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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MOTIV SPACE SYSTEMS, INC., et al., Cross-complainants and Appellants, v. ALLIANCE SPACESYSTEMS, LLC, Cross-defendant and Respondent.	B284012 (Los Angeles County Super. Ct. No. BC590784) **REDACTED**

APPEAL from a judgment of the Superior Court of Los Angeles County, Gregory Keosian, Judge. Affirmed.

Gordon & Rees, Richard P. Sybert, A. Louis Dorny, Matthew G. Kleiner and Jordan S. Derringer for Cross-complainants and Appellants.

Daniels, Fine, Israel, Schonbuch & Lebovits, Paul Fine and Bernadette C. Brouses for Cross-defendant and Respondent.

This case has its genesis in a complaint by MDA US Systems, LLC (MDA) against appellant Motiv Space Systems, Inc. (Motiv), and appellants Christopher Thayer (Thayer), Brett Lindenfeld (Lindenfeld), Thomas McCarthy (McCarthy), and Richard Fleischner (Fleischner) (collectively, the individual appellants). The individual appellants left their employment at MDA to form Motiv. Based on the individual appellants' actions in forming and operating Motiv in breach of various agreements and common law principles, MDA sued them and Motiv, alleging causes of action for misappropriation of trade secrets, breach of contract, breach of the duty of loyalty, interference with contractual relations, and unfair competition.

MDA entered into a settlement agreement with respondent Alliance Spacesystems, LLC (Alliance). Thereafter, appellants filed a cross-complaint against Alliance for equitable indemnity, contribution, and promissory estoppel. Alliance filed a motion for determination of good faith settlement of an agreement it had reached with MDA. The trial court determined this settlement was in good faith and entered a judgment of dismissal as to the cross-complaint. This appeal followed.

On appeal, appellants contend the trial court abused its discretion in finding the settlement was made in good faith, in denying them a continuance to conduct further discovery, and in denying them leave to amend their cross-complaint to state a cause of action for breach of contract. We affirm.

FACTUAL AND PROCEDURAL HISTORY[1]

A. *The Parties*

1. *MDA*

MDA "is a leading developer and supplier of commercial and civil rocket launch payloads and structures." It has particular expertise in the robotics used in the Mars rovers and has developed robotic arms and structures for NASA and JPL. During the course of its work, MDA has "developed extensive trade secrets and confidential and proprietary information pertaining to various aspects of the design, testing and operation of the robotic arms, as well as software, scripts, methods and data regarding how to bid successfully for such projects and perform them." It also "compiled an internal, proprietary list of its vendors and their respective costs and margins for each specific component that was externally developed." This enabled MDA "to efficiently and effectively respond to requests for proposals and provide costing estimates based on actual expenditures on prior missions," giving it an edge over its competitors. MDA "took reasonable steps to protect the confidentiality of this information, including requiring its employees, officers and contractors to enter into and abide by written non-disclosure agreements. . . ."

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[1] The facts are taken from the allegations of MDA's first amended complaint and from the documents submitted in connection with the motion for determination of good faith settlement, including those which are confidential under a protective order issued by the trial court pursuant to stipulation of the parties.

2. *Alliance and AllianceWeb*

MDA's robotics division was located in Pasadena, California. MDA had a composite division, focused on the design and manufacture of composite structures, located in Los Alamitos, California. In December 2012, MDA divested itself of the composite division; this division became Alliance.[2]

MDA operated a private intranet platform called AllianceWeb. Confidential and proprietary documents for both the robotics division and the composite division were stored on AllianceWeb. After divestment, Alliance needed access to documents pertaining to the composite division, which were stored on AllianceWeb. Because it was not practical or feasible to separate the documents belonging to MDA from those relating to the composite division (now Alliance), MDA granted Alliance a license to use AllianceWeb for its composite business. The license agreement restricted access to AllianceWeb by Alliance and imposed nondisclosure and confidentiality requirements on Alliance.

3. *The Individual Appellants and Motiv*

The individual appellants were all employed by MDA in its robotics division. They had access to MDA's confidential information and were subject to nondisclosure agreements and confidentiality obligations. As part of their employment at MDA, they had access to AllianceWeb and knew how to access the various documents stored there.

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[2] MDA, originally named Alliance Spacesystems, Inc., began operating in 1997.

On March 3, 2014, Thayer, Lindenfeld, and McCarthy submitted their resignations to MDA. Their last day with MDA was March 14, 2014. On March 24, 2014, they "formally launched their new company, Motiv," a move "they had been planning for" some time.

Prior to their resignations from MDA, Thayer, Lindenfeld, and McCarthy had already begun using their contacts to divert projects from MDA to Motiv.

B. *Motiv Gains Access to AllianceWeb*

Motiv contacted the president of Alliance, Eric Byrens (Byrens), and suggested that Motiv and Alliance work together to submit a joint proposal for a composite-related project. In connection with the proposal, Motiv requested access to AllianceWeb for information as to Alliance's experience and capabilities with respect to composites.

Byrens gave Lindenfeld and Thayer access to AllianceWeb. He instructed them that their access was limited to documents necessary for the joint proposal; they were not permitted to access or download any of MDA's proprietary documents. Although they agreed to this limitation, they ignored it and accessed MDA's documents.

C. *The Mars 2020 Project*

In April or May 2014, MDA received a request for proposal from JPL for a preliminary requirements study for NASA's Mars 2020 Project. As part of the study, MDA made recommendations for increased capabilities for a robotic arm similar to one MDA previously designed and manufactured for JPL. Fleischner had worked on the preliminary requirements study for MDA.

Following completion of the preliminary requirements study, JPL notified MDA that it planned to release a request for proposal for the Mars 2020 improved robotic arm by October 2014. Fleischner left MDA on October 2, 2014 and immediately joined Motiv. JPL did not actually release the request for proposal until February 20, 2015.

MDA submitted all the necessary documents for the Mars 2020 robotic arm proposal by the deadline. Unknown to MDA, Motiv also submitted a proposal. In April 2015, JPL notified MDA that the Mars 2020 robotic arm contract had been awarded to another company.

MDA met with JPL for a debriefing on June 8, 2015. JPL did not identify the winning proposal but did tell MDA that the proposals were very close and MDA's proposal was "not significantly higher" than the winning proposal. MDA subsequently learned Motiv had submitted the winning proposal and had done so by improperly accessing and downloading MDA's confidential and trade secret information from AllianceWeb.

D. *The Litigation*

MDA filed its complaint against Motiv and the individual appellants on August 11, 2015, alleging misappropriation of trade secrets, breach of contract, breach of the duty of loyalty, interference with contractual relations, and unfair competition. Appellants filed an answer on February 17, 2016, denying the allegations of the complaint and asserting numerous affirmative defenses. Pursuant to stipulation of the parties, appellants filed their cross-complaint against Alliance on November 18, 2016, for equitable indemnity, contribution and promissory estoppel.

Appellants served Alliance with a request for production of documents on January 18, 2017.

Alliance filed a demurrer to appellants' cross-complaint on January 31, 2017. The basis of the demurrer was that neither the complaint nor the cross-complaint contained any allegations of wrongdoing as to Alliance. Alliance then filed a response to appellants' request for production of documents on March 15, 2017, in which it objected to some of the requests as seeking information protected by attorney-client privilege or documents containing trade secret or other proprietary information. It objected to other requests on various grounds, but it agreed to provide Motiv with some of the requested documents.

MDA filed a first amended complaint on March 9, 2017. Alliance filed an amended demurrer to the cross-complaint on March 27, 2017. At the same time, Alliance filed a motion for determination of good faith settlement. (Code Civ. Proc., §§ 877, 877.6.[3])

E. *Alliance's Motion for Determination of Good Faith Settlement*

In support of its motion for determination of good faith settlement, Alliance submitted the declaration of its counsel, Michael E. Swartz (Swartz), who stated that in July 2016 Alliance received a subpoena seeking the production of business

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[3] Code of Civil Procedure section 877 governs the procedure to seek and obtain, and the effect of, a good faith settlement prior to judgment. Section 877.6 provides for a hearing to determine whether a settlement has been entered into in good faith.

All further undesignated references are to the Code of Civil Procedure.

records in connection with this lawsuit. It was while it was preparing a response that Alliance discovered that Lindenfeld "had downloaded numerous files appearing to belong to MDA from AllianceWeb." Swartz notified MDA's counsel of the discovery.

Thereafter, "both MDA and Alliance worked diligently to negotiate a settlement in order to remediate the, at most, small role that Alliance had played by giving Motiv limited access to AllianceWeb." During negotiations, "[b]oth MDA and Alliance were represented by counsel who sought to protect their respective clients' interests. [¶] . . . Neither Alliance's nor MDA's financial condition or insurance policy limits were used to determine or discount the amount that Alliance paid to MDA." On August 8, 2016, Alliance and MDA settled any claims between them for $200,000, which Alliance paid to MDA.

Alliance also submitted a copy of the settlement agreement, which recited the basis of a potential claim by MDA against Alliance, the parties' belief that it was in their best interests "to enter into this Settlement Agreement on a fully-informed basis and that the terms described herein are fair, reasonable, and adequate." Pursuant to the agreement, Alliance would pay MDA $200,000, "permanently terminate Motiv's and the [i]ndividual [appellants'] access to AllianceWeb immediately" and not provide them access in the future.[4] MDA released all claims it had against Alliance within the scope of the agreement.

[**REDACTED**[5]]

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[4] With non-monetary consideration, the total value of the settlement was $275,000.

[5] [**REDACTED**]

F. *Discovery and Continuance of the Proceedings*

On April 5, 2017, appellants filed an ex parte application to continue the hearing date and briefing deadlines for Alliance's demurrer and motion for determination of good faith settlement "because the parties must still meet and confer regarding Alliance's deficient responses to discovery requests" regarding the motion for determination of good faith settlement. The court granted a continuance to May 1, 2017.

Appellants wrote to Alliance that same day, addressing the "deficiencies" in Alliance's response to their request for production of documents. Alliance responded on April 10, 2017, maintaining its objections but agreeing to produce the documents for which there were no objections on April 12.

In the meantime, on April 7, 2017, appellants filed their answer to MDA's first amended complaint.

Appellants filed a second ex parte application to continue the hearing date for Alliance's demurrer and motion for determination of good faith settlement on April 12, 2017, in which they claimed they needed additional time to bring a discovery motion related to Alliance's response to their request for production of documents; they also wanted time to propound additional discovery requests. Alliance filed opposition to this request, noting it had stipulated to the previous continuance, and arguing that appellants failed to show good cause for an additional continuance. The application was denied without prejudice based on the failure to show good cause for the continuance.

Alliance produced the documents it had agreed to produce on April 12, 2017 by providing appellants' counsel an access link to the documents.

The following day, appellants filed their opposition to Alliance's motion for determination of good faith settlement. They also filed their opposition to Alliance's amended demurrer.

G. *Appellants' Opposition to Alliance's Motion for Determination of Good Faith Settlement and Alliance's Reply*

Appellants opposed the motion for determination that the settlement was in good faith, arguing "the 'ballpark' is entirely undefined." Appellants rejected Alliance's attempt to minimize its role in the issues raised in the charging documents, arguing that they "ignore[d] reality," and argued that they needed to conduct additional discovery on the issue of whether the settlement was made in good faith. They based this last claim on Alliance's claimed refusal to produce relevant documents in response to appellants' informal discovery request.

In support of their opposition, appellants provided a declaration by their attorney, Patrick J. Mulkern (Mulkern), in which he stated "Alliance refused to produce any documents related to discussions and documents exchanged between Alliance and [MDA] in regards to this lawsuit." He stated he had attempted to address Alliance's objections, but Alliance refused to produce the requested documents. He also stated that, as of the date of his declaration, Alliance had failed to produce the documents it had agreed to produce.

Mulkern attached as an exhibit to his declaration an email exchange between Lindenfeld and Byrens. In it, Lindenfeld asked if Byrens had any issues with him utilizing "some old cost data . . . that's squirreled away on some of our old programs

within the AllianceWeb." Byrens replied, "No issue here, everything that resides on our servers is ours."

In its reply, Alliance argued it had produced sufficient evidence to allow the court to determine whether the settlement was made in good faith, and pointed out that appellants had failed to submit any evidence in opposition to the claim made in the moving papers that the settlement was within the "ballpark."[6] Nor had appellants shown that additional discovery was necessary for them to oppose Alliance's motion. At the same time, Alliance filed a reply to appellants' opposition to Motiv's demurrer to the cross-complaint.

[**REDACTED**]

H. *Appellants' Further Discovery Attempts*

On April 25, 2017, appellants filed a motion to compel further responses to their request for production of documents. That motion was scheduled for hearing on July 6, 2017, which was after the May 1 hearing date on Alliance's motion for determination of good faith settlement. No request to advance the date calendared for the hearing on the discovery motion appears in the record on appeal.

In support of the motion to compel, Mulkern submitted a declaration stating that the email link to the documents Alliance produced was sent to someone else in his law firm, not to him. It

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[6] With its reply, Alliance filed a supplemental declaration by Swartz documenting the considerations that had gone into the settlement and which revealed the amount which Motiv's counsel had told him was what Motiv contended was Motiv's "ballpark estimate" of the potential total damages recoverable from Alliance.

was not until April 20, when he contacted the person who sent that email, that he was able to get access to the documents, which took approximately 12 hours to download.

On May 1, 2017, appellants filed an ex parte application for leave to file a supplemental declaration by Mulkern containing evidence unavailable to him at the time appellants filed their opposition to the motion to determine good faith settlement. The declaration would show that "[t]he discovery-related gamesmanship employed by Alliance demonstrates the impropriety of either (a) granting the Settlement Motion; or (b) deciding the [Good Faith] Settlement Motion without giving [appellants] more time to conduct relevant discovery." Although the application references the filing of Alliance's reply memorandum (which was accompanied by the supplemental Swartz declaration), no reference is made to the information contained in that filing to the representation Swartz had made with respect to the "ballpark" valuation of the litigation which appellants' counsel had placed on the case.

Alliance filed opposition to the ex parte application, characterizing it as a "transparent attempt to circumvent" the previous denial of a continuance. (Emphasis omitted.) In support of its opposition, Alliance filed the declaration of its attorney Bernadette C. Brouses documenting the discovery that had already taken place. This included, in addition to the request for production of documents, 17 sets of written discovery requests served on MDA, two depositions of MDA's persons most knowledgeable as to several categories of information, and the Byrens deposition.

I. *Argument in the Trial Court and the Trial Court's Ruling*

At argument on the motion to determine the good faith of the settlement in the trial court on May 1, 2017, counsel for Motiv made specific reference to the amount he had earlier told counsel for Alliance was that party's potential monetary exposure. Once he had done so, counsel for Motiv took the position that that amount was no longer valid because the nature of the action had changed. Appellants' counsel did not provide any specifics as to why the amount he had stated earlier had changed; instead he made unspecified references to additional projects which might be affected by the access to the data stored on the AllianceWeb server. Counsel for Alliance responded to these arguments by stating that appellants' counsel had "been in the case for two years. They've taken depositions on damages of MDA witnesses. He knows well more than I do what the potential damages are in this case. If he thought that the [amount] was outside the ballpark of what the correct damages were, he was well able to meet his burden on that. Instead, he strategically has decided to sit back and pick at our numbers because he doesn't have anything." Appellants' counsel also acknowledged Alliance had settled before the case had expanded in scope. "So [Alliance's counsel] is not wrong, but he's not right either." Alliance's counsel argued the amount of the settlement was reasonable based on the facts as they were known at the time of the settlement.

Following the hearing, the trial court granted Alliance's motion for determination of good faith settlement and dismissed appellants' cross-complaint. It also denied appellants' ex parte application and overruled Alliance's demurrer as moot.

In its ruling on the motion for good faith settlement determination, after reviewing the factors a court must consider in determining whether a settlement agreement was entered into in good faith, as set forth in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488 (*Tech-Bilt*), the court found to be in good faith the settlement between Alliance and MDA for $200,000 in cash plus additional non-cash consideration (including Alliance agreeing to "permanently terminate [appellants'] access to AllianceWeb, and 'reasonably cooperate' with MDA's counsel with respect to this litigation").[7]

The court noted and rejected appellants' argument that Alliance's motion was "not supported by competent evidence because only the settlement agreement is provided," finding the settlement agreement was competent evidence. In addition, it determined that Swartz's declaration as to how the settlement agreement was reached provided sufficient evidence of good faith. The court explained "the evidence shows that the only claim by MDA against Alliance for its contributions to MDA's damages is because Alliance granted Motiv access to AllianceWeb with instruction not to access MDA information, but fail[ed] to prevent Motiv from breaching this agreement and accessing MDA documents. Alliance's role is therefore significantly attenuated from the wrongdoing of Motiv."

The court also addressed appellants' argument that they needed additional discovery to address Alliance's motion. Specifically, appellants were seeking additional evidence as to communications between Alliance and MDA, Alliance's financial

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[7] The court acknowledged the total value of the settlement later in its ruling to be $275,000.

condition, coordination between Alliance and MDA in reaching the settlement agreement, the basis for the estimation as to Alliance's potential liability, and other bases of support for the amount of the settlement. The court found Alliance's financial condition was not a factor in the settlement, and there was "no evidence on the face of this settlement of any collusion between Alliance and MDA, both of whom were represented by counsel." Additionally, the amount of the settlement was "for a relatively large sum, well within the 'ball-park' of Alliance['s] liability in this action . . . ." The court found that, to the extent the documents requested were not protected by the attorney-client or work product privileges, appellants had "failed to show the value of any of the requested discovery."

The determination as to the good faith of the settlement resolved appellants' claims in its cross-complaint against Alliance for indemnity and contribution. As to Motiv's cause of action for promissory estoppel, the court noted that "[f]ollowing a good faith determination, the judge doubtless may dismiss disguised or artfully pleaded claims for indemnity or contribution—i.e., causes of action purporting to state direct claims but which, in fact, seek only to recover derivative damages." (*Norco Delivery Service, Inc. v. Owens-Corning Fiberglas, Inc.* (1998) 64 Cal.App.4th 955, 964.) The court then found appellants' "promissory estoppel cause of action is functionally a cause of action for indemnity and contribution, and is therefore also subject to dismissal pursuant to a finding of good faith settlement."

The court also acknowledged appellants' oral request for leave to amend their cross-complaint to state a cause of action for breach of contract, but denied them leave to amend.

J. *Motion for Reconsideration and Judgment*

On May 10, 2017, appellants filed an ex parte application for an order shortening time on their motion for reconsideration and clarification and for an order extending the time in which to file a writ petition pursuant to section 877.6, subdivision (e). They argued it would be more efficient for the court to determine their motion for reconsideration before they sought writ review.

Alliance opposed this application on several grounds, including that it was untimely and appellants could not show new facts justifying reconsideration.

The trial court denied appellants' request to shorten time on the motion for reconsideration but granted their request to extend the time to seek writ review.[8] Appellants withdrew their motion for reconsideration on May 17, 2017, one day before the date set for the hearing on the motion.

The judgment of dismissal in favor of Alliance was filed on June 2, 2017. Appellants timely filed their notice of appeal on July 20, 2017.

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[8] Section 877.6, subdivision (e), provides: "When a determination of the good faith or lack of good faith of a settlement is made, any party aggrieved by the determination may petition the proper court to review the determination by writ of mandate. The petition for writ of mandate shall be filed within 20 days after service of written notice of the determination, or within any additional time not exceeding 20 days as the trial court may allow." Appellants filed a petition for writ of mandate on June 9, 2017. We summarily denied their petition on June 16, 2017. (*Motiv Space Systems, Inc. v. Superior Court* (Jun. 16, 2017, B283021).)

DISCUSSION

A. *Motion for Determination of Good Faith Settlement*

1. *Relevant Legal Principles and Standard of Review*

Section 877.6 provides alternative procedures to resolve whether a settlement was entered in good faith. If no contest is expected, a settling party may file an application for an order determining the good faith of the settlement. (§ 877.6, subd. (a)(2).)[9] If a contest is expected, any party may file a motion for such a determination, utilizing standard motion procedures. (§ 877.6, subd. (a)(1).)[10] In addition to giving the notice required by section 1005, the moving papers must establish "a prima facie showing of a good faith settlement." (*City of Grand Terrace v. Superior Court* (1987) 192 Cal.App.3d 1251, 1262.) This reference to moving papers, as do the references to affidavits and

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[9] Section 877.6, subdivision (a)(2), provides in part: "[A] settling party may give notice of settlement to all parties and to the court, together with an application for determination of good faith settlement and a proposed order. The application shall indicate the settling parties, and the basis, terms, and amount of the settlement."

[10] Section 877.6, subdivision (a)(1), provides in part: "Any party to an action in which it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors, upon giving notice in the manner provided in subdivision (b) of Section 1005."

When this motion procedure is utilized, as indicated in the quoted text, the moving party need not be a party to the settlement.

counteraffidavits in section 877.6, subdivision (b), contemplate that the procedure on the motion will be that applicable to motions generally. (See § 1010; Cal. Rules of Court, rule 3.1113(j) [requiring attachment of declarations in support of a motion] and rule 3.1306(a) [evidence allowed at hearing on motion].) The admissibility of evidence is governed by the Evidence Code; for example, the evidence presented in declarations must be from witnesses who are competent and who possess personal knowledge of the facts stated. (See *Pajaro Valley Water Management Agency v. McGrath* (2005) 128 Cal.App.4th 1093, 1108.) The statute includes a specific provision for the filing of "responsive counterdeclarations to negate the lack of good faith asserted by the nonsettling contesting party." (*City of Grand Terrace*, *supra*, at p. 1262.)

Thus, while the initial burden is on the party making the motion for good faith determination to make an initial evidentiary showing, it need only establish a prima facie case, one sufficient to persuade the trial court in the absence of contrary evidence. Further, once declarations in opposition to the motion are filed, the moving party may supplement its initial filing with additional evidence. (*City of Grand Terrace v. Superior Court*, *supra*, 192 Cal.App.3d at p. 1262.)[11]

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[11] Section 877.6, subdivision (b), provides: "The issue of the good faith of a settlement may be determined by the court on the basis of affidavits served with the notice of hearing, and any counteraffidavits filed in response, or the court may, in its discretion, receive other evidence at the hearing." Section 2015.5 provides that properly composed declarations under penalty of perjury are the equivalent of affidavits.

In fulfilling their respective evidentiary burdens, neither party may rely on "questionable assumptions." (*Mattco Forge, Inc. v. Arthur Young & Co.* (1995) 38 Cal.App.4th 1337, 1350; accord, *Greshko v. County of Los Angeles* (1987) 194 Cal.App.3d 822, 834 [conclusionary allegations are insufficient where good faith is contested] (*Greshko*).) And, the trial court is authorized to accept both declarations and "other evidence" which the court may receive at the hearing. (§ 877.6, subd. (b).)

The trial court evaluates the evidence presented according to the statutory allocation of the burden of proof: Section 877.6, subdivision (d), states "The party asserting the lack of good faith shall have the burden of proof on that issue."

A cogent statement of the factors which the trial court must take into consideration in reaching its determination on a motion seeking a good faith determination is set out in our Supreme Court's opinion in *Tech-Bilt*: "[T]he intent and policies underlying section 877.6 require that a number of factors be taken into account including a rough approximation of plaintiffs' total recovery and the settlor's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, and a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial. Other relevant considerations include the financial conditions and insurance policy limits of settling defendants, as well as the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants. [Citation.] Finally, practical considerations obviously require that the evaluation be made on the basis of information available at the time of settlement. '[A] defendant's settlement figure must not be grossly disproportionate to what a reasonable person, at the time

of the settlement, would estimate the settling defendant's liability to be.' [Citation.] The party asserting the lack of good faith, who has the burden of proof on that issue (§ 877.6, subd. (d)), should be permitted to demonstrate, if he can, that the settlement is *so far 'out of the ballpark' in relation to these factors as to be inconsistent with the equitable objectives of the statute*. Such a demonstration would establish that the proposed settlement was not a 'settlement made in good faith' within the terms of section 877.6." (*Tech-Bilt*, *supra*, 38 Cal.3d at pp. 499-500, fn. omitted and italics added.)

And, the trial court's determination as to the good faith of a settlement agreement under section 877.6 "should be made on the basis of experience rather than speculation." (*Tech-Bilt*, *supra*, 38 Cal.3d at p. 500.) "'When testing the good faith of a settlement figure, a court may enlist the guidance of the judge's personal experience and of experts in the field.'" (*Ibid.*) "[A] determination as to whether a settlement is in good faith must be left to the discretion of the trial court." (*Id.* at p. 502.) This determination "'may be reversed only upon a showing of abuse of discretion.'" (*PacifiCare of California v. Bright Medical Associates, Inc.* (2011) 198 Cal.App.4th 1451, 1464; see also *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 957.)

2. *Application*

Appellants contend "Alliance failed to carry its burden of producing sufficient competent evidence to demonstrate that the settlement was in the 'ballpark.'" This attack by appellants on the quality and sufficiency of the evidence presented by Alliance—which appellants use to cast doubt on the size of the

"ballpark" of the potential damages has an inherent difficulty: The source of the information upon which Alliance based its ballpark estimate—which appellants challenge on appeal—was appellants themselves. As discussed *ante*, it was appellants' counsel who made the representation as to the parameters of the potential recovery to counsel for Alliance; the same counsel confirmed he had made this estimate during argument on the motion in the trial court. He also confirmed then that the nature of the litigation had "changed" after MDA and Alliance had entered into their settlement.

The burden on the moving party to establish the ballpark estimated value of the litigation is not high, in significant part because to carry out the goals of settlement prior to trial that ballpark is constructed on imperfect information. (*Tech-Bilt, supra*, 38 Cal.3d at pp. 499-500.)

The filing of the two declarations by Alliance's counsel met moving party's obligation to go forward on the motion. The trial court's determination in this regard was proper; it certainly meets the standard by which we review it—abuse of discretion. (*PacifiCare of California v. Bright Medical Associates, Inc.*, *supra*, 198 Cal.App.4th at p. 1464.)

We turn to address the burden on the party opposing the good faith determination—that placed on the respondent in this appeal. As stated in *Tech-Bilt*, "[t]he challenger must prove 'the settlement is so far "out of the ballpark" in relation to [the stated] factors as to be inconsistent with the equitable objectives of [section 877.6].'" (*North County Contractor's Assn. v. Touchstone Ins. Services* (1994) 27 Cal.App.4th 1085, 1091, quoting *Tech-Bilt*, *supra*, 38 Cal.3d at pp. 499-500.) In this case, we find no abuse of discretion in the trial court, concluding that the ballpark

estimate provided by counsel for appellant was properly relied upon by the settling parties in reaching their agreement, and by the trial court in determining that the appellants had not carried their burden to establish lack of good faith.[12]

Nothing in Motiv's presentation in the trial court suggests a contrary result. Its counsel stated during argument that it had no facts to support any ballpark valuation other than that which it had earlier given to Alliance's counsel. Instead, counsel sought a continuance so that it might pursue its outstanding and pending discovery—but that request did not explain how full and complete responses to that discovery would assist in establishing a different "ballpark" amount, or that such an amount might persuade the trial court to reject the settlement before the court. Nor has Motiv addressed Alliance's argument that it was the acts of the individual appellants—acting on behalf of Motiv—which created the issues as to which MDA seeks redress—rather than any affirmative act of Alliance, thus reducing Alliance's culpability.

Motiv's evidentiary argument—that Alliance may not rely on statements made to it by Motiv's counsel because they are

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[12] In reaching this determination, "'[t]he trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.' [Citation.]" (*Gaines v. Fidelity National Title Ins. Co.* (2016) 62 Cal.4th 1081, 1100, fn. omitted; *North County Contractor's Assn. v. Touchstone Ins. Services*, *supra*, 27 Cal.App.4th at p. 1091 [our review is to "determine whether substantial evidence supports the trial court's determination that the settlement here was in the 'ballpark' and made in good faith"]; see *Franklin Mint Co. v. Superior Court* (2005) 130 Cal.App.4th 1550, 1558.)

hearsay—ignores the application here of the evidentiary principle that statements by counsel on behalf of a party come within an exception to the hearsay rule. (Evid. Code, § 1222 [authorized admissions].)

And, at the time the settlement between MDA and Alliance was negotiated and finalized, Motiv had not yet filed its cross-complaint, nor had MDA yet amended its complaint to include damages arising out of Motiv's actions with respect to other projects; therefore, the estimate of the ballpark offered by Motiv's counsel was still the best estimate the parties had.

Appellants rely on *Greshko*, *supra*, 194 Cal.App.3d 822 to support their argument. In *Greshko*, the Salases sued Greshko for damages arising from a traffic accident. Greshko filed a cross-complaint for indemnity against the county and the City of Industry. The Salases settled with the county and the city. The trial court made a determination of good faith settlement and dismissed the cross-complaint. (*Id.* at pp. 827-828.) In that decision, conflicting declarations were presented on the issue of liability. In overturning the trial court's determination that that settlement had been made in good faith, that Court of Appeal ruled the trial court had abused its discretion by placing unjustified reliance on a conclusionary declaration of counsel for one of the settling parties while ignoring a well-reasoned declaration in opposition filed by an expert witness for the opposing party. The Court of Appeal concluded the trial court had essentially ignored the credible evidence as to dangerousness, improperly characterizing it as "'self-serving,'" thereby abusing its discretion. (*Id.* at pp. 832, 833-834.)

In the present case, in addition to the fact that the ballpark estimate was that of opposing counsel, counsel offered no

evidence to suggest either a larger estimate of ballpark parameters or that any discovery responses would alter that estimate. Moreover, the trial court must make its good faith determination upon the evidence and circumstances presented at the time of the settlement rather than upon a hypothetical and unsupported suggestion of a larger future amount. (See *Erreca's v. Superior Court* (1993) 19 Cal.App.4th 1475, 1498.)

Also, as Alliance points out, its counsel Swartz referenced in his declaration facts established during discovery which provided a further basis for his statements regarding the settlement amount. And he explained how he reached certain conclusions based on his experience as an attorney. Thus, unlike the declarations in *Greshko*, Swartz's declarations were not devoid of factual foundation, nor were they "entirely conclusory." (*Greshko*, *supra*, 194 Cal.App.3d at p. 834.)

[**REDACTED**]

Swartz's declarations and supporting documentation provided substantial evidence to support the trial court's finding that the amount of the settlement was "well within the 'ball-park' of Alliance['s] liability in this action." We conclude that the trial court did not abuse its discretion in finding the settlement agreement was entered in good faith. (*PacifiCare of California v. Bright Medical Associates, Inc.*, *supra*, 198 Cal.App.4th at p. 1464; *North County Contractor's Assn. v. Touchstone Ins. Services*, *supra*, 27 Cal.App.4th at p. 1091.)

B. *Denial of a Continuance*

1. *Relevant Legal Principles and Standard of Review*

As stated above, section 877.6 and *Tech-Bilt* provide "the party asserting a settlement is not in 'good faith' within the

meaning of the statute has the burden of proof on that issue. [Citations.] However, the question whether a settlement meets the statutory requirement of 'good faith' presents an issue of fact. [Citations.]" (*City of Grand Terrace v. Superior Court*, *supra*, 192 Cal.App.3d at p. 1264; accord, *County of Los Angeles v. Guerrero* (1989) 209 Cal.App.3d 1149, 1156.) When the motion for determination of good faith settlement is made, the party challenging the determination of good faith may not "possess sufficient factual information to carry its burden of proof as to lack of good faith." (*City of Grand Terrace*, *supra*, at p. 1265.) In that situation, it is appropriate for the party "to move for a continuance of the hearing, if necessary, for the purpose of gathering facts, which could include further formal discovery, to support its statutory burden of proof as to all *Tech-Bilt* factors . . . placed in issue in order that the matter can be fully and fairly litigated." (*Ibid.*)

As a general rule, "[t]he granting [or denying] of a continuance for discovery lies in the discretion of the trial court, whose ruling will not be disturbed in the absence of manifest abuse. [Citation.]" (*Beckman v. Thompson* (1992) 4 Cal.App.4th 481, 487; accord, *Foster v. Civil Service Com.* (1983) 142 Cal.App.3d 444, 448.) Similarly, "[w]e review a trial court's discovery orders for an abuse of discretion." (*MacQuiddy v. Mercedes-Benz USA, LLC* (2015) 233 Cal.App.4th 1036, 1045.) ""'Where there is a basis for the trial court's ruling and the evidence supports it, a reviewing court will not substitute its opinion for that of the trial court. [Citation.]" [Citation.] The trial court's determination will be set aside only when it has been established that there was no legal justification for the order granting or denying the discovery in question.' [Citation.]" (*City*

of King City v. Community Bank of Central California (2005) 131 Cal.App.4th 913, 930-931.)

2. *Application*

Appellants contend they were entitled to discover documents relating to "(a) potential evidence of collusion between Alliance and MDA, and (b) evidence of Alliance's potential share of liability." As to the first category, appellants suggest they should have been allowed to obtain "communications between counsel for Alliance and MDA in order to discover the nature and extent of the negotiations between the two settling parties."

Neither in the trial court nor here have appellants presented any basis for believing there was collusion between MDA and Alliance. At the time the settling parties entered into their settlement agreement, Alliance had not even been sued. The parties had considered the role Alliance played in enabling appellants' wrongdoing and had, the trial court found, settled "for a relatively large sum, well within the 'ball-park' of Alliance['s] liability in this action."

In the trial court, appellants' counsel argued, "The criticism of the pending discovery is: Well, what would it show? I will tell you exactly what it would show. We asked for communications between MDA's counsel and Alliance, and they said: You don't get that. That's privileged. Not anymore. It just got waived. There was a discussion, it's identified here under penalty of perjury in his declaration. If there was a protectable privilege of what was in that discussion, it is now waived.

"I want to know what did that [$3 to $10] million [claim of damages] get attached to? Was that [$3 to $10] million based on the Mars 2020? The Mars 2020 plus [another contract]? I don't

know. That's exactly the kind of math that needs to be done to determine whether [$]200K is in the ballpark or not."

Counsel failed to explain how this information would show the settlement amount—arrived at before the litigation was "expanded"—was not in the ballpark when it was based on the entire amount of damages claimed at the time of settlement, rather than on just a portion of those damages. Nor did counsel indicate how the discovery would establish collusion. Thus, as the trial court found, appellants failed to show "what value any additional discovery would have." (*County of Los Angeles v. Guerrero*, *supra*, 209 Cal.App.3d at p. 1159; cf. *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 255 [in summary judgment context, no abuse of discretion in denying continuance where counsel "failed to explain how the outstanding discovery was necessary for [the] appellant's opposition"].)

With respect to the second category of information, as the trial court noted, appellants already had information as to Alliance's role in causing MDA's damages; it was the individual appellants—employees of appellant Motiv—who are alleged to have misappropriated proprietary information belonging to MDA from Alliance. Thus, they had access to communications between themselves and Alliance, including Byrens's representation that Lindenfeld could utilize old cost data because "everything that resides on our servers is ours." In other words, they had the evidence they needed to prove, if possible, "the settlement was 'so poorly related to the value of the case as to impose a potentially disproportionate cost on'" appellants. (*Rankin v. Curtis* (1986) 183 Cal.App.3d 939, 947.) Again, appellants have failed to show "what value any additional discovery would have." (*County of Los Angeles v. Guerrero*, *supra*, 209 Cal.App.3d at p. 1159.)

Appellants have failed to show that the additional discovery was necessary to support its burden of proving the settlement was not in good faith. Based on the foregoing, we find no abuse of discretion in the trial court's denial of a continuance for appellants to conduct additional discovery. (*City of Grand Terrace v. Superior Court*, *supra*, 192 Cal.App.3d at p. 1265.)

C. *Denial of Leave To Amend*

At the hearing on Alliance's motion for determination of good faith settlement, appellants' counsel stated that if the court granted the motion, the litigation against Alliance was concluded.[13] He then added that "Alliance interestingly argues in reply that the MOU [memorandum of understanding between Motiv and Alliance regarding access to AllianceWeb] is, and this is their words, is unquestionably a contract. So here's what I'd like your honor to do. If you're inclined to go with the tentative and sustain the demurrer, I'd like leave to amend, because I intend to bring a breach of contract cross-complaint, because Alliance tells me that it's unquestionably a contract. And if that's the case, then that's what I'll do."

The trial court did not sustain Alliance's demurrer but overruled it as moot in light of the dismissal of the cross-complaint.

Appellants now contend the trial court abused its discretion in denying them leave to amend because they can state a cause of action for breach of contract.

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[13] Counsel for appellants stated in part: "If you grant the good-faith settlement, then you're done."

Pursuant to section 473, subdivision (a)(1), "[t]he court may . . . , in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading . . . ." And, "'[t]here is a policy of great liberality in permitting amendments to the pleadings at any stage of the proceeding. [Citations.] An application to amend a pleading is addressed to the trial judge's sound discretion. [Citation.] On appeal the trial court's ruling will be upheld unless a manifest or gross abuse of discretion is shown. [Citations.] The burden is on the [appellants] to demonstrate that the trial court abused its discretion.' [Citation.]" (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945; see also *Duchrow v. Forrest* (2013) 215 Cal.App.4th 1359, 1377.)

"To demonstrate an abuse of discretion, the burden is on [appellants] to show there is a reasonable possibility that the proposed amendment will cure the defect [citation] by showing in what manner the amendment to the complaint can be amended and how that amendment will change the legal effect of the pleadings. [Citation.] [¶] We note [that appellants] did not provide a proposed amendment [that would state a cause of action for breach of contract] and that omission alone supports the trial court's order denying leave to amend. [Citation.]" (*Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 444; see also *Baldwin v. AAA Northern California, Nevada & Utah Ins. Exchange* (2016) 1 Cal.App.5th 545, 559.)

Appellants claim on appeal they can state a viable claim for breach of contract. Assuming the MOU is a contract and

appellants performed under the contract,[14] the question is whether appellants can plead a breach by Alliance and resulting damages which allegations do not constitute a disguised attempt "to recover derivative damages." (*Norco Delivery Service, Inc. v. Owens-Corning Fiberglas, Inc.*, *supra*, 64 Cal.App.4th at p. 964.)

Appellants argue "Alliance breached the MOU because, as alleged by MDA, Alliance did not have the authority to allow Motiv access to all of the documents in AllianceWeb. As a result, Motiv has been damaged in that it has faced legal exposure and incurred attorney's fees defending the claims of MDA which are based upon Motiv's alleged unauthorized access to documents in AllianceWeb."

"The elements of a cause of action for indemnity are (1) a showing of *fault* on the part of the indemnitor and (2) resulting damages to the indemnitee for which the indemnitor is contractually or equitably responsible. [Citation.]" (*Expressions at Rancho Niguel Assn. v. Ahmanson Developments, Inc.* (2001) 86 Cal.App.4th 1135, 1139; accord, *Stockton Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437, 459.) The gravamen of a cause of action for indemnity is that the indemnitee has suffered "'an actual monetary loss through payment of a judgment'" (*Major Clients Agency v. Diemer* (1998) 67 Cal.App.4th 1116, 1126; accord, *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 110), and the indemnitor should be responsible for its proportionate share of the judgment (*Bostick v.*

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[14] "[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) [the] plaintiff's performance or excuse for nonperformance, (3) [the] defendant's breach, and (4) the resulting damages to the plaintiff. [Citation.]" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.)

Flex Equipment Co., Inc. (2007) 147 Cal.App.4th 80, 129; *Fleck v. Bollinger Home Corp.* (1997) 54 Cal.App.4th 926, 931.)

We agree with the trial court that appellants' proposed breach of contract cause of action is nothing more than a "disguised or artfully pleaded claim[] for indemnity" (*Norco Delivery Service, Inc. v. Owens-Corning Fiberglas, Inc.*, *supra*, 64 Cal.App.4th at p. 964), as it seeks to have Alliance pay its share of any damages appellants may be forced to pay to MDA. Accordingly, the trial court did not abuse its discretion in denying leave to amend. (*Brenner v. City of El Cajon*, *supra*, 113 Cal.App.4th at p. 444.)

DISPOSITION

The judgment is affirmed. Alliance shall recover its costs on appeal.

GOODMAN, J.*

We concur:

GRIMES, Acting P. J. STRATTON, J.

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* Retired judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.