SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 11-28-23 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear by video.

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 prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:

(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. Phone lines are now open for you to call and reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Where to call for your hearing date: 408-882-2430 When you can call: Monday to Friday, 8:30 am to 12:30 pm

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16

(Dept 16 is now hearing cases that were formerly in Dept 2)

Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk

191 North First Street, San Jose, CA 95113

Telephone: 408.882.2270

DATE: 11-28-23 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear by video.

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 prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV406816 Motion: Strike	Sonia Santoro vs Charles Wagner	Notice does not appear proper, as there is no amended notice filed. If Plaintiff appears at the hearing, the motion will be continued to allow for proper notice. If Plaintiff fails to appear, the matter will come off calendar.
LINE 2	19CV357874 Motion: Summary Judgment/Adjudication	Santa Clara Valley Water District v. SDM Smith, Inc., CH2M Hill, Inc.	See Tentative Ruling. The Court will prepare the final order.
LINE 3	21CV384705 Motion: Compel	Varick Partners, LLC vs Rana Rekhi et al	See Tentative Ruling. Counsel for Rekhi shall prepare the final order within 10 days of the hearing.
LINE 4	21CV384705 Motion: Compel	Varick Partners, LLC vs Rana Rekhi et al	See Tentative Ruling. Counsel for Rekhi shall prepare the final order within 10 days of the hearing.
LINE 5	21CV384705 Motion: Compel	Varick Partners, LLC vs Rana Rekhi et al	See Tentative Ruling. Counsel for Rekhi shall prepare the final order within 10 days of the hearing.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16

(Dept 16 is now hearing cases that were formerly in Dept 2)

Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 11-28-23 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear by video.

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 prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 6	21CV384705 Motion: Admissions Deemed Admitted	Varick Partners, LLC vs Rana Rekhi et al	See Tentative Ruling. Counsel for Rekhi shall prepare the final order within 10 days of the hearing.
LINE 7	18CV322244 Hearing: Motion for award of a/f and reimbursement of costs	Jeffrey Chavez vs Jacqueline Gast et al	See Tentative Ruling. Plaintiff shall prepare the final order.
LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			

- oo0oo -

Calendar Line 2
Case Name: *Santa Clara Valley Water District v. CH2M Hill, Inc., et al.*
Case No.: 19CV357874

Motion for Summary Judgment to the Second Amended Complaint by Defendant CH2M Hill, Inc.

Factual and Procedural Background

This is an action for negligence and breach of contract by plaintiff Santa Clara Valley Water District ("District") against various professional engineering corporations that provide services for the design and construction of improvement projects.

According to the operative second amended complaint ("SAC"), the District is the largest multi-purpose water supply, watershed stewardship, and flood management special district in California. (SAC at ¶ 10.) The District owns and operates the Rinconada Water Treatment Plant ("RWTP") which takes in raw water from various sources and processes it to produce potable water (i.e., drinking water). (Id. at ¶ 11.) Like every drinking water plant, the RWTP employs a Residuals Management System ("RMS") to remove solids in the water treated by the plant. (Id. at ¶ 13.)

By 2008, the existing RMS was reaching the end of its useful life. (SAC at ¶ 14.) The District's Board of Directors therefore approved the addition to the District's Capital Improvement Program of a Residuals Management Project ("RMP") to upgrade and modernize the RMS. (Ibid.)

On or about June 23, 2009, the District and defendant CH2M Hill, Inc. ("CH2M") entered into a Standard Consultant Agreement ("Agreement"). (SAC at ¶¶ 15, 54, Ex. A.) Under this Agreement, CH2M was required to prepare a Conceptual Engineering Report that reviewed data regarding the amount (usage and dosage) of added solids (e.g., alum and PAC) and then to determine on that basis (and on other factors) the amount of solids the re-designed RMS would be handling in the future. (Id. at ¶ 15.) The contract also required CH2M to prepare a Final Basis of Design Report (30% Design). (Ibid.)

CH2M breached the Agreement by committing errors in calculating solids production, which directly led to the under-sizing of the RMS, as well as design errors leading to problems in the transfer of sludge from the main portion of the RWTP to the RMS, hydraulic imbalances in the RMS' gravity thickeners and improper/insufficient safety equipment. (SAC at ¶ 56.)

On May 15, 2012, the District and defendant CDM Smith, Inc. ("CDM") entered into a Standard Consultant Agreement which incorporated subsequent amendments. (SAC at ¶¶ 27, 40, 42, 44, 63, Exs. B-D.) CDM breached the agreement by: (1) failing to accurately calculate solids production; (2) under-sizing of the RMS; (3) design errors resulting in problems in the transfer of sludge from the main portion of the RWTP to the RMS; (4) hydraulic imbalances in the RMS' gravity thickeners; (5) improper/insufficient safety equipment and systems; and (6) other design errors and omissions. (Id. at ¶ 65.)

Defendant CDM and defendant TJC and Associates, Inc. ("TJC") also entered into a contract where CDM engaged TJC to provide engineering design services for the RMP. (SAC

at ¶ 72.) A motivating purpose for entering into this contract was to benefit the District, i.e., to yield structural, electrical and instrumentation designs that would, upon construction, provide the District with an RMS that was safe, operational, economical and capable of meeting current and future demands. (Ibid.)

TJC breached its contract with CDM by: (1) defectively designing the system regulating the flow from the gravity thickeners to the sludge mixing tank; (2) designing the polymer-dosing system on a "flow pacing" rather than "concentrating pacing" basis; (3) specifying improper components for the sludge mixing tank, e.g., mixing nozzles that clogged and had to be removed and ineffective ultrasonic level indicators; (4) failing to include sufficient access in its structural design to the two conveyors; (5) disregarding safety protocols in its design of RMS fire alarms, which created an electrocution hazard; and (6) misaligning a maintenance monorail with the centrifuges. (SAC at ¶ 74.) The District alleges it would have benefited had TJC performed its work under its contract with due care as required by law. (Id. at ¶ 72.)

Construction of the RMP went out to bid in June 2013, and a construction contract was awarded to Preston Pipelines, Inc. ("Preston") in August 2013. (SAC at ¶ 39.) In November 2015, Preston commenced a series of performance tests on the completed construction work. (Id. at ¶ 41.)

In June 2016, as Preston's performance testing concluded, the District and CDM investigated performance and under-sizing concerns, resulting in a CDM report to the District of the plant's under-sizing in late June 2016. (SAC at ¶ 43.) At the same time, following extensive discussions with the District, defendant CDM agreed to provide the District with technical support and funding to remedy the under-sizing. (Ibid.) But, despite the fact that the under-sizing had not (and has not) been remedied, defendant CDM advised the District in December 2016 that it would no longer support remediation/repair efforts. (Id. at ¶ 45.)

As a result of defendants' design errors, the District is left with an RMS that is too small and unable to manage current or future demands. (SAC at ¶ 47.) While under-sizing is the largest issue confronting the RMS, other significant design errors by defendants have led to additional problems that are unrelated or related in part to the under-sizing errors. (Ibid.) The District estimates that remediating the under-sizing and other issues will total in excess of $26 million for design and construction. (Id. at ¶ 48.)

On November 1, 2019, the District filed a complaint against defendants CH2M and CDM alleging claims for: (1) negligence (against all defendants); (2) breach of contract (against CH2M); (3) breach of the implied covenant of good faith and fair dealing (against CH2M); (4) breach of contract (against CDM); and (5) breach of the implied covenant of good faith and fair dealing (against CDM).

On December 19, 2019, defendant CH2M filed a Notice of Removal to federal court.

On January 2, 2020, defendant CDM filed its answer to the complaint and a cross-complaint against the District and CH2M alleging causes of action for: (1) breach of written contract (against the District); (2) breach of oral contract (against the District); (3) equitable indemnity and contribution (against CH2M); and (4) declaratory relief (against CH2M).

On August 31, 2020, the District filed a FAC against defendants CH2M, CDM, and TJC (collectively, "Defendants") asserting claims for: (1) negligence (against all Defendants); (2) breach of contract (against CH2M); (3) breach of the implied covenant of good faith and fair dealing (against CH2M); (4) breach of contract (against CDM); (5) breach of the implied covenant of good faith and fair dealing (against CDM); (6) breach of contract – third party beneficiary (against TJC); and (7) negligent misrepresentation (against TJC).

On September 8, 2020, the federal court remanded the case back to state court.

On October 2, 2020, defendant CH2M filed its answer to the FAC and a cross-complaint against CDM setting forth causes of action for: (1) equitable indemnity; (2) contribution; and (3) declaratory relief.

On April 14, 2021, defendant TJC filed a demurrer to the FAC. On August 20, 2021, the court (Hon. Takaichi) filed an order sustaining the demurrer with leave to amend as to the seventh cause of action.

On September 7, 2021, the District filed the operative SAC against Defendants setting forth causes of action for: (1) negligence (against all Defendants); (2) breach of contract (against CH2M); (3) breach of the implied covenant of good faith and fair dealing (against CH2M); (4) breach of contract (against CDM); (5) breach of the implied covenant of good faith and fair dealing (against CDM); and (6) breach of contract – third party beneficiary (against TJC).

On July 27, 2023, defendant CH2M filed the motion presently before the court, a motion for summary judgment to the SAC. The District filed written opposition, a request for judicial notice and evidentiary objections.

A trial setting conference is set for December 12, 2023.

Motion for Summary Judgment to the SAC

Defendant CH2M moves for summary judgment on the ground that claims alleged in the SAC (only 1st, 2nd, and 3rd COA apply to CH2M) are time-barred by Code of Civil Procedure section 339's two year statute of limitations.

The District's Request for Judicial Notice

"Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter." (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117.)

In opposition, the District requests the court take judicial notice of the following: (1) CH2M's answer to the complaint and cross-claims for equitable indemnity, contribution, and declaratory relief; and (2) CH2M's answer to the District's FAC. (See Request for Judicial Notice ["RJN"] at Exs. A-B.) The court may take judicial notice of these exhibits as records of the superior court subject to judicial notice under Evidence Code section 452, subdivision (d).

(See *Stepan v. Garcia* (1974) 43 Cal.App.3d 497, 500 [the court may take judicial notice of its own file].) The exhibits also appear to be relevant to arguments raised in support of the opposition. (See *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301[information subject to judicial notice must be relevant to the issue at hand].)

Therefore, the request for judicial notice is GRANTED.

The District's Evidentiary Objections

In opposition, the District filed objections to evidence submitted in the moving papers. The court declines to rule on the objections which are not material to the outcome of the motion for reasons stated below. "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).)

Legal Standard

Any party may move for summary judgment. (Code Civ. Proc., § 437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c); *Aguilar, supra,* at p. 843.) The object of the summary judgment procedure is "to cut through the parties' pleadings" to determine whether trial is necessary to resolve the dispute. (*Aguilar, supra,* at p. 843.)

The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact…" (*Aguilar, supra,* 25 Cal.4th at p. 850; see Evid. Code, § 110.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Aguilar, supra,* at p. 851.)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); see *Aguilar, supra,* 25 Cal.4th at p. 850.)

A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra,* 25 Cal.4th at p. 850, fn. omitted.) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id.* at p. 856.)

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

"[S]ummary judgment is a drastic remedy and should be used with caution. [Citation.] Because summary judgment is a drastic procedure all doubts as to the propriety of granting a

motion for summary judgment should be resolved in favor of the party opposing the motion. [Citations.]" (*Tully v. World Savings & Loan Assn.* (1997) 56 Cal.App.4th 654, 660; see *Kernan v. Regents of University of California* (2022) 83 Cal.App.5th 675, 684 ["The drastic remedy of summary judgment may not be granted unless reasonable minds can draw only one conclusion from the evidence."].)

Statute of Limitations

" 'Statute of limitations' is the collective term applied to acts or parts of acts that prescribe periods beyond which a plaintiff may not bring a cause of action. [Citations.]" (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806.) It "strikes a balance among conflicting interests. If it is unfair to bar a plaintiff from recovering on a meritorious claim, it is also unfair to require a defendant to defend against possibly false allegations concerning long-forgotten events, when important evidence may no longer be available." (*Pooshs v. Philip Morris USA, Inc.* (2011) 51 Cal.4th 788, 797 (*Pooshs*).)

"Critical to applying a statute of limitations is determining the point when the limitations period begins to run. Generally, a plaintiff must file suit within a designated period after the cause of action *accrues*. [Citation.] A cause of action accrues 'when [it] is complete with all of its elements' – those elements being wrongdoing, harm, and causation. [Citation.]" (*Pooshs, supra,* 51 Cal.4th at p. 797.)

To determine which statute of limitations applies to a cause of action, it is necessary to identify the nature of the cause of action, i.e., the "gravamen" of the cause of action. (*Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145, 1153.) The nature of the right sued upon and not the form of action nor the relief demanded determines the applicability of the statute of limitations under the code. (*Ibid.*) "What is significant for statute of limitations purposes is the primary interest invaded by defendant's wrongful conduct." (*Barton v. New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200, 1207.)

"Summary judgment is the appropriate disposition of an action which on its face is barred by a statute of limitations [citation]. However, summary procedure is drastic and should be used with caution and not become a substitute for trial [citation]." (*Sevilla v. Stearns-Roger, Inc.* (1980) 101 Cal.App.3d 608, 610.)

Also, "[w]hile resolution of the statute of limitations issue is normally a question of fact, where the uncontradicted facts established through discovery are susceptible of only one legitimate inference, summary judgment is proper." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1112.)

When evaluating whether a claim is time-barred, a court must determine (1) which statute of limitations applies and (2) when the claim accrued. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1316.)

Waiver

In opposition, the District argues defendant CH2M waived the statute of limitations defense under Code of Civil Procedure section 339 by failing to allege it in its answer to the FAC.

Code of Civil Procedure section 458 sets forth the pleading requirements for a statute of limitations defense:

> "In pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of section____ (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure; and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred."
>
> (Code Civ. Proc., § 458.)

Under California case law, "[t]here are two ways to properly plead a statute of limitations: (1) allege facts showing that the action is barred, and indicating that the lateness of the action is being urged as a defense and (2) plead the specific section and subdivision." (*Martin v. Van Bergen* (2012) 209 Cal.App.4th 84, 91.)

"Section 458 has been strictly construed as requiring that the relevant statute and subdivision, if applicable, be pleaded, otherwise the answer fails to raise the statute of limitations defense." (*Coy v. County of L.A.* (1991) 235 Cal.App.3d 1077, 1086, fn. 5; see *Overton v. White* (1937) 18 Cal.App.2d 567, 574 [waiver of statute of limitations defense where the answer merely failed to "refer to the proper subdivision"].)

Thus, an answer that fails to specify the applicable statute (and subdivision, if applicable) raises no issue and presents no defense. (*Area 55, LLC. v. Nicholas & Tomasevic, LLP* (2021) 61 Cal.App.5th 136, 172.) "Stated differently, where the defendant fails to comply with section 458's strict pleading requirements, the defendant 'waives the defense' of the bar of the applicable statute of limitations. [Citation.]" (*Ibid*.)

In support, the District submits a copy of the answer filed defendant CH2M in response to the complaint which alleges the following with respect to the statute of limitations defense:

> "CH2M HILL is informed and believes, and based thereon alleges, that the First, Second, and Third Causes of Action are all barred by the applicable statutes of limitations, including but not limited to California Code of Civil Procedure Sections 337, 337.1, 337.15, 338, and 339."[1]
>
> (See RJN at Ex. A.)

[1] CH2M's answer to the complaint was filed on December 26, 2019 while the action was removed to federal court.

Thereafter, CH2M filed a subsequent answer to the FAC alleging the following in connection with the statute of limitations:

> "SCVWD's claims and causes of action against CH2M HILL are barred by the applicable Statutes of Limitation, including without limitation, Code of Civil Procedure 337, 337.1, 338, and 343."
>
> (See RJN at Ex. B.)

As a preliminary matter, the court notes defendant CH2M did not file any answer to the SAC. But, having filed an answer to the FAC, CH2M was not required to file an additional answer to the SAC. As one court explains:

> " ' …"In short, when a complaint is amended after answer, the defendant is not bound to answer *de novo*. He may do so if he chooses; but, if he does not elect to do so, his original answer stands as his answer to the amended complaint; and in such cases he will not be in default except as to the additional facts set up in the amended complaint, and not put in issue by the answer…" ' [Citation.]"
>
> (*Carrasco v. Craft* (1985) 164 Cal.App.3d 796, 809, citing *Gray v. Hall* (1928) 203 Cal. 306, 310-311, 313.)

Thus, CH2M's answer to the FAC stands as the operative responsive pleading having superseded the answer to the complaint. (See *Meyer v. State Board of Equalization* (1954) 42 Cal.2d 376, 384 ["It is well established that an amendatory pleading supersedes the original one, which ceases to perform any function as a pleading."]; *Welsh v. Bardshar* (1902) 137 Cal. 154, 155 ["The amended answer superseded the original as a pleading."]; see also *Kentfield v. Hayes* (1881) 57 Cal. 409, 411 ["The amended answer was the only answer in the case. When it was filed it superseded the original answer, and all questions in relation to the abandoned answer were waived by the filing of the amended answer upon which the defendant went to trial."].) While the original answer alleged a statute of limitations defense under section 339, the amended answer deletes any mention of this code section or its relevant subdivision. Nor is it enough for CH2M to assert language of "including without limitation" to somehow incorporate section 339 into its answer. Such an interpretation would undermine the plain meaning of section 458 which, as stated above, courts have strictly construed to require the relevant section and subdivision or the statute of limitations defense fails. Here, the subject answer does not contain any reference to section 339, subdivision (1) and therefore the statute of limitations defense is waived.

While the motion is denied on this basis alone, the court will briefly consider the motion on its merits.

Accrual

Assuming Code of Civil Procedure section 339, subdivision (1) had been properly pled in the answer, defendant CH2M contends the claims accrued no later than June 6, 2016.[2] As

[2]Although the parties dispute which statute of limitations is appropriate, the court will apply the two-year limitations period under section 339, subdivision (1) for purposes of this argument.

the complaint was not filed until November 2019, beyond the two-year limitations period, CH2M asserts the action is untimely.

"The general rule for defining the accrual of a cause of action sets the date as the time 'when, under substantive law, the wrongful act is done,' or the wrongful result occurs, and the consequent 'liability arises.' [Citation.] In other words, it sets the date as the time when the cause of action is complete with all of its elements [citations] – the elements being generically referred to by sets of terms such as 'wrongdoing' or 'wrongful conduct,' 'cause' or 'causation,' and 'harm' or 'inquiry' [citations]." (*Nogart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397.)

CH2M relies on the two-year limitations period set forth in Code of Civil Procedure section 339, subdivision (1) which provides:

> "An action upon a contract, obligation or liability not founded upon an instrument of writing, except as provided in Section 2725 of the Commercial Code or subdivision 2 of Section 337 of this code; or an action founded upon a contract, obligation or liability, evidenced by a certificate, or abstract or guaranty of title of real property, or by a policy of title insurance; provided, that the cause of action upon a contract, obligation or liability evidenced by a certificate, or abstract or guaranty of title of real property or policy of title insurance shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder."
>
> (Code Civ. Proc., § 339, subd. (1).)

Defendant CH2M argues professional negligence constitutes the gravamen of these claims and thus section 339, subdivision (1) applies. (See *Slavin v. Trout* (1993) 18 Cal.App.4th 1536, 1539 [section 339, subdivision (1) is commonly applied to negligence by professionals which damages intangible property interests].)

"A cause of action for professional negligence does not accrue until the plaintiff (1) sustains damage and (2) discovers, or should discover, the negligence. [Citation.] While 'the mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence,' an action accrues, and the statute begins to run, as soon as the plaintiff suffers 'appreciable harm' from the breach. [Citation.]" (*Roger E. Smith v. Shn Consulting Eng'rs & Geologists* (2001) 89 Cal.App.4th 638, 650-651.)

Defendant CH2M contends the District should have discovered the negligence no later than June 6, 2016. (See Motion at p. 12:1-9.) In support, CH2M relies on the following material facts from its separate statement filed in conjunction with the motion:

> **MF No. 5:** The District's "discovery of this error happened as [it] was completing construction in June of 2016."
>
> **MF No. 6:** The District admits when CH2M "did their calculation, their calculation they inquired from the district if we dose alum based on 'bulk alum' or 'active ingredient,' and at that time they were told 'bulk alum,' which is incorrect because we dose off of 'active ingredient'."

MF No. 7: CDM told the District in "the summer of 2016" that CH2M's "Conceptual Engineering Report has miscalculated the alum dosing of the project."

(CH2M's Separate Statement of Undisputed Facts ["SSUF"] at Nos. 5-7.)

But, the evidence cited in support of these material facts, consisting primarily of deposition testimony, does not affirmatively establish that the District made discovery of CH2M's negligence no later than June 6, 2016. At best, the evidence cited in material fact no. 7 refers only to the "summer of 2016" as opposed to the specific date of June 6, 2016. (See *Scalf v. D.B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1523 [summary judgment should not be granted on the basis of "tacit admissions or fragmentary and equivocal concessions"].) Thus, defendant CH2M does not meet its initial burden in establishing the time of discovery of the alleged negligence for accrual purposes.

Defendant CH2M further asserts the District sustained damages in June 2016 to trigger the two-year statute of limitations. (See Motion at p. 12:10-17.) In support, CH2M relies on the following material facts from its separate statement:

MF No. 8: The District incurred costs as soon as it started to have problems "immediately after startup" "using operators on overtime for the extra hours" to operate the Project.

MF No. 9: Water Works Engineers raised concerns with CH2M's calculation included in the CER regarding the use of bulk versus active dosing, failure to calculate for ferric chloride and powered activated carbon in a June 2016 report.

(CH2M's SSUF at Nos. 8-9.)

Again, the evidence cited in support of these material facts does not conclusively demonstrate that the District sustained injuries in June 2016. Therefore, defendant CH2M fails to meet its initial burden on accrual with respect to the damages element and thus the statute of limitations defense cannot be resolved on summary judgment. (See *Filosa v. Alagappan* (2020) 59 Cal.App.5th 772, 785 ["on this record defendants have not carried their initial burden on summary judgment to establish their statute of limitations defense"].)

Finally, any such damages as of June 2016 would appear to be speculative as CDM proposed and continued remediation efforts to resolve the under-sizing going into 2018. (See SAC at ¶¶ 43-46.) Stated another way, the District wouldn't suffer any appreciable harm until the remediation efforts by CDM had terminated. According to evidence submitted in opposition by Kurt Flammer, a professional engineer and former District employee, those remediation efforts continued until at least August 2018:

> "[W]e received assurances from CDM that we had not been harmed, that the problems could be resolved. In fact, CDM offered into the summer of 2016 to address the problems at the Residuals Management Facility at its own cost and entered into a third amendment of its contract with the District in August 2016 ("Third Amendment"), which extended the CDM contract to August 31, 2018 and did not provide for any additional compensation to CDM. … The purpose of the Third Amendment was to permit CDM time to redress any problems with the Residuals Management System and

to work with the District to identify improvements to the Residuals Management Systems capacity."

(Flammer Decl. at ¶ 38; District's Additional Facts at No. 66.)

Such evidence, if credited by the trier of fact, would show that the District did not suffer any appreciable harm until at least August 31, 2018 when its contract ended with CDM. Thus, the filing of the complaint on November 1, 2019, would appear to be timely under the two-year statute of limitations in section 339, subdivision (1).

Based on the foregoing, the motion for summary judgment to the SAC is DENIED.

Disposition

The motion for summary judgment to the SAC is DENIED.

The court will prepare the Order.

- oo0oo -

Calendar Lines 3-6
Case Name: *Varick Partners v. Rekhi, et al.*
Case No.: 21CV384705

According to the allegations of the First Amended Complaint ("FAC"), in early 2020, defendant Mark Gibbs ("Gibbs"), the owner of Yellowwood Capital, Inc. ("YCI"), approached the members of soon-to-be Varick Partners, LLC ("Plaintiff") with a business opportunity to purchase the company, Rekhi Brothers d/b/a Wine Globe ("RB"). (See FAC, ¶ 6.) In anticipation of such an acquisition and based on the representations made by defendants Gibbs, Rana Rekhi ("Rekhi") and YCI, Plaintiff was formed to create a parent corporation for the acquisition of RB, with three entity owners: Hurley Family Trust, Chamonix Holding, Inc., and YCI. (See FAC, ¶¶ 7-13.)

Plaintiff was not in the business of selling alcohol and therefore relied upon the representations of Defendants Rekhi, Gibbs, and YCI. (FAC, ¶ 9.) Plaintiff relied on the following information provided by Defendant Gibbs, at the request of Defendant Rekhi: financials prepared by an alleged CPA; RB's tax returns showing over $500,000 of profit; the online merchant processing account; the company's e-commerce partner; and the liquor license in place for the company. (FAC, ¶¶ 9-11.) Defendants Gibb and Rekhi also provided purported confidential business information of RB, including reports of: significant sales from out of state website visitors; revenue exceeding $1,000 per day; sales reports listing nine of the ten top selling products sold were distilled spirits; months and months of sales data showing continued growth in the business; and RB's legal status to ship sales using common carriers. (FAC, ¶ 9.) However, Rekhi provided the documents knowing the false premises assumed in the documentation and failed to disclose that the majority of sales were actually illegal. (FAC, ¶ 11.) Plaintiff was unaware that RB breached contracts with the shipping companies by failing to properly collect excise tax for sales because the spirits were disguised as wine. (FAC, ¶ 12.) On March 11, 2020, Plaintiff paid funds to Rekhi for the purchase of RB, and in connection with the purchase, WGH executed a promissory note in favor of Rekhi in the amount of $380,000. (See complaint, ¶¶ 13, 15.) To date, almost $200,000 of this amount has been paid to Rekhi and Rekhi has since demanded payment of almost $185,000 for ongoing obligations under the promissory note; however, this demand for payment, as with all prior payments, are allegedly based on a fraud perpetuated on Plaintiff in false declarations and statements relating to the viability of RB and its compliance with applicable laws and regulations. (See FAC, ¶ 15.)

Pursuant to the Amended Operating Agreement for Plaintiff, Gibbs was employed by Plaintiff to manage day-to-day operations, and in fact did so, processing payments, managing employees and paying vendors and suppliers; however, immediately after the close of the purchase of RB, and in direct contravention of his agreed-to obligations under the Operating Agreement for Plaintiff, he: engaged in a lengthy and concerted effort to obfuscate the actual financial condition of the company and provided financials by a purported CPA who in fact was a convicted felon and legally prohibited from preparing such reports, and improperly leveraged Wine Globe assets. (See FAC, ¶¶ 16-30.) When Plaintiff attempted to obtain additional financial records, inspect critical records and oversee the status of the investment in WGH, Gibbs appeared to assist Plaintiff in its diligence efforts, but Gibbs only further misled Plaintiff and provided Plaintiff with further fraudulent and false information related to the company's viability, operations, accounting and legality. (See FAC, ¶ 21.)

In May 2020, WGH sales unexplainably plummeted by approximately 90%, and when Gibbs was confronted by Plaintiff, Gibbs explained that there was a glitch in their shipping vendor prohibiting WGH from conducting the vast majority of its sales, that this glitch would be quickly resolved and that sales would return to those seen in February and March 2020. (See FAC, ¶ 22.) In June 2020, in contemplation with the sale of WGH, Plaintiff secured the services of a reputable business broker who was provided the financial information and reports supplied by Gibbs and was told that WGH's reasonable value was $4,000,000. (See FAC, ¶ 24.) Plaintiff investigated the shipping glitch that was still unresolved, and found that Gibbs had stopped paying their shipping company, FedEx, for his further enrichment, and that the shipper was over $350,000 in arrears. (See FAC, ¶ 25.)

Plaintiff further investigated and discovered that: RB had always used FedEx to ship both wine and spirits; Rekhi knew that shipping spirits through FedEx constituted a violation of the terms of the contract with FedEx and likely violated the laws of multiple states; Gibbs knew that shipping spirits across state lines was in violation of FedEx's contract and various state laws; Gibbs and Rekhi intentionally concealed these facts to the other members of Plaintiff to entice them to purchase RB; Rekhi and Gibbs had developed a system of disguising the shipping of spirits by packaging items in a matter to obscure the actual contents, using standard wine shipping containers to fool casual inspections of their shipments; and, RB used a convicted felon for the preparation for the financials for the sale of RB to Plaintiff. (See FAC, ¶ 30.) After Gibbs' admissions of fraud, Gibbs promised to secure authorized shipping channels for WGH's products and to faithfully follow shipping regulations. (See FAC, ¶ 31.) However, Gibbs started shipping spirits across state lines with UPS knowingly in violation of UPS' terms of service and UPS discovered the violation and terminated the UPS account—of which Gibbs did not advise Plaintiff. (See FAC, ¶ 32.) Gibbs attempted to circumvent UPS' and FedEx's termination of the accounts by opening multiple accounts in his personal name; however, they uncovered Gibbs' fraud, refused shipping services and returned hundreds of packages, leaving WGH with boxes of rejected shipments. Plaintiff will have to reimburse their end-user customers for the charges incurred, and restock and/or destroy unshippable items. (See FAC, ¶¶ 33-34.)

As part of the continued fraud, Plaintiff also claims that: Rekhi assisted Gibbs in accessing the cameras of WGH's warehouse as evidenced by an email dated February 13, 2021; Rekhi assisted Gibbs by falsely claiming to own the domain WineGlobe.com with Google domain disputes via email on or about February 12, 2021; Gibbs has provided and/or Rekhi has obtained private tax documentation relating to Wine Globe via email on February 16, 2021; Rekhi has offered to provide false testimony to support Gibbs' claim of ownership of Wine Globe; Rekhi and Gibbs have conspired to create new documents to support Gibbs' alleged ownership of Wine Globe; Gibbs and Rekhi have modified the promissory note that was premised on their prior fraud; Rekhi advised Gibbs on how to secure the merchant account with Shopify via email on February 13, 2021; Rekhi reactivated her access to Wine Globe's Intuit Online Payroll Account; and, Gibbs and Rekhi have falsely advised lenders such as Xtria Capital that Rekhi has a lien on Wine Globe's products. (See FAC, ¶ 47.) As a result of Gibbs and Rekhi's actions customers have had unfulfilled orders; PayPal has placed a hold on WGH's funds in its PayPal account; merchant accounts prevent, hinder or charge excessive rates to accept credit cards for sales; and, WGH has had its retail sales permit cancelled by the State for nonpayment of sales taxes. (See FAC, ¶¶ 47-50.)

On October 6, 2022, Plaintiff filed the FAC against defendants YCI, Gibbs, and Rekhi (collectively, "Defendants"), asserting the following causes of action:

1. breach of written contract (against all defendants);
2. breach of written contract (against YCI and Gibbs);
3. fraud—intentional misrepresentation (against all defendants);
4. fraud—negligent misrepresentation (against all defendants);
5. fraud—concealment (against all defendants);
6. slander (against all defendants);
7. libel (against YCI and Gibbs);
8. inducing breach of contract (against YCI and Gibbs);
9. conversion (against YCI and Gibbs); and,
10. unfair business practices (against all defendants).

On March 23, 2023, Rekhi propounded on Plaintiff requests for production of documents ("RPDs"), form interrogatories ("FIs"), special interrogatories ("SIs") and requests for admission ("RFAs"). Responses were due on April 25, 2023; on May 1, 2023, Rekhi's counsel sent a letter to Plaintiff requesting discovery. On May 2, 2023, Plaintiff's counsel responded that he failed to calendar the responses and requested an extension of two weeks to provide the responses by May 16, 2023. Rekhi's counsel agreed to the extension request. Plaintiff failed to provide responses by May 16, 2023 and on May 17, 2023, Plaintiff's counsel requested an additional extension of time to provide responses by May 26, 2023. Plaintiff again failed to provide responses by May 26, 2023. Plaintiff provided responses on May 30, 2023; however, they were unverified and unaccompanied by any documents. On June 23, 2023, Rekhi's counsel requested that Plaintiff provide code-compliant further responses without objections. Plaintiff's counsel did not respond to the June 23, 2023 letter and on July 6, 2023, Rekhi's counsel sent an email to inquire about further responses. On July 6, 2023, Plaintiff's counsel responded that Plaintiff would provide further responses by July 14, 2023. Plaintiff did not provide responses by July 14, 2023, claiming that Plaintiff's counsel's personal hardships were preventing his ability to provide code-compliant responses; however, Plaintiff's counsel was preparing and filing documents in another case, and did not provide further responses or documents, and on August 3, 2023, Rekhi moved to compel further responses to the RPDs, FIs, and SIs and moved to deem requests for admissions as admitted. On November 11, 2023, Plaintiff provided further responses to FIs, RFAs and SIs 1-35, and produced additional documents. However, Plaintiff failed to provide further responses to SIs 36-115.

I. Rekhi's motions to compel further responses to RPDs and FIs and the motion to deem requests for admissions as admitted are withdrawn.

In Rekhi's reply brief, Rekhi notes that she has received further responses to the RPDs, FIs, SIs 1-35 and RFAs and thus withdraws her motions to compel further responses to RPDs and FIs and the motion to deem requests for admissions as admitted. Accordingly, the motions are off calendar.

II. Rekhi's motion to compel further responses to SIs 36-115 is GRANTED.

A party is required to respond to interrogatories by either answering the interrogatory, providing a writing, or objecting to the interrogatory. (See Code Civ. Proc. § 2030.210, subd.

(a).) A responding party has 30 days after service of the interrogatories to provide a response. (See Code Civ. Proc. § 2030.260, subd. (a).) If the responding party fails to provide a timely response to the interrogatories, they waive objections to the interrogatories. (See Code Civ. Proc. § 2030.290, subd. (a).) A propounding party may move to compel a further response to an interrogatory if the objection is without merit or too general. (See Code Civ. Proc. § 2030.300, subd. (a)(3).)

Rekhi's SIs 36-115 seeks information regarding contentions and allegations made in paragraphs 47 (SIs 36-41), 58 (SIs 42-44), 62 (SIs 45-47), 63 (SIs 48-50), 75 and 86 (SIs 51-65), 76 and 87 (SIs 66-77), 98 (SIs 78-80), 108 (SIs 84-86) and contentions regarding Rekhi's concealment (SIs 81-83), damages (SIs 84-89), sales of wine or liquor (SIs 90-106) and Plaintiff's holdings and Rekhi Bros. assets (SIs 107-116). Plaintiff objects to SI 36, stating:

> OBJECTION. In addition to the 50 Request for Admission and 62 Requests for Production and a set of Form Interrogatories, Defendant has served 115 Special Interrogatories, vastly exceeding the limitations of C.C.P. §2030.030(a)(1). By serving three times the limit set forth under the Code is a gross abuse of the "Declaration of Necessity" proffered by Defendant's counsel. The Requests are duplicative, unnecessary and unwarranted given the allegations of this case. Plaintiff is willing to meet and confer on additional requests, but will not respond to any further Special Interrogatories in Set 1, as served.
>
> > <u>Amended Response to Interrogatory No. 36</u>
> > Under C.C.P. §2030.040(a)(1), only 35 interrogatories are permitted. To exceed that, an attorney must certify under penalty of perjury several conditions to exceed the "Rule of 35" by declaration stating that the case's complexity, expense, expedience require the additional discovery and that they are not being offered for an improper purpose. Defendant's counsel's Declaration, while possibly meeting the statutory requirements, does not meet the clear facts of this case. There is a single transaction in this suit, the sale of Rekhi Bros. to WGH. It is ridiculous to presume this type of case was envisioned as so complex to TRIPPLE [sic] the number of requests that the Judicial Counsel believed would be appropriate for the vast majority of cases. Here, counsel attached her declaration to the first sets of interrogatories stating the number of interrogatories was necessary "existing and potential existing issues in this case." That was incorrect for two reasons. First, although this case may be of great interest and importance to the litigants and their lawyers, on the spectrum of cases pending in the Santa Clara County Superior Court it is far from complex, and the number of interrogatories served clearly was excessive and identifies things that are not at issue currently ("potential existing issues.") Defendant has certainly not

> shied away into excessive motion practice in the case, so claims of cost control seem to ring hollow. Further, balance should be taken with note of the other discovery that was served, as noted in Plaintiff's Original response, this 115 interrogatories was also served with 50 Request for Admission and 62 Requests for Production and a set of Form Interrogatories. The attempt to overburden Plaintiff and its counsel succeeded, but should not be permitted and rewarded.

(Winghart decl. in opposition to motion to compel further responses, exh. K.)

Plaintiff does not provide any response to interrogatories 37-115.

Here, as Rekhi argues, Plaintiff failed to provide timely responses and thus has waived any objection based on the violation of the "Rule of 35." Plaintiff did not move for an order relieving it from waiver pursuant to Code of Civil Procedure section 2030.290 subd. (a)(1)-(2). Moreover, SI 36 seeks facts regarding Plaintiff's own contention alleged in paragraph 47 of its FAC; Rekhi is clearly entitled to this information. Plaintiff appears to concede that Rekhi's counsel's declaration is sufficient pursuant to the statute, and indeed, Ms. Choi's declaration satisfies the statutory requirements. Plaintiff does not move for a protective order pursuant to Code of Civil Procedure section 2030.090, and thus, Rekhi "may propound a greater number of specially prepared interrogatories to another party if this greater number is warranted…." (Code Civ. Proc. § 2030.040, subd. (a).) Here, the expedience of using interrogatories to provide to the responding party the opportunity to conduct an inquiry, investigation, or search of files or records to supply the information sought is less intrusive than other forms of discovery seeking this same information, and the FAC itself provides for a number of issues in the instant case. In opposition, Plaintiff complains about the number of interrogatories but the information sought is all information that Plaintiff will need to prove its case and is information to which Rekhi is entitled so as to defend herself. Plaintiff's objection to SI 36 is OVERRULED.

Rekhi's motion to compel further responses to SIs 36-115 is GRANTED in its entirety. Plaintiff shall provide verified, code-compliant responses to counsel for Rekhi within 20 calendar days of this Order.

III. Rekhi's request for monetary sanctions against Plaintiff is GRANTED in part.

In connection with the motion to compel further responses to SIs, Rekhi seeks $6,412.50 in monetary sanctions against Plaintiff for all four motions. Rekhi does not separate the work done on the motion to compel further responses to SIs from the other motions, instead indicating that 12 hours of work were spent on all four motions at the rate of $325 per hour, 2.5 hours of work were spent on all four motions at the rate of $400 per hour and 2 hours of paralegal work were spent on all four motions at the rate of $150 per hour. Rekhi also seeks $1,212.50 in anticipatory time. The Court does not award monetary sanctions for anticipatory time. Moreover, the issue on the motion to compel further responses to SIs 36-115 is a very limited and uncomplicated issue as there was only a single objection as to a single SI at issue.

Rekhi's request for monetary sanctions against Plaintiff is GRANTED in part. Plaintiff shall pay counsel for Rekhi $750.00 (2 hours at $325 + ¼ hour at $400) within 20 calendar days of this Order.

Counsel for Rekhi shall prepare the proposed order for the Court's signature.

- oo0oo -

Calendar Line 7
Case Name: *Jeffrey Chavez v. Jacqueline Gast and Lorraine Gast*
Case No.: 18CV322244

Plaintiff seeks attorney fees and costs related to the partition action taken in this case.

Plaintiff seeks attorney fees in the amount of at least $68,800 (see Motion, p8). Defendant contests the awarding of attorney fees claiming primarily that the Plaintiff's motion is not timely and that it would not be equitable to require defendants to pay the fees given, among other claims, that Plaintiff did not pay his fair share for the home while he lived there, that Defendants have limited resources, and that Plaintiff delayed settlement of the action, while Defendants prevented the property from being foreclosed on.

Plaintiff argues that this Court should not consider Defendants' opposition as it was filed late. This Court will consider the opposition, as it is favored policy to consider cases on their merits and Plaintiff was not prejudiced by the late filing. Defendants are advised that the Court may disregard late pleadings in the future if the rules are not followed.

The Court has authority to award fees under CCP §§ 874.010, 874.020 and 874.040. Under 874.010 the costs of a partition action include reasonable attorney's fees incurred by a party for the common benefit. This Court has already found that the "that sale of the Property and division of the net proceeds of sale is for the common benefit of all owners." (See Interlocutory Judgment and Order of Dec. 9, 2022.) In general, attorney's fees taken for the common benefit should be paid by the parties entitled to share in the lands divided, in proportion to their respective interests. See *Orien v. Lutz* (2017) 16 Cal.App.5th 957, 967. In making the determination of how to allocate fees, the Cout may take equitable considerations into account. For example, if a party unnecessarily drives up costs or takes actions not for the common benefit, the Court may require that party to solely bear such costs. See *Orien v. Lutz* (2017) 16 Cal.App.5th 957, 968-69.

Defendants claims that the motion for fees is not timely because it was brought six months after the confirmation of the sale. Defendants cite no authority for this claim. The Court does not find the motion untimely.

Defendants next assert that they should not have to pay Plaintiff's attorney fees because it would not be equitable. They claim that it would not be fair to make them pay attorney fees given that Plaintiff did not pay his fair share of the mortgage and other costs while living in the property. Defendants file no competent evidence with their motion in support of this claim. Moreover, there is no question that Plaintiff owned one-third of the property, that Defendants were unable to buy out his share at fair market value, and that a partition action was required to allow Plaintiff to receive his fair share of the property, regardless of whether Plaintiff owed Defendants for back rent or other expenses. If there is an accounting to be done, it can take into consideration both the attorney fees owed by Defendants as well as any monies owed to Defendants by Plaintiff. The fact that Plaintiff may owe Defendants money does not make it inequitable to require them to pay attorney fees for actions taken for the common benefit.

Defendants suggest that they do not have the income to be able to afford such fees. (See Opposition, pp2-3). Again, there is no actual evidence, but instead mere assertions in the motion, to support this claim. Defendants have also not provided anything more than argument

to support their allegations that Plaintiff improperly or unfairly delayed the sale of the property or that they prevented the property from being foreclosed upon. Defense counsel's "beliefs" as laid out in his Declaration is not evidence the Court can rely on. Defendants include in their papers and in counsel's declaration claims regarding settlement discussions, but such discussions are not admissible and as such are not properly before this Court.

Plaintiff was required to file for partition to obtain his share of the property. After trial, he prevailed in obtaining partition for a one-third share. He prevailed in his motion to relieve the referee and in his claim that the buyer not be required to pay cash. Both of these actions allowed the sale to proceed at relatively low cost to the parties. As such, the Court still finds that Plaintiff's actions in this litigation were taken for the common benefit such that he should obtain some reimbursement of his attorney's fees.

Defendants do not contest the rate charged or hours spent by Plaintiff's counsel. Based on the prevailing rate for Santa Clara County with which this court is aware having presided over dozens of fee motions in the last couple of years, a billing rate of $400 per hour as requested by Plaintiff is reasonable. Plaintiff provides billing records showing that counsel spent approximately 172 hours on this case (of which he did not bill for approximately 6), for a total of $66,360. (See Ex. A attached to Cai Declaration). Plaintiff's costs were $610.52. Defendants do not take issue with the time spent by Plaintiff's counsel and this Court finds that the time spent was for the common benefit. As such, the Court apportions the fees and costs according to each side's interests. As Defendants each have a one-third interest in the property, each Defendant is ordered to pay one-third of the attorney's fees and costs to Plaintiff's attorney. Defendant Jacqueline Gast is ordered to pay $22,323.50 to Plaintiff's counsel and Defendant Lorraine Gast is ordered to pay $22,323.50 to Plaintiff's counsel.

Defendants also ask this Court to make Plaintiff pay for their attorney fees. While it is true that a court should consider the fees incurred by both sides and allocate them appropriately, here the Court does not believe Plaintiff should have to share in the attorney fees paid by Defendant. First, Defendants provided no evidence supporting fees paid by them. Though Defendants' counsel states his hourly rate and provides an estimate of the number of hours he worked, no billing records or break down of what work was performed is included to allow the Court to consider whether such fees or work were reasonable. Moreover, the Court cannot find on the record presented here that Defendants' actions were for the common benefit as they had no valid claim upon which to contest the partition. Accordingly, Defendants' claim for attorney's fees is denied.

Defendant Jacqueline Gast is ordered to pay $22,323.50 to Plaintiff's counsel within 15 days of the final order. Defendant Lorraine Gast is ordered to pay $22,323.50 to Plaintiff's counsel within 15 days of the final order. Plaintiff shall submit the final order.

- oo0oo -