support of the motion to compel the deposition: Mr. Watson is a key non-party witness in this case having caused the lawsuit to be filed in the first instance; on March 3, 2022 he prepared a deposition subpoena for Mr. Watson calling for his personal appearance by Zoom to testify on April 11, 2022; the proof of service indicates that Mr. Watson was personally served the subpoena on March 7, 2022; on March 8, 2022 he prepared and served the notice of deposition relating to the subpoena on all parties; on March 17, 2022 defendants' counsel objected to the notice of taking deposition and deposition subpoena and stated he will not be made available for deposition and will not appear; although Mr. Watson claims his is an active counsel for defendants in this case, he has never made any appearance in the action in the more than 2 years and 7 months since the case was filed; on September 11, 2019 Mr. Manning advised him that he is defendants' counsel who would be handling the lawsuit; the 1st amended complaint was served on Mr. Manning at his request as defendants' counsel of record; he made multiple attempts to meet and confer with Mr. Watson regarding his non-appearance and he steadfastly refused to appear on April 11, 2022 asserting he is active counsel for the defendants, though not attorney of record; and on April 11, 2022 Mr. Watson failed to appear for his deposition. (Declaration of Terry Mollica in Support of Motion to Compel, page 1, lines 15-16 and 26-27; page 2, lines 12-22; and paragraphs 4, 6, 7, 9, and 10.)

Franklin Watson declares in support of the motion: for many years he has been and continues to be legal counsel for defendants, including throughout this litigation; he regularly confers with defendants and lead counsel Manning concerning all aspects of this matter; in May 2019 defendants engaged him to advise them on their rights and obligations under a lease agreement they entered into with the plaintiffs, the right of first refusal and, option to purchase granted the plaintiffs, as defendants were starting discussions with a potential third party purchaser of the property; on July 3, 2019 he sent Mr. Baugh an email informing him he was legal counsel for defendants and provided notice that the leased property will be sold to a third party, unless the plaintiffs exercised their right of first refusal or option to purchase contained in the lease; he received a response from Terry Mollica on July 8, 2019 instructing him that Mr. Mollica was plaintiffs' counsel and all future communications concerning the lease must be sent to him; thereafter, he communicated numerous times with Mr. Mollica concerning the lease and related documents and the parties' rights and obligations therein; in July 2019 Mr. Mollica advised him that he would not allow any further communication between plaintiffs and defendants and instead all further communication had to occur between Mr. Mollica and him; as the lease dispute escalated after July 2019, he continued to engage in numerous communications with Mr. Mollica and on August 7, 2019 Mr. Mollica demanded in writing that the defendants agree to participate in mediation; he continued to communicate with Mr. Mollica until the complaint was filed on August 16, 2019; once Mr. Mollica filed the complaint, as he was not trying to be lead counsel, because he does not actively try cases anymore, Mr. Manning's firm was engaged by defendants to be lead counsel in this matter; he remained engaged by the defendants to assist Mr. Manning in this matter and has been actively involved in working with Mr. Manning on behalf of defendants; and after being served with the deposition subpoena, both he and trial counsel for defendants objected to the deposition

subpoena, advised Mr. Mollica that he was active counsel for defendants and assisting with their case in this matter, and that pursuant to applicable case law, Mr. Mollica needed to demonstrate facts to justify taking his deposition. (Declaration of Franklin Watson in Opposition to Motion to Compel Deposition, paragraphs 2-10.)

Plaintiff Katheryn Kaufman declares: Frank Watson has been their family attorney for years; he was their counsel on transactional and tenancy issues relating to the subject property, which is the subject of their lease agreement with the plaintiffs; in July 2019 plaintiffs began discussions with the plaintiffs about the possible sale of the property and whether they would cooperate with the sale or instead elect to purchase the property pursuant to the right of first refusal and related option to purchase; plaintiffs stated they would only cooperate with the sale and not attempt to block it if plaintiffs paid plaintiffs $200,000; that demand was rejected and plaintiffs instructed Mr. Watson to communicate with plaintiffs relative to the lease dispute; during this same time Mr. Mollica, plaintiffs' counsel, began corresponding with Mr. Watson to address the dispute and purchase rights of plaintiffs; Mr. Watson worked on defendants' behalf to deal with the issues raised; with the assistance of Mr. Watson, defendants retained trial counsel in September 2019; prior to that engagement, Mr. Watson was defendants' sole legal counsel, fielding all correspondence from Mr. Mollica and advising defendants' accordingly, including preparing for potential mediation of the issues; and their retention of trial counsel has not disrupted their legal relationship with Mr. Watson, who they continue to retain and confer with regarding ongoing issues in this litigation; Mr. Watson and the trial counsel in this case have collaborated on litigation matters and defendants' continue to rely upon and seek the counsel of Mr. Watson in this case both in coordination with and independently of the trial counsel. (Declaration of Katheryn Kaufman in Opposition to Motion to Compel Deposition, paragraphs 2 and 4-6.)

There is evidence before the court that Mr. Watson was representing defendants as their attorney related to the legal dispute that led to the lawsuit; as he does not try cases anymore, he was trying not to act as lead counsel and Mr. Manning's firm was retained to be lead counsel; he remained counsel for defendants to assist Mr. Manning in this litigation; and has been actively involved in working with Mr. Manning on defendants behalf. Mr. Watson is an opposing counsel within the meaning of the rule that depositions of opposing counsel are presumptively improper, severely restricted, and require "extremely" good cause. Therefore, plaintiffs were required to provide evidence that establishes the first two prongs of the test to determine whether there exists extremely good cause to depose an opposing counsel, which require plaintiffs to establish they have no other practicable means to obtain the information and the information sought from opposing counsel is crucial to the preparation of the case.

The plaintiffs' evidence submitted and argument asserted in support of the motion to compel counsel's deposition is solely directed at the issue of whether Mr. Watson is defendants' counsel despite not having appeared as attorney of record for defendants. The plaintiffs have not submitted any evidence that they have no other practicable means to obtain the information and that the information sought from opposing counsel is crucial to the preparation of the case.

The motion to compel the deposition of defendants' counsel is denied.

Sanctions

While the court finds the plaintiffs' interpretation of the applicability of the rule that depositions of opposing counsel are presumptively improper, severely restricted, and require "extremely" good cause was in error under the facts presented, the court also finds that they acted with substantial justification or that other circumstances make the imposition of sanctions

unjust. In addition, the court previously found that there was sufficient meet and confer activity under the totality of the circumstances.

The request that plaintiffs be sanctioned is denied.

Defendants'/Cross-Complainants' Motion for Protective Order to Prevent Deposition and for Sanctions.

Plaintiffs subpoenaed Frank Watson to be deposed on April 11, 2022. Defendants served an objection to the deposition on March 17, 2022 asserting that Frank Watson was their counsel in relation to this action, he is opposing counsel, and, therefore, any attempt to depose him is presumptively improper and requires a showing of extremely good cause. On March 21, 2022 Mr. Watson joined in the objection. On April 4, 2022 defendants filed a motion for protective order to prevent the taking of the deposition. Mr. Watson did not appear for the April 11, 2022 deposition.

Defendants and Mr. Watson seek issuance of a protective order prohibiting the plaintiffs from deposing opposing counsel and they also seek an order awarding $3,997.50 in monetary sanction payable by plaintiffs. Defendants argue in support of the motion: Mr. Watson is defendants' current and active counsel representing defendants in this matter; plaintiffs can not overcome the presumption against the deposition of defendants' counsel, Mr. Watson; and plaintiffs must be sanctioned, because they effectively compelled the filing of the motion for protective order despite being advised of the strong policy considerations against deposing an opposing counsel.

Plaintiffs oppose the motion on the following grounds: Mr. Watson provided legal work prior to commencement of the litigation for defendant which requires him to be deposed; Mr. Watson's conduct as counsel for defendants prior to commencement of the litigation gives rise to the underlying claims related to the lease dispute, therefore, he must testify as a percipient

witness; he is not an attorney of record in this case and/or trial counsel, therefore, the presumption that depositions of opposing counsel are improper, severely restricted, and require "extremely" good cause does not apply; Mr. Watson has not moved to quash the subpoena; and plaintiffs should be awarded sanctions.

Defendants and Mr. Watson replied: the opposition has not satisfied their burden of proof to establish that extremely good cause exists to require defendants' attorney to be deposed; plaintiffs admit that Mr. Watson was defendants' counsel at the time the case was commenced and now improperly seeks his testimony on actions he took in the capacity as opposing counsel; plaintiffs are incorrect in asserting that Mr. Watson is not opposing counsel in the instant case, but is a former counsel in a different case, so the normal burden to depose him applies (Plaintiffs' Opposition to Motion for Protective Order, page 3, lines 15-16.); any information the plaintiffs do not already have from percipient witnesses, such as defendants and their realtor, that they may obtain by counsel's deposition is subject to privilege and work product claims, because all of counsel's actions relating to plaintiffs were taken at defendants' direction; and sanctions should be awarded to defendants.

"If a subpoena requires the attendance of a witness or the production of books, documents, or other things before a court, or at the trial of an issue therein, or at the taking of a deposition, the court, upon motion reasonably made by any person described in subdivision (b), or upon the court's own motion after giving counsel notice and an opportunity to be heard, may make an order quashing the subpoena entirely, modifying it, or directing compliance with it upon those terms or conditions as the court shall declare, including protective orders. In addition, the court may make any other order as may be appropriate to protect the person from unreasonable or oppressive demands, including unreasonable violations of the right of privacy of the person." (Emphasis added.) (Code of Civil Procedure, § 1987.1(a).)

Failure to File Motion to Quash Subpoena

When served with the deposition subpoena defendants and Mr. Watson objected to the subpoena and then four days before the scheduled deposition filed and served by email a motion for protective order. Defendants and Mr. Watson were not mandated to file a motion to quash. They had the option to move for a protective order, which they did. The contention that a failure to move to quash the subpoena is grounds to grant the motion to compel the deposition lacks merit.

Deposition of Attorney

"Depositions of opposing counsel are presumptively improper, severely restricted, and require "extremely" good cause—a high standard. (*Spectra–Physics, Inc. v. Superior Court* (1988) 198 Cal.App.3d 1487, 1493, 244 Cal.Rptr. 258 (*Spectra–Physics*); see also *Trade Center Properties, Inc. v. Superior Court* (1960) 185 Cal.App.2d 409, 411, 8 Cal.Rptr. 345 (*Trade Center*).) [FN 1] ¶ FN 1. This is a variant of the Restatement's test: "A tribunal should not permit a lawyer to call opposing trial counsel as a witness unless there is a compelling need for the lawyer's testimony." (Rest.3d, Law Governing Lawyers, § 108(4).) ¶ There are strong policy considerations against deposing an opposing counsel. The practice runs counter to the adversarial process and to the state's public policy to "[p]revent attorneys from taking undue advantage of their adversary's industry and efforts." (Code Civ. Proc., § 2018.020, subd. (b).) " 'Discovery was hardly intended to enable a learned profession to perform its functions ... on wits borrowed from the adversary.' " (*Spectra–Physics, supra,* 198 Cal.App.3d at p. 1494, 244 Cal.Rptr. 258, quoting *Hickman v. Taylor* (1947) 329 U.S. 495, 516, 67 S.Ct. 385, 91 L.Ed. 451 (conc. opn. of Jackson, J.).) ¶ Attorney depositions are disruptive, and add to the length and expense of litigation. Rather than preparing the clients' case for trial, counsel must be prepared (often by retaining additional counsel) to place himself or herself in

the witness box, being a responsive witness while remaining a partisan advocate. "There is a reason there are so few successful player-coaches—it's hard to do two things well at the same time.... We speak from painful experience: Lawyers make the absolute worse deposition witnesses." (Solovy & Byman, *Discovery: Opponent Deponents* 23 Nat'l L.J. (Jan. 8, 2001) p. A17.) The parties get sidetracked into endless collateral disputes about which attorney statements are protected and which are not, and it increases the possibility that the lawyer may be called as a witness at trial. "It is not hard to imagine additional pretrial delays to resolve work-product and attorney-client objections, as well as delays to resolve collateral issues raised by the attorney's testimony." (*Spectra–Physics, supra,* 198 Cal.App.3d at p. 1494, 244 Cal.Rptr. 258.) ¶ Attorney depositions chill the attorney-client relationship, impede civility and easily lend themselves to gamesmanship and abuse. "Counsel should be free to devote his or her time and efforts to preparing the client's case without fear of being interrogated by his or her opponent." (*Spectra–Physics, supra,* 198 Cal.App.3d at p. 1494, 244 Cal.Rptr. 258.) "[I]n the highly charged atmosphere of litigation, attorney depositions may serve as a potent tool to harass an opponent." (Flynn, Jr., *On 'Borrowed Wits': A Proposed Rule for Attorney Depositions* (1993) 93 Colum. L.Rev.1956, 1965 (hereafter Flynn, Jr.).) ¶ To effectuate these policy concerns, California applies a three-prong test in considering the propriety of attorney depositions. First, does the proponent have other practicable means to obtain the information? Second, is the information crucial to the preparation of the case? Third, is the information subject to a privilege? (*Spectra–Physics, supra,* 198 Cal.App.3d at pp. 1494–1495, 1496, 244 Cal.Rptr. 258; see also *Estate of Ruchti* (1993) 12 Cal.App.4th 1593, 1601, 16 Cal.Rptr.2d 151 [affirming protective order against deposition of opposing counsel].) ¶ Each of these prongs poses an independent hurdle to deposing an adversary's counsel; any one of them may be sufficient to defeat the attempted attorney deposition. ¶ Without question, the proponent has

the burden of proof to establish the predicate circumstances for the first two prongs. But California has not directly addressed the issue of which party has the burden of proof to establish the third prong, that the deposition would (or would not) impinge upon privileged information. One federal court, in implementing the three-prong test, has placed the burden of establishing the applicability of the attorney-client privilege and the work product doctrine on the party opposing discovery. "[T]he one asserting the work-product and attorney-client privileges has the burden of demonstrating the applicability of those privileges to the specific items which he claims are not subject to discovery." (*First Sec. Sav. v. Kansas Bankers Sur. Co.* (D.Neb.1987) 115 F.R.D. 181, 182.) ¶ We agree. Parties claiming the benefit of the work product rule have the burden to show preliminary facts to support its applicability. (*Fellows v. Superior Court* (1980) 108 Cal.App.3d 55, 67, 166 Cal.Rptr. 274.) "The fact that an attorney is the subject of the discovery request does not warrant reallocating the burden of proof, because then the party asserting the privilege could effectively decide the question for itself. The facts supporting the claim of privilege are uniquely and solely within the control of the party asserting it...." (Flynn, Jr., *supra,* 93 Colum. L.Rev. at pp. 1979–1980.)" (Carehouse Convalescent Hospital v. Superior Court (2006) 143 Cal.App.4th 1558, 1562–1564.)

"What petitioner here seeks is the right to take the deposition of his adversary's attorney upon matters pertaining to the latter's preparation for trial. Whether to protect the work product of that attorney or to restrict the picking of his brains, the court clearly should bar such a proceeding except upon a showing of extremely good cause. No such showing is here made. On the contrary, it is clear that Files has responded freely to interviews by petitioner's counsel, and remains available for further interview, or for deposition if required. Lacking strong elements of good cause, it would seem an abuse of discretion for the trial court to refuse an

order that the deposition not be taken." (Trade Center Properties, Inc. v. Superior Court In and For City and County of San Francisco (1960) 185 Cal.App.2d 409, 411.)

On the other hand there is authority for the proposition that rule and three prong test to depose a party's counsel does not apply to former opposing counsel in a different case, which is not binding authority as it is stated in a U.S. District court case. "The burden shifts to the party seeking to overcome the privilege by its proposal to take the deposition of opposing counsel. *Carehouse Convalescent Hosp. v. Superior Court,* (2006) 143 Cal.App.4th 1558, 156 3, 50 Cal.Rptr.3d 129. In this case, the proposed deposition is not of opposing counsel, but of former opposing counsel in a different case, so the normal burden applies. Defendants cite *Carehouse* and *Spectra-Physics, Inc. v. Superior Court,* 198 Cal.App.3d 1487, 244 Cal.Rptr. 258 (1988), both of which apply to depositions of current opposing counsel, not former opposing counsel in a different case, and are therefore not on point. The burden is on Defendants to establish the existence of the privilege they claim. *Munoz, Id.* at 1128." (Nemirofsky v. Seok Ki Kim (N.D. Cal. 2007) 523 F.Supp.2d 998, 1000–1001.)

There is also authority for the proposition that in limited circumstances in insurance bad faith cases, the opposing attorney is susceptible of being deposed where the counsel for the insurer was the sole, or principal, negotiator and in which bad faith is alleged and punitive damages are sought.

"While the practice of taking the deposition of opposing counsel should be severely restricted, and permitted only upon showing of extremely good cause (*Trade Center Properties, Inc. v. Superior Court*, supra) in those cases in which an attorney for a party is the sole, or principal, negotiator and in which bad faith is alleged and punitive damages are sought based upon that allegation of bad faith, then we think the facts fall outside attorney-client privilege, and outside the work produce rule, and the deposition of the attorney may be taken,

subject to all proper objections." (Fireman's Fund Ins. Co. v. Superior Court (1977) 72 Cal.App.3d 786, 790.)

"However, even where depositions are permitted in insurance bad faith litigation, the attorney-client privilege nevertheless applies and limits the questions which may be asked of counsel, unless the insurer directly relies on advice of counsel as a defense to the bad faith charge. (*Transamerica Title Ins. Co. v. Superior Court* (1987) 188 Cal.App.3d 1047, 233 Cal.Rptr. 825.)" (Spectra-Physics, Inc. v. Superior Court (1988) 198 Cal.App.3d 1487, 1494.)

There does not appear to be any authority for applying the limited exception to the general rule against deposing opposing counsel in actions that fall outside of insurance bad faith actions.

"Outside the area of insurance bad faith actions, counsel for Teledyne provides no authorities permitting trial counsel to be deposed. On the contrary, the decisions express the same strong policy considerations against such discovery as does the *Fireman's Fund* case." (Spectra-Physics, Inc. v. Superior Court (1988) 198 Cal.App.3d 1487, 1494.)

The appellate opinion in Fireman's Fund Ins. Co., does not hold that outside the limited factual situation where the insurer's attorney has engaged in the bad faith conduct that supports the insurance bad faith action an opposing counsel is subject to being deposed merely because the attorney provided legal services on behalf of the client during the underlying dispute between plaintiffs and defendants.

"Cases do not stand for propositions that were never considered by the court. (*Tosco Corp. v. General Ins. Co.* (2000) 85 Cal.App.4th 1016, 1021, 102 Cal.Rptr.2d 657.)" (Mares v. Baughman (2001) 92 Cal.App.4th 672, 679.)

"An opinion is not authority for a point not raised, considered, or resolved therein. (E.g., *People v. Castellanos* (1999) 21 Cal.4th 785, 799, fn. 9, 88 Cal.Rptr.2d 346, 982 P.2d 211;

San Diego Gas & Elec. Co. v. Superior Court (1996) 13 Cal.4th 893, 943, 55 Cal.Rptr.2d 724, 920 P.2d 669.)" (Styne v. Stevens (2001) 26 Cal.4th 42, 57-58.)

This action is not an insurance bad faith action, therefore, plaintiffs must meet the strict requirements for deposing an opposing counsel even when the plaintiffs want to depose counsel about counsel's conduct during legal services provided to defendants concerning the dispute at issue in this action that occurred prior to the filing of the complaint.

While plaintiffs argue that no reported case has applied the rule to attorneys who are not trial counsel or counsel of record (Plaintiff's Memorandum of Points and Authorities in Opposition to Motion for Protective Order, page 3, lines 8-9.), the cases do hold that opposing counsels to which the rule applies does not include counsels who did the preparatory legal work prior to the filing of the litigation at issue and/or who provided legal counsel to the opposing party concerning the litigation at issue during the litigation, though counsel did not appear as attorney of record.

"Cases do not stand for propositions that were never considered by the court. (*Tosco Corp. v. General Ins. Co.* (2000) 85 Cal.App.4th 1016, 1021, 102 Cal.Rptr.2d 657.)" (Mares v. Baughman (2001) 92 Cal.App.4th 672, 679.)

"An opinion is not authority for a point not raised, considered, or resolved therein. (E.g., *People v. Castellanos* (1999) 21 Cal.4th 785, 799, fn. 9, 88 Cal.Rptr.2d 346, 982 P.2d 211; *San Diego Gas & Elec. Co. v. Superior Court* (1996) 13 Cal.4th 893, 943, 55 Cal.Rptr.2d 724, 920 P.2d 669.)" (Styne v. Stevens (2001) 26 Cal.4th 42, 57-58.)

The court rejects plaintiffs' argument that the general rule that depositions of opposing counsel are presumptively improper, severely restricted, and require "extremely" good cause in order to direct such depositions only applies where the attorney is the attorney of record and appeared in the action on behalf of the party. "Opposing counsel" reasonably includes counsel

who has did the preliminary legal work leading up to the filing of the instant litigation and/or has acted as legal counsel for the party during the instant litigation even though counsel is not the trial attorney, attorney of record, and did not make a formal appearance for the party. Under such circumstances, the attorney is still providing legal services and advice to the opposing party in the instant litigation.

- Proof of the First Two Prongs.

One of defendants' attorneys, Benjamin Tagert, declares in support of the motion for protective order: Frank Watson has been and is counsel for defendants in relation to this litigation and the issues giving rise thereto; Mr. Watson has continued as counsel since the firm employing Mr. Tagert was employed as trial counsel in this matter; Mr. Watson has worked with trial counsel's office on litigation matters and has been involved with the post-complaint marketing and sale of the subject real property; on March 8, 2022 plaintiffs served the notice of deposition and deposition subpoena for Frank Watson; on March 17, 2022 trial counsel served by email the defendants' objection to the Watson Subpoena on the ground that depositions of opposing counsel are presumptively improper and require "extremely" good cause; the plaintiffs were invited to meet and confer on the issue; on March 21, 24, and 28, 2022 they attempted further meet and confer on the issues raised in the objection and the motion; and while plaintiffs' counsel has responded, he has thus far ignored the objection and meet and confer efforts without explanation. (Declaration of Benjamin Tagert in Support of Motion for Protective Order, paragraphs 4-7; and Exhibit C.)

Frank Watson declares: he has been assisting the defendants on matters related to their transactions and dispute with the plaintiffs since February 2019; prior to the plaintiffs filing the lawsuit, he advised the defendants on transactional and tenancy issues related to the subject real property which is the subject of the lease agreement with the plaintiffs; he continued to

advise the defendants on matters relating to their disputes with the plaintiffs during the first few months and corresponded with plaintiffs' counsel, Terry Mollica, when he was retained on or about July 2019; to this day he remains counsel to defendants in relation to this litigation as he has been regarding the issues giving rise thereto; he has worked with trial counsel's firm on litigation matters and advised the defendants on issues relating to their disputes with the plaintiffs in the lead up to their commencement of this lawsuit; and has been involved with the post-complaint marketing and sale of the subject real property, which is the subject of the parties' lease agreement and related disputes. (Declaration of Frank Watson in Support of Motion for Protective Order, paragraphs 1, 3, and 4.)

There was no evidence from plaintiffs submitted in opposition to the motion in the court's file at the time this ruling was prepared.

Citing Nemirofsky v. Seok Ki Kim (N.D. Cal. 2007) 523 F.Supp.2d 998, 1000–1001, plaintiffs argue that Mr. Watson is not an opposing counsel in this case and is instead a former opposing counsel in a different case, so the normal burden applies and not the general rule that depositions of opposing counsel are presumptively improper, severely restricted, and require "extremely" good cause; and because plaintiffs do not seek to depose defendants' trial counsel, the burden rests on Mr. Watson to prove the existence of a privilege in order to prevent the deposition. (Plaintiffs' Memorandum of Points and Authorities in Opposition, page 3, lines 15-20.)

There is evidence before the court that Mr. Watson was representing defendants' as their attorney related to the legal dispute that led to the lawsuit; after a law firm was retained to be trial counsel, Mr. Watson remained counsel for defendants to assist the trial counsel law firm in this litigation; and Mr. Watson has been actively involved in working with the defendants' trial counsel firm on litigation matters. Mr. Watson is not a former opposing counsel in a different

case. Mr. Watson is an opposing counsel within the meaning of the rule that depositions of opposing counsel are presumptively improper, severely restricted, and require "extremely" good cause. Therefore, plaintiffs were required to provide evidence that establishes the first two prongs of the test to determine whether there exists extremely good cause to depose an opposing counsel, which require plaintiffs to establish they have no other practicable means to obtain the information and the information sought from opposing counsel is crucial to the preparation of the case.

The plaintiffs' argument asserted in opposition to the motion for protective order is solely directed at the issue of whether Mr. Watson is defendants' counsel despite not having appeared as attorney of record for defendants. The plaintiffs have not submitted any evidence that they have no other practicable means to obtain the information and the information sought from opposing counsel is crucial to the preparation of the case.

Therefore, plaintiffs have not established that the general rule does not apply and Mr. Watson can be deposed subject to claims of attorney client privilege and work product protection.

Percipient Witness Claim

The evidence before the court clearly establishes that Mr. Watson is an opposing counsel protected by the rule that depositions of opposing counsel are presumptively improper, severely restricted, and require "extremely" good cause. There are strong policy considerations against deposing an opposing counsel. Such depositions chill the attorney-client relationship, impede civility and can easily lead to gamesmanship and abuse. An opposing attorney discharging his or her duties related to legal services being provided in conjunction with the subject action and disputes leading up to the litigation is not merely a percipient witness that can be deposed without meeting the strict requirements of deposing an opposing attorney.

Defendant's motion for protective order is granted.

Sanctions

While the court finds the plaintiffs' interpretation of the applicability of the rule that depositions of opposing counsel are presumptively improper, severely restricted, and require "extremely" good cause was in error under the facts presented, the court also finds that they acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

The request that plaintiffs be sanctioned is denied.

TENTATIVE RULING # 11: PLAINTIFFS' MOTION TO COMPEL DEPOSITION OF DEFENDANTS' COUNSEL IS DENIED. DEFENDANTS' MOTION FOR PROTECTIVE ORDER IS GRANTED. THE COURT ORDERS THAT PLAINTIFFS ARE PROHIBITED FROM DEPOSING OPPOSING COUNSEL, MR. FRANK WATSON. THE REQUESTS FOR SANCTIONS ARE DENIED. NO HEARING ON THESE MATTERS WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M.

THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, JULY 29, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

12. VU v. FEITSER PC-20180223

Cross-Complainants Feitser's and Stix Development's Motion for Leave to File 3rd Amended Cross-Complaint.

Cross-Complainants Feitser and Stix Development move for leave to file a 3rd amended cross-complaint to add allegations against cross-defendants Crossroad Ventures Group, Inc. and Omni Structures and Management, Inc. A proposed 3rd amended cross-complaint has been submitted.

Cross-Complainants Feitser and Stix Development argue that allowing leave to file a 3rd amended cross-complaint is appropriate for the following reasons: new information has come to light and cross-complainants seek to add allegations against cross-defendant Crossroad Ventures Group, Inc. and Omni Structures and Management, Inc.; and the allegations pled against the other cross-defendants, including the plaintiffs, are no different than the allegations asserted against them in the last amended cross-complaint.

On July 12, 2022 cross-defendant Omni Structures and Management, Inc. filed a notice of non-opposition to the motion.

On July 18, 2022 cross-defendant Crossroad Ventures Group, Inc. filed a notice of non-opposition to the motion.

Plaintiffs/Cross-Defendants oppose the motion on the following grounds: plaintiffs/cross-defendants have been prejudiced by the delay in bringing the motion; there is no excuse for the delay in that the proposed 3rd amended cross-complaint was distributed to counsel more than six months ago, yet no action was taken; the event that brought forth the new facts occurred two years ago; this is a blatant delay tactic to prevent the case from being at issue and prevent a trial date from being set; and cross-complainants have failed to comply with Rule

3.1324(b) by not submitting a declaration that states when the additional facts were discovered or why the motion was not brought sooner.

Cross-Complainants replied: plaintiffs/cross-defendants have no practical standing and nothing to gain by opposing the motion as the amendments in the proposed 3rd amended cross-complaint does not affect them as the allegations against them in the proposed 3rd amended cross-complaint are the same as presently alleged in the operative amended cross-complaint; the proposed 3rd amended cross-complaint is the result of extensive meet and confer communications with the new proposed cross-defendants during the COVID outbreak, which did not cause unreasonable delay; and plaintiffs/cross-defendants are not prejudiced as no trial date has been set, no discovery cut-off date is set, and no other deadlines are imminent, leaving plaintiffs/cross-defendants adequate time to conduct discovery and prepare for trial.

Rules of Court, Rule 3.1324

"A separate declaration must accompany the motion and must specify: ¶ (1) The effect of the amendment; ¶ (2) Why the amendment is necessary and proper; ¶ (3) When the facts giving rise to the amended allegations were discovered; and ¶ (4) The reasons why the request for amendment was not made earlier." (Rules of Court, Rule 3.1324(b).)

Cross-Complainants Feitser's and Stix Development's counsel declares in support of the motion: counsel for cross-defendants Crossroad Ventures Group, Inc. and Omni Structures and Management, Inc. have been discussing and negotiating a portion of the contents of the proposed 3rd amended cross-complaint for some time, which negotiations have resulted in more significantly detailed allegations concerning those two cross-defendants and have led to the deletion of James Esway and Roderick Thayer as cross-defendants; and the proposed 3rd amended complaint is necessary and proper in order to allow cross-complainants to address

matters that have arisen in light of the deposition of James Esway and matters discovered since cross-complainants filed their cross-complaint. (Declaration of Mark Pruner in Support of Motion, paragraphs 3 and 4.)

Cross-Complainants' counsel's declaration essentially explains that there was a delay in seeking leave to amend due to discussions and negotiations with counsel for cross-defendants Crossroad Ventures Group, Inc. and Omni Structures and Management, Inc. concerning a portion of the contents of the proposed 3rd amended cross-complaint for some time. Therefore, the declaration has complied with Rule 3.1324(b)(4).

Cross-Complainants' counsel's declaration did not state the date that Mr. Esway's deposition was taken and the dates that matters were discovered since cross-complainants filed their cross-complaint that uncovered the facts giving rise to the amended allegations. Therefore, the declaration fails to meet the requirement of Rule 3.1324(b)(3).

However, that does not mandate the court to deny the motion.

The court notes that it has long been held that noncompliance with court rules, to which no penalty was attached, does not prevent the court from hearing and disposing of motions. (See Johnson v. Sun Realty Co. (1934) 138 Cal.App. 296, 299.)

The court exercises its discretion to hear and rule on the merits of this motion.

General Principles of Motions for Leave to Amend

"The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any

pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code." (Code of Civil Procedure, § 473(a)(1).)

There is a general policy in this state of great liberality in allowing amendment of pleadings at any stage of the litigation to allow cases to be decided on their merits. (Kittredge Sports Co. v. Superior Court (1989) 213 Cal.App.3d 1045, 1047.) "…it is a rare case in which 'a court will be justified in refusing a party leave to amend his pleadings so that he may properly present his case.' (Citations omitted.) If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion. (Citations omitted.)" (Morgan v. Superior Court (1959) 172 Cal.App.2d 527, 530.) "…absent a showing of prejudice to the adverse party, the rule of great liberality in allowing amendment of pleadings will prevail. (*Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564, 176 Cal.Rptr. 704.)" (Board of Trustees of Leland Stanford Jr. University v. Superior Court (2007) 149 Cal.App.4th 1154, 1163.)

It is irrelevant that new legal theories are introduced in the proposed amended pleading as long as the proposed amendments relate to the same general set of facts in the pleading that will be superseded. (Kittredge Sports Co. v. Superior Court (1989) 213 Cal.App.3d 1045, 1048.)

Plaintiffs'/Cross-Defendants' counsel declares: that cross-complainants provided a redlined copy of a proposed 3rd amended cross-complaint on January 25, 2022; counsel relayed the plaintiffs' refusal to stipulate to any amended cross-complaint at least as of April 2022; and James Esway's deposition occurred on May 12, 2020 and June 1, 2020. (Declaration of Marc Guedenet in Opposition to Motion, paragraphs 8, 9, and 11.)

The only claimed prejudice from the claimed delay in seeking leave to file a 3rd amended cross-complaint is that the trial will be further delayed in a four year case.

There is no trial date set. There is no claim of the imminent expiration of the five year statute to bring this matter to trial. Any concerns about setting a trial date and any further case management orders to make sure this matter goes to trial within the required time to bring the case to trial can be brought up at the next case management conference at 9:30 a.m. on Monday, September 19, 2022 in Department Ten and addressed by a court order setting the trial date and discovery cut-off. In order to address concerns of delay in responding to the 3rd amended cross-complaint, the court will order that responses to the 3rd amended cross-complaint be served and filed within 35 days.

The motion for leave to file the 3rd amended cross-complaint is granted. Cross-Complainants Feitser and Stix Development are to file an original, executed 3rd amended cross-complaint as proposed within 15 days.

TENTATIVE RULING # 12: CROSS-COMPLAINANTS FEITSER'S AND STIX DEVELOPMENT'S MOTION FOR LEAVE TO FILE A 3RD AMENDED CROSS-COMPLAINT IS GRANTED. THE 3RD AMENDED CROSS-COMPLAINT AS PROPOSED IS DEEMED SERVED. CROSS-DEFENDANTS ARE ORDERED TO FILE AND SERVE RESPONSES TO THE 3RD AMENDED CROSS-COMPLAINT WITHIN 35 DAYS. CROSS-COMPLAINANTS FEITSER AND STIX DEVELOPMENT ARE ORDERED TO FILE AN ORIGINAL, EXECUTED 3RD AMENDED CROSS-COMPLAINT AS PROPOSED WITHIN 15 DAYS. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE

TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, JULY 29, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.