SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

DATE: August 13, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

The courthouse is open: Department 10 is now fully open for in-person hearings, as of April 18, 2023. The court strongly prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court strongly prefers either **in-person or video** appearances. Audio-only appearances are permitted but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort.

Scheduling motion hearings: Please go to https://reservations.scscourt.org or call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion *before* you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

CourtCall is no longer available: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. Again, the court strongly prefers in-person or video appearances. Telephonic appearances are a sub-optimal relic of a bygone era.

Recording is prohibited: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

Court reporters: Unfortunately, the court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If any party wishes to have a court reporter, the appropriate form must be submitted. See https://www.scscourt.org/general_info/court_reporters.shtml.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV421499	Creditors Adjustment Bureau, Inc. v. Four Seasons Painting, Inc.	Motion to strike answer: notice is proper, and the motion is unopposed. Although plaintiff filed this motion months after defendant filed the answer, it appears that defendant never served the answer on plaintiff, and so this motion remains timely. The court finds good cause to GRANT the motion, given that defendant is a corporate entity that appears to be attempting to represent itself (it filed the answer *in propria persona*), which is not allowed. The court therefore strikes the answer. Moving party to prepare proposed order for the court's signature.
LINE 2	19CV352403	Deanna Lacy et al. v. San Joaquin Regional Rail Commission et al.	Click on LINE 2 or scroll down for ruling in lines 2-3.
LINE 3	19CV352403	Deanna Lacy et al. v. San Joaquin Regional Rail Commission et al.	Click on LINE 2 or scroll down for ruling in lines 2-3.
LINE 4	2015-1-CV-284282	Jose C. Arvizu et al. v. Patrick Eugene Oliver	Click on LINE 4 or scroll down for ruling.
LINE 5	21CV384630	Carleen Whittelsey v. Hopkins & Carley et al.	Click on LINE 5 or scroll down for ruling.
LINE 6	21CV389062	Tal Lavian, PhD et al. v. Zvi Or-Bach et al.	Click on LINE 6 or scroll down for ruling.

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LINE #	CASE #	CASE TITLE	RULING
LINE 7	24CV434077	Alan Kleiman v. Alon Design and Remodeling, Inc. et al.	Motion to compel arbitration: parties to appear. Notice does not appear to be proper, as there is no proof of service for this motion. In addition, no timely arbitration agreement is in the file (a tardy one appears to have been filed on August 5, 2024, just eight days before the hearing), and the proofs of service of the summons and complaint, filed on May 2, 2024, also appear to be deficient.

- oo0oo -

Calendar Lines 2-3
Case Name: *Deanna Lacy et al. v. San Joaquin Regional Rail Commission et al.*
Case No.: 19CV352403

I. BACKGROUND

This is an action for dangerous condition of public property, premises liability, and negligence arising from the death of Donald Lacy ("Decedent") on August 31, 2018, when he was running on the Guadalupe River Trail near Union Pacific Railroad Company tracks in the Alviso neighborhood of the City of San Jose. A train operated by defendants San Joaquin Regional Rail Commission ("SJRRC") and Herzog Transit Services ("Herzog") struck and killed Decedent as he was crossing the railroad tracks. The action is brought by Decedent's mother and representative of his estate, Deanna Lacy, and his wife, Kara Quirke (collectively, "Plaintiffs").

Plaintiffs filed the original complaint on July 30, 2019. They filed the operative first amended complaint ("FAC") on December 17, 2019. The FAC states five causes of action: (1) "Dangerous Condition of Public Property" (against various public entity defendants); (2) "Wrongful Death Sounding in Negligence/Premises Liability" (against defendant JMB Construction, Inc. and various Does); (3) "Wrongful Death Sounding in Negligence/Premises Liability" against defendant Union Pacific Railroad Company ("Union Pacific") and various Does; (4) "Wrongful Death Sounding in Negligence" (against SJRRC, Herzog, and various Does); and (5) "Survival Action" (against all defendants). The first four causes of action are asserted by Kara Quirke only. The fifth cause of action is asserted by Deanna Lacy only. There are no exhibits attached to the FAC.

Union Pacific, SJRRC, and Herzog filed a joint answer to the FAC on February 25, 2020.

This court (Judge Kirwan) granted defendant JMB Construction, Inc.'s motion for summary judgment on October 28, 2021. Plaintiffs' claims against the County of Santa Clara, City of San Jose, and Santa Clara Valley Water District have also now been resolved, according to Plaintiffs. (Opposition to SJJRC/Herzog's Motion, p. 5, fn. 1.) Currently before the court are two separate motions for summary judgment by the remaining defendants: (1) by Union Pacific and (2) by SJRRC and Herzog jointly. Both motions were filed on September 21, 2023. These motions were originally set for hearing on January 30, 2024, but the court continued the hearing to May 14, 2024 upon the parties' stipulation, and then continued the hearing again at defendants' request (which was unopposed) to August 13, 2024.

II. APPLICABLE LEGAL STANDARDS

A. Summary Judgment

A motion for summary judgment or adjudication shall be granted only if it completely disposes of an entire cause of action, an affirmative defense, a claim for damages, or an "issue of duty." (See Code Civ. Proc., § 437c, subd. (f)(1); *McClasky v. California State Auto. Ass'n* (2010) 189 Cal.App.4th 947, 975 ["If a cause of action is not shown to be barred in its entirety, no order for summary judgment—or adjudication—can be entered."].)

The moving party's declarations and evidence will be strictly construed in determining whether they negate or disprove an essential element of a plaintiff's claim "in order to resolve any evidentiary doubts or ambiguities in plaintiff's (or opposing party's) favor." (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64, parentheses added.) While the same standards of admissibility govern both, the opposition declarations are liberally construed, whereas the moving party's evidence is strictly scrutinized. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) The evidence must be liberally construed in support of the opposing party, resolving any doubts in favor of that party. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.) Neither side can rely on its own pleadings (even if verified) to support or oppose a motion for summary judgment. (See *College Hospital, Inc. v. Sup. Ct*. (1994) 8 Cal.4th 704, 720, fn. 7; *Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 933; *California Public Records Research, Inc. v. County of Yolo* (2016) 4 Cal.App.5th 150, 182 (*CPRR*).)

The pleadings limit the issues presented on a motion for summary judgment or adjudication, and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258 (*Laabs*); *Nieto v. Blue Shield of Calif. Life & Health Ins*. (2010) 181 Cal.App.4th 60, 73 (*Nieto*) ["the pleadings determine the scope of relevant issues on a summary judgment motion"].) "Declarations in opposition to a motion for summary judgment are not a substitute for amending the pleadings to raise additional theories of liability. '[S]ummary judgment cannot be denied on a ground not raised by the pleadings. [Citations.]'" (*Nativi v. Deutsche Bank National Trust Co*. (2014) 223 Cal.App.4th 261, 290 (*Nativi*) [internal citation omitted]; see also *California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 637, fn. 3 ["A party may not oppose a summary judgment motion based on a claim, theory, or defense that is not alleged in the pleadings," and "[e]vidence offered on an unpleaded claim, theory, or defense is irrelevant because it is outside the scope of the pleadings."].) The burden of a defendant moving for summary judgment only requires that he or she negate a plaintiff's theories of liability as alleged in the complaint. A moving party need not "refute liability on some theoretical possibility not included in the pleadings." (*County of Santa Clara v. Atlantic Richfield Co*. (2006) 136 Cal.App.4th 292, 332-333 [quoting *Tsemetzin v. Coast Federal Savings & Loan Assn*. (1997) 57 Cal.App.4th 1334, 1342].)

The opposing party may be bound by admissions made in deposition testimony or verified responses to discovery. "In a nutshell, the rule bars a party opposing summary judgment from filing a declaration that purports to impeach his or her own prior sworn testimony." (*Scalf v. D.B. Lodge Homes, Inc*. (2005) 128 Cal.App.4th 1510, 1522; see also *Shin v. Ahn* (2007) 42 Cal.4th 482, 500, fn. 12 ["a party cannot create an issue of fact by a declaration which contradicts his prior discovery responses"]; *Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1087 ["Where a declaration submitted in opposition to a motion for summary judgment clearly contradicts the declarant's earlier deposition testimony or discovery responses, the trial court may fairly disregard the declaration and 'conclude there is no substantial evidence of the existence of a triable issue of fact.'"].)

The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850 (*Aguilar*).) "A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action . . . . The burden then shifts to the plaintiff to show there is a

triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72 [internal citations omitted].) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable finder of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, at 850.) "A party "'"cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact. [Citation.]" [Citation.]' [Citation.]" (*Christina C. v. County of Orange* (2013) 220 Cal.App.4th 1371, 1379; see also *McHenry v. Asylum Entertainment Delaware, LLC* (2020) 46 Cal.App.5th 469, 479 [because speculation is not evidence, speculation cannot create a triable issue of material fact].)

B. Premises Liability

"Broadly speaking, premises liability alleges a defendant property owner allowed a dangerous condition on its property or failed to take reasonable steps to secure its property against criminal acts by third parties." (*Delgado v. American Multi-Cinema, Inc.* (1999) 72 Cal.App.4th 1403, 1406.) "Premises liability is a form of negligence . . . and is described as follows: The owner of premises is under a duty to exercise ordinary care in the management of such premises in order to avoid exposing persons to an unreasonable risk of harm. A failure to fulfill this duty is negligence." (*Brooks v. Eugene Burger Management Corp*. (1989) 215 Cal.App.3d 1611, 1619; see also CACI 1001 (2024 rev.) ["A person who [owns/leases/occupies/controls] property is negligent if he or she fails to use reasonable care to keep the property in a reasonably safe condition. A person who [owns/leases/occupies/controls] property must use reasonable care to discover any unsafe conditions and to repair, replace, or give adequate warning of anything that could be reasonably expected to harm others."].) "In order to establish negligence, a plaintiff must demonstrate a duty on the part of defendant, breach of that duty, causation and damages." (*Strong v. State of Cal*. (2011) 201 Cal App 4th 1439, 1449.) Whether a duty of care exists is a question of law for the court. (*Id*.)

There is also a separate notice requirement: "An owner is liable for harm caused by a dangerous condition, of which the owner had actual or constructive knowledge. An injured plaintiff has the burden of showing that the owner had notice of the defect in sufficient time to correct it, but failed to take reasonable steps to do so." (*Howard v. Omni Hotels Management Corp*. (2012) 203 Cal.App.4th 403, 431 (*Howard*), citations omitted.)

"An owner of real property is 'not the insurer of [a] visitor's personal safety . . . .' However, an owner is responsible 'for an injury occasioned to another by [the owner's] want of ordinary care or skill in the management of his or her property . . . .' Accordingly, landowners are required 'to maintain land in their possession and control in a reasonably safe condition,' and to use due care to eliminate dangerous conditions on their property." (*Taylor v. Trimble* (2017) 13 Cal.App.5th 934, 943-944, internal citations and quotations omitted.) "The proper test to be applied to the liability of the possessor of land . . . is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others." (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1156.)

With regard to a property owner's obligations, "if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner [or possessor/lessor/party in control] is under no further duty to remedy or warn of the condition." (*Krongos v. Pacific Gas & Electric Co*. (1992) 7 Cal.App.4th 387, 393.) The

determination of whether a particular danger is open and obvious rests upon an objective standard. (*Bunch v. Hoffinger Industries, Inc.* (2004) 123 Cal.App.4th 1278, 1295–98.) Thus, the inquiry is whether the dangerous condition is obvious to a reasonable person, not the plaintiff in particular. (*Ibid*.; see also *Christoff v. Union Pacific Railroad Co*. (2005) 134 Cal.App.4th 118, 126–27 (*Christoff*) ["Any reasonable person would know that standing within a few feet of a high speed freight train is dangerous."]; see also *Miller v. Pacific Constructors* (1945) 68 Cal.App.2d 529, 540.)

III. UNION PACIFIC'S MOTION FOR SUMMARY JUDGMENT

A. The Basis for Union Pacific's motion

Union Pacific seeks summary judgment on the ground that "Plaintiffs cannot prove one or more elements of their sole cause of action against [Union Pacific] for 'Negligence/Premises Liability.'" (See Union Pacific's Notice of Motion, p. 2:8-9.)

The FAC's third cause of action, the only one directly alleged against Union Pacific (with the fifth cause of action, as alleged against Union Pacific, being dependent upon it), alleges on information and belief that Union Pacific created a dangerous condition by failing to build barriers, gates, signage, and/or lights at the point where the Guadalupe River Trail met Union Pacific's tracks, and by failing to prevent pedestrians from entering its right-of-way. (See FAC, ¶ 48.) It also alleges on information and belief that Union Pacific had "actual and/or constructive knowledge" of the dangerous condition. (*Id.* at ¶ 49.)[1] The third cause of action does not allege that Union Pacific was responsible for the Guadalupe River Trail itself (the trail on which Decedent was running) or allege that Decedent was required by any necessity to cross the railroad tracks.[2]

B. Analysis of Union Pacific's Motion

Union Pacific's first argument is that it owed no duty of care to Decedent because it had (and has) immunity from liability under Civil Code section 846. (See Union Pacific's Memorandum, pp. 4:15-6:6.) Civil Code section 846 is a statute primarily intended to protect private landowners from suits by uninvited visitors who enter private property for recreational purposes and are injured. As Decedent was engaged in a recreational activity (running) when he died on Union Pacific's tracks, Union Pacific asserts that it is immune. This argument is unavailing and does not meet Union Pacific's initial burden.

Summary judgment cannot be granted on grounds not raised by the pleadings. The joint answer filed by Union Pacific, SJRRC, and Herzog on February 25, 2020 does not assert Civil Code section 846 as a defense. Of the three defendants, only SJRRC asserted an

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[1] To plead an allegation on the basis of information and belief, a plaintiff must allege the facts or information that led him or her to infer or believe the truth of the ultimate factual allegation. (*Gomes v. Countrywide Home Loans, Inc*. (2011) 192 Cal.App.4th 1149, 1158-1159; see also *Brown v. USA Taekwondo* (2019) 40 Cal.App.5th 100, 1106 ["where factual allegations are based on information and belief, the plaintiff must allege 'information that "lead[s] [the plaintiff] to believe that the allegations are true."'"].) The third cause of action does not allege any such information.

[2] Union Pacific's Separate Statement of Undisputed Facts ("UMFs") states that the Santa Clara Valley Water District owned and maintained the trail (see UMFs Nos. 1 & 3), and Plaintiffs' Separate Statement admits these facts.

affirmative defense of statutory immunity, and section 846 was not included among the statutes listed in that eighteenth affirmative defense.

Statutory immunity is an affirmative defense that must be raised or it is waived. (See *Quigley v. Garden Valley Fire Protection Dist*. (2019) 7 Cal.5th 798, 807-810.) "[O]bjections a defendant might have on the merits—including an objection that liability is barred by an affirmative defense—are ordinarily deemed 'waived' if the defendant does not raise them in its demurrer or answer to the complaint." (*Id*. at p. 807 [citing Code Civ. Proc., § 430.80, subd. (a)].)[3] "[A]bsolute privileges and immunities, too, ordinarily apply only if the defendant invokes them." (*Id*. at p. 809; see also Code Civ. Proc., § 431.30, subd. (g) [affirmative "defenses shall be separately stated, and the several defenses shall refer to the causes of action which they are intended to answer, in manner by which they may be intelligibly distinguished"].)

Union Pacific's second argument is that the third cause of action fails because Union Pacific had no duty to warn of an open and obvious hazard such as the active railroad tracks at the accident location, and that it had no duty to construct additional fencing. (See Memorandum, pp. 6:19-8:7.) Union Pacific also relies upon the undisputed fact that Decedent was aware that the railroad tracks at the accident site were an active train line. (See Union Pacific UMFs Nos. 7 and 8, admitted by Plaintiffs [citing discovery responses and deposition testimony submitted as Exhibits F and G to Union Pacific's compendium of evidence].) This argument is put at issue by both the general denial in the joint answer and the first affirmative defense (failure to state a cause of action).

In their opposition brief, Plaintiffs make much of the fact that some of the decisions cited by Union Pacific to support this argument are old and predate the California Supreme Court's decision in *Rowland v. Christian* (1969) 60 Cal.2d 108 (*Rowland*).[4] They also assert that the facts of *Christoff, supra,* are distinguishable from the facts here because the injured plaintiff in *Christoff* was walking along a railroad bridge rather than running near a ground-level railroad track. (See Opposition, p. 21:17-20.) But Union Pacific also cites several decisions that postdate the *Rowland* decision, some of which specifically discuss the "*Rowland* factors" described by the Supreme Court as a method of determining whether a duty of care should be found to exist in a negligence case, and *Christoff* itself is a more recent case. In *Christoff*, the Court of Appeal held that "the presence of railroad tracks is a warning of an open and obvious danger." (*Christoff, supra*, 134 Cal.App.4th at 136.) *Christoff* did not discuss the *Rowland* factors, but relied on several of the same older California cases involving railroad tracks that Union Pacific cites in support of its argument. This means that the Court of Appeal implicitly determined that those decisions still contained valid statements of law. (See also 6 Witkin, *Summary of Cal. Law* (11th ed. 2017) Torts, § 1268 [citing *Christoff* for the proposition that "if the danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty unless harm was unforeseeable despite the obvious nature of the danger. Under this analysis, the defendant is not negligent; i.e., he or she has not violated any duty of care."].)

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[3] The demurrer to the original complaint filed by the moving defendants on November 12, 2019 also failed to raise Civil Code § 846 as an issue.

[4] The court has not considered any unpublished California decisions cited in the opposition or any arguments based on such decisions. (See Cal. Rules of Court, rule 8.1115.)

While there is little published California case authority specifically discussing railroad tracks and the interaction between the traditional rule referred to in *Christoff* and the *Rowland* factors, persuasive federal authority supports Union Pacific's position. In a recent order granting a motion for summary judgment brought by Union Pacific against a claim for wrongful death based on negligence, the U.S. District Court for the Central District of California noted:

> Before *Rowland*, "It was generally understood throughout the country that railroads had no duty to fence access to their tracks in order to prevent injury to unauthorized entrants," but now the existence of a railroad's duty of care turns on application of the *Rowland* factors . . . . [¶] Since *Rowland*, courts have repeatedly held that railroads are entitled to summary judgment on premises liability claims asserting that they had a duty to warn about the dangers posed by trains. Some of these decisions have applied the *Rowland* factors and determined that no duty exists . . . . [¶] Other courts have found railroads entitled to summary judgment based on the absence of a duty to warn without analyzing the *Rowland* factors. These cases rely on the well-established general rule that "an owner or possessor of land owes no duty to warn of obvious dangers on the property." *Christoff v. Union Pac. R.R. Co.*, 134 Cal.App.4th 118, 126, 36 Cal.Rptr.3d 6 (2005) (citations omitted). Applying this general rule to railroads, courts have repeatedly held that "the presence of railroad tracks is a warning of an open and obvious danger."

(*M.P.D.A. v. Union Pac. R.R. Co*., (C.D. Cal. October 20, 2023, No. 2:23-cv-02549-SB-BFM) 2023 U.S. Dist. LEXIS 189259 at *11-14.)[5] In *M.P.D.A.* the decedent, who was attempting to pass between the cars of a temporarily stopped train, was killed when the train began moving again.

The U.S. District Court for the Northern District of California similarly granted a motion for summary judgment brought by the owner of railroad tracks, BNSF, in a case where a 25-year-old woman was struck and killed by a train while she was walking along the side of railroad tracks. (See *Hall v. Amtrak* (N.D. Cal. August 21, 2020, No. C19-02312-WHA) 2020 U.S. Dist. LEXIS 152312 (*Hall*).) The decedent in *Hall* was struck by a train approaching her from behind: she apparently did not hear the train or the warning horn sequence for the nearby track crossing because she was wearing headphones. Relying on the *Christoff* decision's finding that railroad tracks are an obvious danger, the federal court found that BNSF had no premises liability because "[t]he obviousness of the danger may . . . negate the duty to warn. . . . So too here. The danger to Ms. Hall of walking along railroad tracks, with or without headphones, where trains frequently run (or to any pedestrians walking on the tracks in this area) was obvious." (*Hall* at pp. *17-18.)

In yet another federal case from 2018, a 21-year-old was killed while walking between the track rails when she was struck from behind by an approaching Amtrak train, and the Central District of California granted a motion for summary judgment brought by Union

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[5] The California Rules of Court do not prohibit citation to unreported federal cases, which may properly be cited as persuasive authority. (Cal. Rules of Court, rule 8.1115; *In re Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1096, fn. 18; *Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP* (2010) 183 Cal.App.4th 238, 251, fn. 6.)

Pacific, the owner of the railroad tracks, against a premises liability claim on the ground that no duty of care existed. (See *Cruz-Sanchez v. National Railroad Passenger Corp.* (C.D. Cal. June 8, 2018, No. CV 16-6368-MWF) 2018 U.S. Dist. LEXIS 225919 (*Cruz-Sanchez*).) The court found the argument that "railroad tracks, in and of themselves, sufficiently warn the public about the obvious danger of passing trains; no additional signage or other warning mechanisms are needed" to be "supported by both commonsense and more than a century's worth of California case law." (*Cruz-Sanchez* at pp. *16-17, citing *Christoff, supra,* as well as *Joslin v. Southern Pac. Co.* (1961) 189 Cal.App.2d 382, 386 ["No adult in possession of his faculties could claim nondiscovery of the danger or nonrealization of the unreasonable risk which entering the area [of railroad tracks], or intermeddling, would entail."] and *Green v. Los Angeles Terminal Ry. Co.* (1904) 143 Cal. 31, 36 ["The railroad track of a steam railway must itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and listen for approaching trains."].) The court concluded:

> In sum, Union Pacific is not liable on Plaintiff's negligence or premises liability claims on a failure-to-fence theory because: (1) a landowner may discharge its obligations to entrants by either remedying a dangerous condition or warning about the dangerous condition; (2) railroad tracks are patently dangerous and themselves serve as a warning of train traffic; (3) given the obviousness of the hazard and the warning in the form of the tracks themselves, Union Pacific owed no further duty to remedy the hazard (by fencing or otherwise) in the absence of some recognized exception to that general rule, such as the entrant's necessity to be on or dangerously close to the tracks; and (4) even assuming that, for all practical purposes, Decedent had to trespass on Union Pacific's property to get to and from work, the "necessity" exception does not apply and it was not otherwise reasonably foreseeable that Decedent would walk directly on the train tracks where she had a clear view of trains approaching in both directions, the ability to cross the tracks quickly, and ample space to safely walk on either side of the tracks in the right-of-way.

(*Cruz-Sanchez* at pp. *27-28.) In response to an argument from the plaintiff that the court should apply the *Rowland* factors, the court stated that "because the Court has determined that Union Pacific has discharged its duty to Decedent/Plaintiff by warning of the hazard of passing trains (*i.e.*, a warning in the form of the train tracks themselves) and that no recognized 'necessity' or foreseeability exceptions apply, the Court need not engage with the *Rowland* factors to decide whether Union Pacific also had a duty to put up a fence." (*Cruz-Sanchez* at *28-*29.)

The one federal court case cited by Plaintiffs in their opposition, *Mangiaracina v. BNSF Railway Co.* (N.D. Cal. March 7, 2019, No. 16-cv-05270-JST) 2019 U.S. Dist. LEXIS 77273 (*Mangiaracina*), is the least persuasive of those presented in the parties' briefs, as it is clearly distinguishable on its facts. That case involved a collision between a motor vehicle, a truck towing a jet ski atop a trailer, and an Amtrak train at an established road crossing for motor vehicles in Contra Costa County. Plaintiffs cite the decision for its refusal to apply the *Christoff* decision (Opposition at pp. 21:23-24:7), but it did so because *Christoff* "did not involve a [public highway] crossing, does not abrogate a crossing operator's well-established duty." (*Mangiaracina, supra,* at p. *39.) As Decedent here was not struck at a public highway crossing, but rather at or near a point where a public trail met Union Pacific's railroad tracks (see Union Pacific UMFs 1-3), *Mangiaracina* is not relevant to a determination as to whether

the court must follow *Christoff*. Indeed, no federal court can tell a California state court to ignore controlling California Court of Appeal precedent on the facts here.

Plaintiffs also oppose the summary judgment motion by arguing that Union Pacific failed to comply with provisions of the Public Utilities Code applicable to railroad crossings. (See Opposition, pp. 8:8-10:9.) This does not raise a triable issue of material fact as to the third cause of action. Plaintiffs are bound by their pleading on summary judgment, and the FAC's third cause of action plainly does not allege any failure to comply with the provisions of the Public Utilities Code. As noted above, a motion for summary judgment may not be denied based on issues not raised by the pleadings. (See *Laabs* and *Nieto, supra*.) Indeed, the FAC fails to allege that the location where Decedent was struck was any kind of official public highway crossing or official pedestrian crossing of railroad tracks. (See FAC, ¶¶ 15-18.) Moreover, it appears that Plaintiffs are arguing on this motion (but not alleging in their FAC) that the party that owned and maintained the Guadalupe River Trial—*i.e.*, Santa Clara Valley Water District, not Union Pacific—was the party that was obligated to obtain approval from the California Public Utilities Commission ("CPUC"). (See Opposition, p. 20:5-6 ["The Water District put trails on either side of the tracks and intended for the public to cross the tracks without seeking approval from the CPUC."].)

The fact that Plaintiffs' retained expert, William Hughes, opines that Union Pacific should have sought approval from the CPUC for a crossing at the location where the public pathway met the railroad tracks (see Plaintiffs' Exhibit 17) does not expand the scope of the FAC's third cause of action. (See *Nativi, supra*, 223 Cal.App.4th at 290.) It is extrinsic to the pleadings. Moreover, the Hughes declaration, executed in Virginia, cannot be considered, as it does not comply with Code of Civil Procedure section 2015.5.[6] The Hughes declaration is the only evidentiary support for Plaintiffs' additional material facts Nos. 20 and 51. The declarations submitted by Plaintiffs from Joellen Gill, executed in Washington State, and from Charles Culver (which fails to state where it was executed, though Culver's CV indicates he lives in Texas) also suffer from the same infirmity: they do not comply with section 2015.5 and cannot be considered. The declaration submitted by Plaintiffs from David King, which *does* comply with Code of Civil Procedure section 2015.5, has nothing to say about Union Pacific.

Plaintiffs are unable to raise any triable issues as to the existence of a duty, as this presents a question of law for the court. Plaintiffs are also bound by what the FAC's third cause of action alleges, and they may not expand on its scope through the submission of declarations on this motion.[7]

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[6] "'[C]ourts have made clear that a declaration is defective under section 2015.5 absent an express facial link to California or its perjury laws.'" (*Sweetwater Union High School Dist. v. Gilbane Building Co*. (2019) 6 Cal.5th 931, 942, citing *Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 610-611 (*Kulshrestha*) [a declaration executed out-of-state submitted in opposition to summary judgment motion, was invalid where it did not state that it was made "under the laws of the State of California"]; see also *ViaView, Inc. v. Retzlaff* (2016) 1 Cal.App.5th 198, 217 [citing *Kulshrestha* and stating that a "declaration in opposition to the motion to quash was not signed under penalty of perjury under the laws of the State of California as required by section 2015.5. It therefore had no evidentiary value and we shall not consider it in our review of the jurisdictional issue."]; *Bombardier Recreational Products, Inc. v. Dow Chemical Canada ULC* (2013) 216 Cal.App.4th 591, 604 ["Out-of-state declarations that do not state they were made 'under penalty of perjury under the laws of the State of California' (Code Civ. Proc., § 2015.5) are not deemed sufficiently reliable to be admitted into evidence."].)

[7] The boilerplate legal conclusions in paragraph 14 of the FAC also do not expand the scope of the allegations against Union Pacific in the third cause of action beyond common law premises liability.

As Union Pacific has established that it had no duty to warn of the open and obvious hazard presented by its railroad tracks, its motion for summary judgment of the FAC's third cause of action for premises liability and the dependent fifth cause of action (survival action) is GRANTED.

IV. SJRRC AND HERZOG's MOTION FOR SUMMARY JUDGMENT

A. The Basis for SJRRC and Herzog's Motion

SJRRC and Herzog move for summary judgment on the ground that "Plaintiffs cannot prove one or more elements of their sole cause of action against [SJRRC/Herzog] for 'Negligence/Premises Liability.'" (Notice of Motion, p. 2:9-10.)[8]

The FAC's fourth cause of action for Negligence, the only one brought against SJRRC and Herzog by Kara Quirke, alleges, solely on information and belief, that SJRRC and Herzog created an unsafe condition by: (1) "Failing to provide proper audible warning"; (2) "Failing to operate the train at a speed unsafe for local conditions, and . . . failing to slow or decelerate when faced with a specific, local hazard on its approach to the crossing . . ."; and (3) "Failing to slow the train and/or apply the brakes in a timely fashion, as to avoid a collision or changed the dynamic of the collision to the extent that the damages from the collision could have been significantly reduced or eliminated." (FAC, ¶ 57.) The fourth cause of action also alleges on information and belief that SJRRC and Herzog had "actual and/or constructive notice" of an (unidentified) unsafe condition. (*Id.* at ¶ 58.) The fourth cause of action does not include any allegations of failure to supervise by SJRRC and Herzog. The FAC's fifth cause of action (survival action) as brought against SJRRC and Herzog by Deanna Lacy is entirely dependent upon the fourth cause of action by Quirke.

B. Analysis of SJRRC and Herzog's Motion

SJRRC and Herzog make two arguments for summary judgment in their supporting memorandum: (1) that plaintiffs have no evidence of negligence on their part, and (2) that parts of the fourth cause of action are preempted by federal law. (See Memorandum, pp. 9:8-17:1 generally.)

1. Preemption

Taking the second argument first, SJRRC and Herzog's claim that the "speed and horn claims" in the fourth cause of action are preempted by the Federal Railroad Safety Act (FRSA), 49 U.S.C. §§ 20101 et seq., is not a basis on which summary judgment can be granted. The joint answer filed by Union Pacific, SJRRC, and Herzog on February 25, 2020 does not put the FRSA at issue in this case. The answer's twelfth affirmative defense, stating only that "Defendants allege that Plaintiffs' claims and/or causes of action are barred, in whole or in part, by the doctrine of preemption (state and federal)," fails to raise any specific basis for preemption as an affirmative defense. "Under federal law, where the defense of federal preemption involves choice of law rather than subject matter jurisdiction, it may be waived by failure to raise it properly in the trial court." (*Hughes v. Blue Cross of Northern California* (1989) 215 Cal.App.3d 832, 851; see also *Karlson v. Ford Motor Company* (2006) 140

[8] The notice mistakenly refers to "UPR" rather than SJRRC and Herzog.

Cal.App.4th 1202, 1236 ["Where jurisdiction resides in both the federal and state courts, whether federal law applies is a choice of law question. Choice of law preemption issues may be waived."].)

Moreover, even if some of the negligence allegations of the fourth cause of action are potentially subject to federal preemption—in this case, the allegations that defendants "fail[ed] to operate the train at a [safe] speed" and "fail[ed] to provide proper audible warning [with a horn]" (FAC, ¶ 57)—this is not a basis for summary judgment. As noted above, a motion for summary judgment (or summary adjudication) may not be granted if it disposes of only *part* of a cause of action, an affirmative defense, a claim for damages, or an "issue of duty." (See Code Civ. Proc., § 437c, subd. (f)(1).)[9]

2. Negligence

The other argument for summary judgment made by SJRRC and Herzog is that Plaintiffs have no evidence of negligent train operation. A defendant may obtain summary judgment by demonstrating that a plaintiff has no evidence to establish an essential element of a cause of action by showing that "plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Aguilar*, *supra*, at pp. 854-855.) "Such evidence may consist of the deposition testimony of the plaintiff's witnesses, the plaintiff's factually devoid discovery responses, or admissions by the plaintiff in deposition or in response to requests for admission that he or she has not discovered anything that supports an essential element of the cause of action." (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 110 [citing *Aguilar*]; see also *Leyva v. Garcia* (2018) 20 Cal.App.5th 1095, 1102-1103.)

SJRRC and Herzog argue that, in response to "state all facts" special interrogatories propounded by SJRRC, Quirke failed to identify any support for the fourth cause of action other than the FAC itself. (See Memorandum, pp. 8:11-10:2; see also SJRRC and Herzog's Separate Statement of Undisputed Material Facts ("UMFs") Nos. 18-22, admitted by plaintiffs.)

Plaintiffs' opposition makes no response to this argument. As noted above, neither party can rely on their own pleadings (even if verified) as evidence to support or oppose a motion for summary judgment or summary adjudication. (See *CPRR, supra*, 4 Cal.App.5th at p. 182.) The opposing party may also be bound by admissions made in deposition testimony or verified responses to discovery. "In a nutshell, the rule bars a party opposing summary judgment from filing a declaration that purports to impeach his or her own prior sworn testimony." (*Scalf v. D.B. Lodge Homes, Inc*. (2005) 128 Cal.App.4th 1510, 1522; see also *Shin v. Ahn* (2007) 42 Cal.4th 482, 500, fn. 12 ["a party cannot create an issue of fact by a declaration which contradicts his prior discovery responses"].)

The evidence cited in support of SJRRC and Herzog's UMFs 18-22 is Quirke's April 17, 2020 verified responses to Special Interrogatories Nos. 4, 7, 10 and 13, submitted as Exhibit H to SJRRC and Herzog's compendium of supporting evidence. Special Interrogatory No. 4 asked Kara Quirke to "state all facts" that supported or related to the contention that SJRRC "failed to provide proper audible warning" to Decedent of the train's approach. The

[9] It appears that Plaintiffs have also raised a disputed issue of fact as to whether the horn was properly sounded in accordance with federal regulations.

only substantive portion of the response is: "Plaintiff refers to [sic] Defendants to the [F]irst Amended Complaint."

Special Interrogatory No. 7 asked Quirke to "state all facts" that support or relate to the contention that "SJRRC failed to operate the train at a safe speed for local then existing conditions." The only substantive response is (again): "Plaintiff refers to [sic] Defendants to the [F]irst Amended Complaint."

Special Interrogatory No. 10 asked Quirke to "state all facts" supporting or relating to the contention that "SJRRC failed to or [sic] decelerate when faced with a specific, local hazard on its approach to the crossing" where Decedent was struck. Again, the only substantive portion of the response is: "Plaintiff refers to [sic] Defendants to the [F]irst Amended Complaint."

Special Interrrogatory No. 13 asked Quirke to "state all facts" supporting or relating to the contention that "SJRRC could have slowed the train 'in a timely fashion, as to avoid a collision or changed the dynamic of the collision to the extent that the damages from the collision could have been significantly reduced or eliminated.'" Once again, the only substantive portion of the response is: "Plaintiff refers to [sic] Defendants to the [F]irst Amended Complaint."

The only evidence cited in support of SJRRC and Herzog's UMF No. 22 (stating that Kara Quirke stated in response to supplemental interrogatories that she did not have any additional responses) is Exhibit I to the SJRRC and Herzog's compendium of supporting evidence. But there is no "Exhibit I" included in the compendium filed with the court, despite the fact that the declaration of counsel Robert Scott refers to an Exhibit I. (See Scott Decl., ¶ 11.)

The court finds that SJRRC and Herzog have failed to meet their initial burden of showing that Quirke "does not possess, and cannot reasonably obtain, needed evidence" to show negligence, notwithstanding these rather insubstantial discovery responses. The only discovery responses submitted (Exhibit H) were already more than three years old when SJRRC and Herzog filed the present motion. While the responses submitted in Exhibit H may establish that Kara Quirke had no evidence to support the fourth cause of action as of April 17, 2020, it is not enough for a moving defendant to show merely that a plaintiff *currently* "has no evidence" on a key element of a plaintiff's claim. The moving defendant must also produce evidence showing that a plaintiff *cannot reasonably obtain* evidence to support that claim. (See *Gaggero v. Yura* (2003) 108 Cal.App.4th 884, 891, [citing *Aguilar* ["[T]he absence of evidence to support a plaintiff's claim is insufficient to meet the moving defendant's initial burden of production. The defendant must also produce evidence that the plaintiff cannot reasonably obtain evidence to support his or her claim."].) A party moving for summary judgment on the basis of an opponent's lack of evidence does not satisfy its burden of proof by producing discovery responses that fail to exclude the possibility that opposing parties may possess or may reasonably obtain evidence sufficient to establish their claim. (See *Scheiding v. Dinwiddie Const. Co.* (1999) 69 Cal.App.4th 64, 80-81 [court may not infer that plaintiff lacks evidence on a point defendant does not pursue in discovery]; *Gulf Ins. Co. v. Berger, Kahn, Shaffton, Moss, Figler, Simon & Gladstone* (2000) 79 Cal.App.4th 114, 134-136 ["[T]o grant summary judgment, the court must be able to infer from the record that the plaintiff could produce no other evidence on the disputed point."]; *Weber v. John Crane, Inc*. (2006) 143

Cal.App.4th 1433, 1441-1442 ["A motion for summary judgment is not a mechanism for rewarding limited discovery; it is a mechanism allowing the early disposition of cases where there is no reason to believe that a party will be able to prove its case."].)

While not presented or argued as a basis for summary judgment in their supporting memorandum, SJRRC and Herzog also suggest that their personnel were not negligent on the day of the accident. (See UMFs Nos. 4-8, 10-17.) This is not properly raised as a basis for granting summary judgment, and in any event, Plaintiffs dispute several of these UMFs, citing deposition testimony and the David King declaration, which (in contrast to other declarations discussed above) can be considered by the court. The court cannot weigh the admissible evidence on summary judgment or evaluate the credibility of declarants. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 540.) "Typically in summary judgment litigation, equally conflicting evidence requires a trial to resolve the dispute." *(Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 881.)

The court DENIES SJRRC and Herzog's motion for summary judgment for failure to meet the initial burden.

V. OBJECTIONS TO EVIDENCE

With the separate replies filed on August 8, 2024, Union Pacific and SJRRC and Herzog have jointly submitted objections to Plaintiffs' evidence in support of both oppositions, specifically portions of the declarations from Charles Culver and William Hughes.

Objections to evidence made in connection with a motion for summary judgment must comply with Rule of Court 3.1354. This rule requires the filing of two documents, objections and a separate proposed order on the objections, both of which must be in one of the approved formats set forth in the rule. The court is not required to rule on defendants' joint objections as they do not comply with Rule of Court 3.1354. (See *Vineyard Spring Estates v. Super. Ct.* (2004) 120 Cal.App.4th 633, 642 [trial courts only have duty to rule on evidentiary objections presented in proper format]; *Hodjat v. State Farm Mutual Automobile Ins. Co.* (2012) 211 Cal.App.4th 1 [trial court not required to rule on objections that do not comply with Rule of Court 3.1354 and not required to give objecting party a second chance at filing properly formatted papers].)

It is also unnecessary for the court to rule on these objections, as the court has already determined that the Culver and Hughes declarations cannot be considered because they do not comply with Code of Civil Procedure section 2015.5. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code Civ. Proc. § 437c, subd. (q).)

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Calendar Line 4
Case Name: *Jose C. Arvizu et al. v. Patrick Eugene Oliver*
Case No.: 2015-1-CV-284282

This is a motion to amend the judgment to add two more judgment debtors to the case: Saratoga Holdings International, Inc. ("Saratoga") and Comprehensive Construction Consulting Services, LLC ("CCCS"). Plaintiffs argue that these two entities are alter egos of defendant Patrick Oliver.

The court GRANTS the motion as to Saratoga. It appears that Saratoga has not responded to plaintiffs' subpoena, and Saratoga has not responded to this motion, even though plaintiffs' proof of service indicates that the motion was served on Saratoga and the named defendants. Although plaintiffs' evidence regarding alter ego liability is somewhat thin—it consists primarily of a California Statement of Incorporation indicating that Patrick Oliver is the "Chief Executive Officer, Secretary, Chief Financial Officer" and sole "Director" of Saratoga—it is enough, particularly in light of Saratoga's failure to respond.

The court DENIES the motion as to CCCS. There is no evidence showing that CCCS is an alter ego of Oliver, and there is no indication that this motion was served on CCCS. They are not mentioned in the proof of service.

The court DENIES plaintiffs' request for additional monetary sanctions.

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Calendar Line 5
Case Name: *Carleen Whittelsey v. Hopkins & Carley et al.*
Case No.: 21CV384630

After the court issued an order confirming an arbitration award in this case on February 23, 2024, the parties continued to disagree about the appropriate next steps. Rather than requesting the prompt entry of a final judgment, plaintiff Carleen Whittelsey asked the court to await the outcome of a petition for writ of mandate with the Court of Appeal. Upon denial of the petition, Whittelsey submitted a proposed judgment via ex parte application on July 1, 2024, and defendants Hopkins & Carley and Bruce Roberts objected to the proposed judgment. The court set the matter for a hearing on August 13, 2024. On July 17, 2024, Whittelsey submitted another proposed judgment, as to which defendants objected yet again. The court stated that the August 13, 2024 hearing would remain as set. On August 6, 2024, the parties appeared for a case management conference, at which Whittelsey urged the court to enter her proposed judgment forthwith. The court indicated that the August 13, 2024 hearing would remain as set.

The court has now reviewed the various papers submitted by the parties. Although the parties agree as to the amount of damages ($532,246.62), prejudgment interest ($316,202.71), and arbitration costs ($45,990.63) to be included in the judgment, they disagree as to the amount of "post-judgment" interest. Whittelsey's original proposed judgment stated: "Interest on said post-award amount shall accrue at the rate of 10% beginning September 12, 2023 and shall continue thereafter." After defendants objected to this language, Whittelsey changed it slightly: "Post-award interest after September 13, 2023 shall accrue at the rate of 10% per annum."

Defendants argue that the amount of any "post-award" or "post-judgment" interest should not remain indeterminate in the judgment and should not be allowed to continue accruing through any appeal of this matter. They note that on October 19, 2023, they tendered a payment to Whittelsey comprising the amount of damages, prejudgment interest, and arbitration costs in the final arbitration award, plus their calculation of post-award interest of 10% from September 12, 2023 to October 25, 2023. The check totaled $907,897.42. Although Whittelsey refused to accept this payment, seeking instead to vacate the arbitration award in this court, defendants contend that under Civil Code section 1504, their tender of payment "stop[ped] the running of interest on the[ir] obligation," and Whittelsey should not be able to continue the accrual of post-award interest simply by virtue of disagreeing with the award as a whole. Defendants note that after this court confirmed the arbitration award and rejected Whittelsey's motion to vacate the award, they re-tendered payment on March 26, 2024. Whittelsey again refused to accept the check.

It appears to the court that the parties are arguing about two different things: *post-arbitration-award* interest vs. *post-judgment* interest. The court agrees with defendants that the amount of "post-arbitration-award" interest should be fixed at this time, given their offer of payment to satisfy the obligation under Civil Code section 1504. The idea that Whittelsey can continue to accrue interest on the arbitration award at an annual rate of 10% by filing a writ and then an appeal creates a perverse incentive to keep this post-arbitration litigation going for as long as possible, rather than to resolve it. On the other hand, the court agrees with Whittelsey that it does not make sense to fix the amount of post-*judgment* interest, because there has not yet been a judgment in this case. Any calculation of post-judgment interest

remains premature, and this court is unaware of any instance in which a judgment itself included a sum certain for the amount of post-judgment interest.

The court therefore directs defendants to prepare a proposed JUDGMENT for the court's signature that contains the total amount of **$907,897.42**, the full amount of the payment tendered on October 19, 2023.

In their supplemental opposition to the second proposed judgment submitted by Whittelsey, defendants argue that correct total should actually be $903,264.20, which is slightly less than the amount they tendered on October 19, 2023. Defendants' proposed judgment, submitted on August 2, 2024, reflects this lower amount. The court is not aware of any provision that allows defendants to make a post-hoc modification of a previous offer of payment that was made under Civil Code section 1504. Accordingly, the court orders that the final judgment amount should remain the amount of the original tender: $907,897.42, which includes the earlier calculation of post-arbitration-award interest.

It is so ordered.

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Calendar Line 6
Case Name: *Tal Lavian, PhD et al. v. Zvi Or-Bach et al.*
Case No.: 21CV389062

Defendants Martin Deutsch, Sosan Akbar, and the Law Offices of Martin Deutsch (collectively, the "Deutsch Defendants" or the "Attorney Defendants") move for an award of attorney's fees after having prevailed on an appeal of an order granting their special motion to strike under Code of Civil Procedure section 425.16 (a.k.a., an "anti-SLAPP" motion). Plaintiffs Tal Lavian, Visumenu, Inc., and Aybell LLC ("Plaintiffs") oppose the motion, but their arguments are not well taken. The court grants the motion in its entirety and orders Plaintiffs to pay a total of $35,560.50 in attorney's fees.

As a general matter, an award of attorney's fees to a defendant who prevails on an anti-SLAPP motion is mandatory. (Code Civ. Proc., § 425.16, subd. (c)(1) ["a prevailing defendant on a special motion to strike shall be entitled" to attorney's fees].) In this case, the trial court (Judge Kirwan) previously awarded $6,009.50 in fees to the Deutsch Defendants after granting their anti-SLAPP motion on April 19, 2022. Plaintiffs then appealed that order, along with Judge Kirwan's subsequent order sustaining the demurrer brought by the other defendants (the "Client Defendants") on August 30, 2022. On January 4, 2024, the Court of Appeal reversed the judgment in favor of the Client Defendants but affirmed "the judgment in favor of the Attorney Defendants." (Opinion, p. 2.) The Court stated that "the parties shall bear their own costs on appeal." (*Id.* at p. 12.)

Although Plaintiffs do not dispute that attorney's fees are generally awardable to a prevailing party on an appeal of an anti-SLAPP motion, they argue that such an award is foreclosed here because the Court of Appeal stated that each side will "bear their own costs," and that language forbids a further award of attorney's fees. This argument—and in particular Plaintiffs' contention that "[t]he law is clear" on this—is specious. (Opposition, p. 6:10.) As the Deutsch Defendants correctly point out in their reply brief, *Butler-Rupp v. Lourdeaux* (2007) 154 Cal.App.4th 918 (*Butler-Rupp*) is directly on point and makes it obvious that Plaintiffs' understanding of "the law" is wrong. In that case, the prevailing party on an appeal did not request attorney's fees for that appeal but later requested such fees upon a return to the trial court; the trial court granted the request, and then the non-prevailing party appealed that decision, arguing that because the Court of Appeal had previously stated that each side would "bear their own costs on appeal" for the prior appeal, such fees were improper. (*Id.* at p. 922.) In the subsequent appeal, the Court of Appeal upheld the award, emphasizing that "'an award of costs neither includes attorney's fees on appeal nor precludes a party from seeking them'" (*id.* at p. 925 [quoting Cal. Rules of Court, former rule 27(c)(2), now rule 8.276(c)(2)]), and that "a decision about the entitlement to costs on appeal is entirely separate from a decision about the entitlement to attorney['s] fees on appeal." (*Id.* at p. 927.) *Butler-Rupp* establishes that the Court of Appeal's language in the present case about each side bearing their own costs on appeal does not preclude the Deutsch Defendants from seeking attorney's fees for that appeal.

Plaintiffs make other unpersuasive arguments. They argue that the Deutsch Defendants were not the prevailing parties on appeal, because "none of their arguments were considered on appeal." (Opposition, p. 7:8-9.) While it is true that the Court of Appeal ultimately affirmed the trial court's decision on a basis presented by the Client Defendants rather than the Deutsch Defendants, that does not necessarily mean that the Court of Appeal did not "consider" the

Deutsch Defendants' arguments, and this court has no idea how Plaintiffs could possibly know what the appellate court did or did not consider. The opinion simply indicates that the Court found a straightforward basis upon which to affirm the judgment in favor of the Deutsch Defendants and did not find a need to address any of the other points raised by the parties. The Deutsch Defendants are still the prevailing party.

Similarly, Plaintiffs argue that the Deutsch Defendants spent too much time on the appeal, given that they raised arguments that were not addressed by the Court of Appeal and given that they also "unnecessarily" brought a motion to dismiss and opposed a motion to consolidate. Even if these arguments and motions did not ultimately factor into the outcome of the appeal, that does not mean that the Deutsch Defendants' actions were "unnecessary." After all, it was the Plaintiffs who brought the unsuccessful appeal, not the Deutsch Defendants, and the court finds that the positions taken by the Deutsch Defendants in an effort to overcome the appeal—even if not ultimately dispositive—were not devoid of merit or unreasonable on their face.

Finally, Plaintiffs contend that the Deutsch Defendants "failed to prove any of the claimed fees" because they did not submit detailed timesheets in support of the present motion. (Opposition, p. 12:1-2.) Once again, this misstates the law. Although it would have been the better practice for the Deutsch Defendants to provide more substantiation for their time entries, the law does not require it, so long as the moving party includes an attorney declaration that provides a sufficient explanation for the requested fees. (See *Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 488; *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 784-786.) In this case, the court finds that the Deutsch Defendants' papers meet the bare minimum. In the end, the court finds that the 122.8 hours spent opposing this appeal were reasonable. Plaintiffs have not taken issue with any of defendants' counsel's hourly billing rates ($325/hour, $275/hour, and $275/hour for the three attorneys), and the court finds them to be reasonable as well.[10]

The court notes that it does *not* ordinarily award attorney's fees for the time spent preparing a reply brief on a motion for fees, or for preparing for a hearing on such a motion. Normally, the court finds such additional efforts to be unnecessary to the decision. But in this case, the court will grant the Deutsch Defendants' request for such fees, given the numerous arguments raised in the opposition brief that needed addressing, which necessitated a more robust reply brief than would otherwise by expected in such a motion. This applies most especially to the galling representation in the opposition brief that the law is "clear" when it is in fact directly contrary to Plaintiffs' position, per *Butler-Rupp.*

The court orders Plaintiffs to pay $35,560.50 in attorney's fees within 30 days of notice of entry of this order.

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[10] Plaintiffs have objected to counsel's declaration setting forth billing rates and hours expended as containing "hearsay," "speculation," and an absence of "foundation." The court overrules these meritless objections.