SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE Civil Complex Center 751 W. Santa Ana Blvd Santa Ana, CA 92701	
SHORT TITLE: Papageorges vs. Dana Point Harbor Partners, LLC	
CLERK'S CERTIFICATE OF MAILING/ELECTRONIC SERVICE	CASE NUMBER: **30-2021-01222794-CU-CO-CXC**

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SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CIVIL COMPLEX CENTER

MINUTE ORDER

DATE: 06/29/2023 TIME: 05:03:00 PM DEPT: CX103

JUDICIAL OFFICER PRESIDING: Lon F. Hurwitz
CLERK: M. Diaz
REPORTER/ERM: None
BAILIFF/COURT ATTENDANT: . None

CASE NO: **30-2021-01222794-CU-CO-CXC** CASE INIT.DATE: 09/22/2021
CASE TITLE: **Papageorges vs. Dana Point Harbor Partners, LLC**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Contract - Other

EVENT ID/DOCUMENT ID: 74047427

EVENT TYPE: Under Submission Ruling

APPEARANCES

There are no appearances by any party.

The Court, having taken Defendant Dana Point Harbor Partners, LLC Motion for Summary Judgment and /or Adjudication under submission on 06/15/2023 and having fully considered the arguments of all parties, both written and oral, now makes its ruling.

A copy of the ruling is attached and incorporated herein for reference.

Court orders clerk to give notice.

21-01222794 Papageorges vs Dana Point Harbor Partners, LLC

Motion for Summary Judgment and/or Adjudication

Moving Party: Defendant Dana Point Harbor Partners, LLC

Responding Party: Plaintiffs N. Papageorges, D. Groves, and A.J. Montrella

RELIEF SOUGHT: Moving party seeks summary judgment, or summary adjudication on the first, second, third, and fifth causes of action alleged in the Complaint. (The fourth cause of action was dismissed when Plaintiffs did not amend the Complaint after the Court sustained Defendant's demurrer on March 18, 2022. (ROA 83.)). Judgment of Dismissal was entered in favor of Defendant County of Orange on 7/14/22 (ROA 99) based upon the Court sustaining the County's Demurrer on 3/21/22.

FACTS/OVERVIEW: On September 22, 2021, Plaintiffs N. Papageorges, D. Groves, and A. J. Montrella (collectively, "Plaintiffs") filed a Class Action Complaint against Dana Point Harbor Partners, LLC and County of Orange alleging the following causes of action:

1. Injunctive Relief re Violation of State Tidelands Grant (against Dana Point Harbor Partners);

2. Breach of Master Ground Lease and Breach of Slip License Agreements (against Dana Point Harbor Partners);

3. Unfair Business Practices (against Dana Point Harbor Partners);

4. Constructive Eviction (against Dana Point Harbor Partners); and

5. Declaratory Relief (against all Defendants)

Plaintiffs are boaters who have licensed the right to utilize boat slips in the Dana Point Harbor ("Harbor") pursuant to Slip License Agreements ("SLAs"). In 1961, the State of California granted the

Harbor to the County of Orange ("County") in trust through a State Tidelands Grant ("Tidelands Grant"), which mandates that the granted land be used "only for the establishment, improvement, and conduct of a harbor" and related purposes, and "for the promotion and accommodation of commerce and navigation, and for recreational use, public park, parking, highway, playground, and business incidental thereto." The Tidelands Grant further states that in the management or operation of the Harbor, "no discrimination in rates, tolls, or charges ... shall ever be made, authorized, or permitted by the county ...." (UMFs 1-4)

In 1975, the County entered into leases with T.B.W. Company ("TBW") and Dana Point Marina Company ("DPMC") to maintain and operate the marinas in the Harbor, whereby the County was paid a minimum annual rental plus a percentage of the boat slip rental fees. Slip fees were determined and set by TBW and DPMC based on enumerated criteria, including supply and demand, slip vacancies, and market prices charged at competing or comparable businesses. After commissioning a study to evaluate operations alternatives that would allow for the marinas to increase revenues to the County, it was determined that instead of leasing the marinas, it would be financially advantageous for the County to retain possession of them and enter into agreements with an outside firm to manage them on the County's behalf. (UMFs 6-12).

After the original DPMC and TBW leases expired in June 2001 and October 2005 respectively, the County entered into operating and management agreements with the entities instead of re-leasing the marinas to them. Under these agreements, TBW and DPMC managed the marinas on behalf of the County while the County retained possession and control of the area. In addition, the agreements included a new method for determining the market rate for slip fees that required the County's approval. The County memorialized this method in a 2001 Minute Order. (UMFs 13-17.)

In 2006, the County approved a plan for the revitalization and reconstruction of the Harbor whereby, under a public-private

partnership structure, a private developer would complete the project. Defendant Dana Point Harbor Partners ("Defendant") was ultimately selected as the developer of the project and operator of the Harbor. The County and Defendant entered into an agreement, known as the Master Ground Lease Agreement ("Master Agreement"), governing Defendant's use and management of the Harbor, including slip rentals. Under this Master Agreement, the Defendant was granted the right to increase the slip fees to market rate, as such rate was "reasonably" determined by Defendant, and the County was allowed to review the methodology for determining any proposed increase before it took effect. In addition, notice of any proposed increase had to be provided to boaters. (UMFs 24, 25, 29, 30, 33.)

In or around June 2021, the Defendant notified boaters, including the Plaintiffs, of slip fee increases that were to take effect on October 1, 2021. More than a month before announcing the increases, Defendant provided the County with notice of the proposed increases and an explanation of the methodology used to determine the new rates. The County concluded the increased rates were reasonable and consistent with the market rate, and that the methodology used by the Defendant was reasonable and not in violation of the Master Agreement. (UMFs 45, 46, 51, 52.)

Plaintiffs filed the current action on September 22, 2021, alleging that Defendant breached the terms of the Master Agreement by using an unreasonable methodology to determine the market rate underlying the proposed slip fee increase. Plaintiffs also generally allege that the slip fee increase violates the terms of the SLAs, as well as the Tidelands Grant and the 2001 County Minute Order.

PROCEDURAL ISSUE: The County was dismissed from the litigation on March 21, 2022, after the Court sustained a demurrer as to the fifth cause of action for Declaratory Relief as to the County. Although the demurrer was sustained with leave to amend, Plaintiffs did not file an amended pleading, and therefore a judgment of dismissal was entered as to the County. (ROA 99.)

REQUEST FOR JUDICIAL NOTICE (ROA 333)

Plaintiffs ask the Court to take judicial notice of: (1) the County Minute Order of March 6, 2001 (Exh. 104); (2) the County Minute Order of June 19, 2001 (Exh. 105); and (3) the Court's Order on Preliminary Injunction (Exh. 113 / ROA 64).

Defendant objects to Exhibit 104 on the ground it is not properly certified or authenticated, and to Exhibits 104 and 105 on the ground that judicial notice should not be taken of the truth of the contents in these documents. (ROA 362)

Judicial notice is GRANTED as to Exhibits 105 and 113 pursuant to Evidence Code section 452, subdivisions (c) and (d), with the caveat that the Court is not judicially noticing the truth of the matters asserted in Exhibit 105. Judicial notice is DENIED as to Exhibit 104 on the ground it is not properly authenticated.

EVIDENTIARY OBJECTIONS

Plaintiffs' Objections: (ROA 339)

It is noted that Plaintiffs did not properly number their evidentiary objections. This is in contravention of CRC rule 3.1354(b), which requires that written objections "be numbered consecutively." Therefore, the Court may either overrule Plaintiffs' objections or decline to rule on them. (See, Joshi v. Fitness Int'l, LLC (2022) 80 Cal.App.5th 814, 830, fn. 9; Santos v. Crenshaw Mfg., Inc. (2020) 55 Cal.App.5th 39, 46.)

The Court, notwithstanding Plaintiffs' failure to comply with CRC 3.1354(b), provides the following rulings on said objections despite said evidence and objections having no material effect on the Court's ultimate decision on these Motions. All references below are to the paragraph numbers and specific sentence position within the paragraph (first, second, third, etc.).

Plaintiffs object to portions of the Declaration of Joseph Ueberroth and the Declaration of Thomas Miller.

Ueberroth is the owner and President of Bellwether Financial Group, a private equity firm that is one of three members and managers of Defendant, Dana Point Harbor Partners, LLC. He attests he is involved in high-level decision-making and oversight,

and his staff is responsible for the day-to-day management of the marinas. (Decl. of Joseph Ueberroth, ¶ 1.)

Miller was a Supervising Deputy County Counsel until July 2018, and provided day-to-day advice to County's Board of Supervisors regarding the Tidelands Grant and the County's public trust obligations. Since July 2018, Miller has been the Chief Real Estate Officer for Orange County and is manages a team that administers and transacts all County real estate matters. He attests that his position requires him to be familiar with the history of the Harbor and its operations. (Decl. of Thomas Miller, ¶¶ 1, 3.)

As to Plaintiffs' Objections, the Court rules as follows:

Declaration of Joseph Ueberroth

Para. 6, 2nd sentence: Overrule

Para. 6, 3rd sentence: Sustain – hearsay

Para. 9, 1st sentence: Sustain – lack of personal knowledge

Para. 9, 4th sentence: Sustain – lack of personal knowledge

Para. 10, 3rd sentence: Overrule

Para. 11, 3rd sentence: Overrule

Para. 12, 3rd sentence: Overrule

Para. 14, 1st sentence: Sustain – hearsay

Para. 15 (in its entirety): Overrule

Para. 17 (in its entirety): Sustain – lack of personal knowledge

Para. 18 (in its entirety): Sustain – irrelevant

Para. 20 (in its entirety): Overrule

Para. 21, last 2 sentences: Sustain – irrelevant

Para. 22, last 3 sentences: Sustain – irrelevant

Para. 23 (in its entirety): Sustain – irrelevant

Declaration of Thomas Miller

Para. 3 (in its entirety): Overrule

Para. 5, last sentence: Overrule

Para. 9, first 3 sentences: Overrule

Para. 13, first 2 sentences: Overrule

Para. 15, last 2 sentences: Overrule

Para. 18 (in its entirety): Overrule

Para. 20, 1st sentence: Sustain – irrelevant

Para. 23 (in its entirety): Overrule

Para. 24, 1st sentence: Overrule

Para. 25 (in its entirety): Overrule

Para. 28, last 2 sentences: Sustain – irrelevant

Para. 29 (in its entirety): Overrule

Para. 30, last sentence: Overrule

Para. 32, last sentence: Overrule

Para. 33, first 2 sentences: Sustain – lack of foundation (2nd sentence)

Para. 35 (in its entirety): Overrule

Para. 37, last sentence: Overrule

Para. 38 (in its entirety): Overrule

Para. 41, 3rd sentence: Overrule

Para. 43, 2nd-4th sentences: Overrule

Para. 44 (in its entirety): Sustain – hearsay

Para. 45, last 3 sentences: Overrule

Para. 46 (in its entirety): Overrule

Para. 47 (in its entirety): Overrule

<u>Defendant's Objections (ROAs 357, 361)</u>

Defendant has filed evidentiary objections to the declarations proffered by Plaintiffs in support of their opposition. (ROA 361)

As a preliminary matter, Defendant objects to and moves to strike in their entirety the Declarations of J. Richard Donahue, Robert Langan, Anne Eubanks, Robert Beck, John Kossa, Michael Heinemeyer, and Tamara Tatich, on the grounds they are replete with irrelevant and baseless opinions and statements, they are based on hearsay, and they include improper and unduly prejudicial language outside the scope of the motion. OVERRULED.

Defendant also states specific objections, and the rulings are as follows:

Declaration of J. Richard Donahue

Objects to declaration in its entirety on ground that Donahue has not been disclosed or certified as an expert, has not established his expertise, and cannot properly provide expert testimony – SUSTAINED.

1. Sustain – improper expert testimony, lack of foundation
2. Sustain – improper expert testimony, lack of foundation
3. Sustain – improper expert testimony
4. Sustain – improper expert testimony, lack of foundation
5. Sustain – improper expert testimony, lack of foundation
6. Sustain – improper expert testimony, lack of foundation
7. Sustain – improper expert testimony, lack of foundation
8. Sustain – improper expert testimony, lack of foundation
9. Sustain – improper expert testimony
10. Sustain – lack of foundation

Declaration of Robert Langan

Objects to declaration in its entirety on ground that Langan is not a party, has not been disclosed as an expert, and has not been identified as a witness – OVERRULED.

11. Sustain – lack of foundation

12. Sustain – improper opinion

13. Sustain – improper opinion

14. Sustain – improper opinion

15. Sustain – hearsay, lack of foundation

16. Sustain – improper opinion

17. Sustain – improper opinion

18. Sustain – improper opinion

19. Sustain – improper opinion

20. Sustain – improper opinion

Declaration of Anne Eubanks

Objects to declaration in its entirety on ground that Eubanks does not own a boat in the Harbor, and the Dana Point Boaters Association, of which she is the President, is not a party to this action – OVERRULED.

21. Sustain – irrelevant, hearsay

22. Sustain – hearsay, lack of foundation

23. Sustain – improper opinion

24. Sustain – lack of foundation/failure to authenticate

25. Sustain – improper opinion

26. Sustain – lack of foundation, speculation

27. Sustain – lack of foundation

28. Sustain – irrelevant

29. Sustain – irrelevant

30. Sustain – lack of foundation

31. Sustain – lack of foundation, speculation

Declaration of Nick Papageorges

Objects to declaration in its entirety on grounds none of the statements are relevant and they contain unduly prejudicial language – OVERRULED.

32. Sustain – lack of foundation

33. Sustain – lack of foundation

34. Sustain – lack of foundation

35. Sustain – irrelevant, prejudicial

36. Sustain – speculation, argumentative

Declaration of Robert Beck

Objects to declaration in its entirety on ground it is irrelevant – OVERRULED.

37. Sustain – lack of foundation

Declaration of John Kossa

Objects to declaration in its entirety on ground it is irrelevant – OVERRULED.

38. Sustain – lack of foundation

39. Sustain – irrelevant

Declaration of Michael Heinemeyer

Objects to declaration in its entirety on ground it is irrelevant – OVERRULED.

40. Sustain – irrelevant

41. Sustain – irrelevant

Declaration of Tamara Tatich

Objects to declaration in its entirety on ground it is irrelevant – OVERRULED.

42. Sustain – irrelevant

43. Sustain – irrelevant

Declaration of Dennis Winters

44. Overrule

45. Sustain – improper opinion

46. Overrule

47. Sustain – hearsay

48. Sustain – lack of personal knowledge

49. Sustain – lack of personal knowledge

50. Sustain – lack of foundation, hearsay

51. Sustain – improper opinion

52. Sustain – lack of personal knowledge, hearsay

53. Sustain – lack of personal knowledge

54. Sustain – improper opinion, lack of foundation

55. Sustain – lack of foundation

56. Sustain – improper opinion, lack of foundation

57. Sustain – improper opinion

58. Sustain – hearsay

59. Sustain – lacks personal knowledge

60. Sustain – improper opinion

Exhibit 105

Sustain – not authenticated

Exhibit 116

Sustain – lack of foundation

In reply, Defendant also filed a document entitled "Response and Objections to Plaintiffs' Additional Undisputed Facts" (ROA 357)

wherein Defendant purports to generally "object" that Plaintiffs' additional facts are largely irrelevant. In addition, within the format of a "reply" separate statement, Defendant states its specific "objections." Defendant's objections are improperly formatted and stated, and the Court will decline to rule on them.

"[A] separate statement is not evidence; it refers to evidence submitted in support of or opposition to a summary judgment motion." (Jackson v. County of Los Angeles (1997) 60 Cal.App.4th 171, 178, fn.4.) For this reason, an objection to a material fact set forth in a separate statement is not an objection to specific evidence, and thus, there is no basis for sustaining the objection. Rather, such an "objection" is only an attack on the contentions made by a party in opposing the other party's separate statement. Therefore, any attempt by a party to object to argument or undisputed material facts should be disregarded or overruled as not being a proper evidentiary objection.

Moreover, California Rules of Court, Rule 3.1354, subdivision (b) provides in relevant part: "All written objections to evidence must be served and filed separately from the other papers in support of or in opposition to the motion. Objections on specific evidence may be referenced by the objection number in the right column of a separate statement in opposition or reply to a motion, but the objections must not be restated or reargued in the separate statement." (CRC, Rule 3.1354(b) [emphasis added].)

"The rules requiring evidentiary objections to be filed separately and not repeated in the separate statement are to allow the trial court to consider each piece of evidence and all of the objections applicable to that piece of evidence separately." (Hodjat v. State Farm Mutual Automobile Ins. Co. (2012) 211 Cal.App.4th 1, 9.) "[I]nterposing objections into the separate statement defeats the goal of allowing the trial court to quickly and efficiently determine what particular piece of evidence is admitted and what is not. This is because the separate statement is focused on individual facts, which may be supported by the same or different pieces of evidence. A trial court would be forced to

wade through all the facts in order to rule on a particular piece of evidence." (Id.)

Accordingly, if a party states its objections in its separate statement, in violation of Rule 3.1354(d) prohibition against the practice, then it is not an abuse of discretion for the court to refuse to rule on the objections. (Hodjat, supra, 211 Cal.App.4th at p. 8.) It is also not an abuse of discretion for the court to refuse to give a party a second chance at filing properly formatted papers if it is clear the party is aware of the requirements contained in the rules. (Id. at p. 9.)

ANALYSIS

Legal Authority

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

"First, and generally, from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that

he is entitled to judgment as a matter of law." (Aguilar, supra, 25 Cal.4th at p. 850.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (Ibid.)

"Second, and generally, the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (Aguilar, supra, 25 Cal.4th at p. 850; § 437c, subd. (p)(1) [plaintiff meets its burden by proving each element of its cause of action].) Unless the moving party meets its initial burden, summary judgment cannot be ordered, even if the opposing party has not responded sufficiently, or at all. (Vesely v. Sager (1971) 5 Cal.3d 153, 169-170, superseded by statute on another point, as noted in Ennabe v. Manosa (2014) 58 Cal.4th 697, 701, 707; FSR Brokerage, Inc. v. Superior Court (1995) 35 Cal.App.4th 69, 73, fn. 4.)

Merits

2nd COA - Breach of Master Ground Lease and Breach of Slip License Agreements

1. Slip Fee Agreements ("SLAs")

Plaintiffs essentially do not dispute that the SLAs permit an increase in slip fee based on certain criteria. (See, Dispute to UMF 60.) The SLAs expressly state that the "Slip Fee structure ... is based upon the greater of the length of the vessel overall or the size of the slip assigned." (Def. Exh. 16, AOE-0284, Sec. 5.a.) In addition, the SLAs provide in part: "Owner understands that [Defendant] may increase the Slip Fee and/or other fees at any time upon thirty (30) days' notice .... Upon notification of an

increase in any fee including the Slip Fee, Vessel Owner may elect to provide 30 days written notice of termination of this Agreement." (Id. at Sec. 5.b.)

It is also undisputed that in June 2021, Defendant notified the boaters, including Plaintiffs, of the slip fee increases that were to take effect on October 1, 2021. (UMF 45; Miller Decl., ¶ 36; Def. Exh. 22, AOE-0350, Papageorges Depo., 79:19-21.)

2. Third-Party Beneficiary Issue

The three elements of the third-party beneficiary doctrine are: (1) whether the third party will benefit from the contract, (2) whether a motivating purpose of the contracting parties was to provide a benefit to the third party, and (3) whether permitting a third party to bring its own breach of contract action against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties. (Goonewardene, supra, 6 Cal.5th at p. 830.)

Regarding the second element, the contracting parties must have a "motivating purpose" to benefit the third party—not just the knowledge that a benefit to the third party may arise from the contract. Regarding the third element, it focuses on whether, taking into account the language of the contract and all of the relevant circumstances under which the parties entered into the contract, allowing the third party to bring a breach of contract action is "'consistent with the objectives of the contract and the reasonable expectations of the contracting parties' ... [i.e.] a judgment regarding the potential effect that permitting third party enforcement would have on the parties' contracting goals, rather than a determination whether the parties actually anticipated third party enforcement at the time the contract was entered into." (Goonewardene, supra, 6 Cal.5th at pp. 830-831.)

Here, although the Master Agreement will ***generally benefit*** licensees under the SLAs (including Plaintiffs) and other members of the public, this is not sufficient to authorize Plaintiffs to sue Defendant under the third-party beneficiary doctrine.

It is noted that in her November 5, 2021 Ruling denying Plaintiffs' Motion for Preliminary Injunction, Judge Sanders stated that she was "inclined to find Plaintiffs were intended third-party beneficiaries of the provision limiting prices to "market rate." (See, Page 2 of Minute Order dated 11/5/2021.) Contrary to Plaintiffs' assertion, this statement does not constitute a dispositive finding by the Court. Nevertheless, as discussed further below, this Court must respectfully disagree with Judge Sanders' "inclination", as well as her finding that the facts here are analogous to the facts in Zigas v. Superior Court (1981) 120 Cal.App.3d 927.

The facts in Zigas are distinguishable from the current litigation. In Zigas, the underlying contract was between the Department of Housing and Urban Development and landlords of apartment buildings financed by federally insured mortgages. The contract obligated the landlords not to charge their tenants more than the HUD-approved rent schedule. The tenants, under the third-party beneficiary doctrine, filed a class action against the landlords alleging they breached the contract by charging more than the rent schedule. The tenants argued that the contract manifested an intent to make them beneficiaries of the landlords' promise not to charge rents in excess of the rent schedule. (Zigas, supra, 120 Cal.App.3d at pp. 830-831.) The appellate court held that the tenants had standing to sue as third-party beneficiaries because the purpose of the contract between HUD and the landlords (as well as the legislative purpose of the statute underlying the federally-insured mortgages) was "narrow and specific: to provide moderate rental housing for families with children." (Id. At p. 838.) In that regard, the appellate court found that the contractual provisions prohibiting rent increases over the approved rent schedule "were obviously designed to protect the tenant against arbitrary increases in rents ... [and were] not intended to benefit the government as a guarantor of the mortgage[s]." (Id. at pp. 838-839.) In addition, the appellate court noted that the contract entitled HUD to seek restitution on behalf of any overcharged tenants. (Id. at p. 839.)

This is not the situation in the current litigation. Although the parties to the Master Agreement may have intended for Plaintiffs and other boaters to benefit from the "market rate" limitation provision, the motivating purpose of the Master Agreement was not to protect Plaintiffs and other boaters against unreasonable slip fee increases, but rather to facilitate the redevelopment of the Harbor.

First, it is noted that Section 11.9—the operative provision at issue— does not pertain exclusively to slip fees. Instead, Section 11.9 provides in relevant part: "[Defendant] shall at all times maintain a complete list or schedule of the prices charged by [Defendant] for all goods or services ... supplied to the public on or from the Property, whether the same are supplied by Lessee or be its Sublessees, assignees, concessionaires, permittees or licensees." (Def. Exh. 6, AOE-0213.) It is in this context that Section 11.9 then states: "Said prices will be 'market rate' pricing ***as reasonably determined by [Defendant]***; provided, however, that in all events such prices shall be consistent with the limitations on pricing as mandated by the Tidelands Grant." (Ibid.) [Emphasis added].

Miller attests that the wording in Section 11.9 was "deliberate" such that any and all previous methodologies regarding rates in the Harbor are no longer relevant "and are superseded by Section 11.9"—including the methodology approved in the 2001 Minute Order. (Miller Decl., ¶ 25.) In addition, Miller attests that the word "reasonable" is intended to qualify the word "methodology"—i.e., Defendant's methodology for determining "market rate" must be "reasonable," not the prices themselves, and the County's review is limited to determining whether Defendant's methodology for determining prices, including the slip fees, is reasonable based on the information provided by Defendant. (Ibid.)

The only express language in Section 11.9 related to slip fees pertains to the notice required to be given to the boaters: "In addition, ... with respect to the Slip Leases specifically, [Defendant] shall be required to provide advance written notice

to County and all tenants and/or licensees under existing Slip Leases of any raises in the slip rental rates, which notice shall include [Defendant's] rationale for such raise as well as its methodology for determining the same." (Def. Exh. 6, AOE-213.) Miller attests that this provision was included "so that the process was open and public to the boaters"—not so that the boaters would be third-party beneficiaries of the provision. (Miller Decl., ¶ 35.) It is also likely that the County and Defendant included this language in Section 11.9 to comply with the 30-day notice provision in the SLAs regarding fee increases.

But even if it is assumed that it was intended for Plaintiffs to generally obtain a benefit from Section 11.9 of the Master Agreement, this is not sufficient to allow Plaintiffs to sue Defendant under the third-party beneficiary doctrine. It must also be found that the motivating purpose of the County and Defendant was to provide such a benefit to Plaintiffs, not just that a benefit to Plaintiffs may follow from the Master Agreement. (See, Goonewardene, supra, 6 Cal.5th at pp. 830, 835.)

In this instance, the relevant motivating purpose of Section 11.9 cannot be determined in isolation, but must be determined within the context of the entire Master Agreement. As noted by Plaintiffs, Section 3.3.1 states in relevant part that "County's objective in entering into this Lease is the complete and continuous use of the facilities and amenities ... by and for the benefit of the public ...." (Def. Exh. 6, AOE-0151.) But the remainder of that sentence states that County's objective is also "for the generation and realization by County of revenue therefrom." (Ibid.) Section 3.3.1 goes on to state: "Accordingly, [Defendant] agrees and covenants that it will (a) operate the Property and Improvements ... fully and continuously ... to accomplish these objectives ... and (c) use commercially reasonable efforts so that County may obtain maximum revenue therefrom as contemplated by this Lease." (Ibid.)

Section 5.3.3 further clarifies the parties' objectives and provides, in part: "[Defendant] acknowledges that the principal inducement to County to enter into this Lease is the timely

commencement, performance and completion by [Defendant] of the Redevelopment Work." (Def. Exh. 6, AOE-0170.) The Recitals also indicate that the primary purpose of the Master Agreement was to facilitate the redevelopment and renovation of the Harbor, including the marinas. (Def. Exh. 6, AOE-0124.)

Plaintiffs have not shown that a motivating purpose of the Master Agreement was to benefit them. Instead, based on all of these provisions, it appears the motivating purpose of the parties in entering into the Master Agreement was for Defendant to manage and pay for the redevelopment and renovation of the marinas, for Defendant to use the improvements for the operation and management of the marinas, and for the County to ultimately take title to all of the improvements upon the expiration of the contract term. (Id., at AOE-0146, Sec. 2.3.1.)

Nevertheless, even if a motivating purpose of Section 11.9 of the Master Agreement was to provide a benefit to Plaintiffs regarding the amount of the slip fees, it still would not follow that Plaintiffs would be entitled to sue Defendant for breach of contract under the third-party beneficiary doctrine. It is inconsistent with the objectives of the Master Agreement and the reasonable expectations of the contracting parties to permit Plaintiffs to sue Defendant for an alleged breach of the Master Agreement. (See, Goonewardene, supra, 6 Cal.5th at pp. 835-836.)

Moreover, as held in Marina Tenants Assn. v. Deauville Marina Development Co. (1986) 181 Cal.App.3d 122, 132-133, Plaintiffs cannot have greater rights than those possessed by the County under the Master Agreement, and Plaintiffs must take the Master Agreement as they find it. For Plaintiffs to seek a redetermination of the slip fees after the County's approval of Defendant's methodology "is to arrogate to [Plaintiffs] a right that does not exist under the [Master Agreement], and further, would subject the [Defendant's] activities to a two-tier review system." (Ibid.) Indeed, under Plaintiffs' interpretation, other third parties could sue Defendant for an alleged breach of the Master Agreement if they disagreed with the methodology Defendant used to determine "market rate" pricing for other goods or services

supplied at the Harbor. Allowing Defendant's methodologies in determining market rate pricing to be challenged twice—once by the County and again by third parties—would make Defendant's performance substantially more burdensome. (See, Marina Tenants Assn., supra, 181 Cal.App.3d at p. 133.)

Here, if Defendant breached the Master Agreement in determining market rate for the slip fees, the County had the ability to reject Defendant's methodology as unreasonable, and even pursue a breach of contract action against Defendant if Defendant caused the County to violate its obligations under the Tidelands Grant. But, it is noted that **the County has stated no such breach occurred**. Miller attests that the County concluded the methodology used by Defendant in comparing slip rates at the Harbor to other Orange County marinas "was reasonable based upon the market for users and slip licensees in the Harbor and therefore not in violation of the Lease." (See, Miller Decl., ¶ 38.)

Although the County has not proffered any other evidence related to its approval of Defendant's methodology, Miller's declaration is sufficient, as well as the fact that the County has not sued Defendant for any such breach of the Master Agreement.

Nevertheless, even if Defendant's methodology was not reasonable and the slip fee increases are not market rate, Plaintiffs do not have the right assert this claim. The County apparently found the methodology reasonable, and as a result, that Defendant had not breached the terms of the Master Agreement. Once the County made this determination, it effectively became bound by that decision. It is noted that Plaintiffs have not alleged that Defendant charged slip fees in excess of the market rate pricing that was calculated using a methodology found reasonable by the County. Plaintiffs cannot seek a redetermination of Defendant's methodology because they do not have that right under the Master Agreement. (Although Plaintiffs have alleged that the County failed to enforce the terms of the Master Agreement by failing to reign in Defendant's slip fee

increases, it is noted that the County is no longer a party to this litigation.)

3. 2001 Minute Order Not Binding

Plaintiffs' reliance on the 2001 Minute Order is misplaced. (See, Pltfs. Appdx. Of Evid., p. 125, Exh. 104.) The 2001 Minute Order reflects an action taken by the County's Board of Supervisors to approve the revision of the then-current policy regarding market pricing for boat slip rentals. The revision was related to language in the clause entitled "Boat Slip Prices" in the then-governing operating agreements. The clause included specific procedures for boat slip price adjustments "intended to ensure that prices charged are fair and reasonable ...." (Id. at p. 128.) It was in this context that the County's Public Facilities & Resources Department recommended that the Board of Supervisors utilize the procedures in the operating agreements as the basis for revising the then-current Board policy on market pricing for marinas in the Harbor. Clearly, the 2001 Minute Order was intended only as a companion action to the then-governing operating agreements, and it was not an ordinance that operated independent of those underlying agreements.

Since those operating agreements were superseded by the Master Agreement, the 2001 Minute Order is no longer applicable.

4. Increases Do Not Violate Tidelands Grant

Plaintiffs allege the slip fee increases violate the Tidelands Grant because they limit public access based on income and wealth; and limit the availability of boat slips "to those who can afford inflated, non-market prices ..." (Compl., ¶ 35.) However, Plaintiffs' allegations in this regard must fail.

The Tidelands Grant, as codified in Section 1 of Chapter 321 of the Statutes of 1961 (as amended), provides in relevant part: "That in the management, conduct, or operation of the harbor ... no discrimination in rates, tolls, or charges or in facilities for any use or service in connection therewith shall ever be made, authorized, or permitted by the county or its successors." (Exh. G to Def. Exh. 1.)

The most neutral definition of "discrimination" is "differential treatment; [especially] a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored." (Black's Law Dictionary (8th ed., Thomson-West), p. 500.) Usually, the term arises in a strict scrutiny constitutional analysis, and refers to classifications that disadvantage a "suspect class" or impinge on the exercise of a "fundamental right." (See, e.g., Jensen v. Franchise Tax Bd. (2009) 178 Cal.App.4th 426, 424.) However, even to the extent that indigency may underlie a claim of discrimination, there is no case authority holding that obtaining a license to use a boat slip in a harbor is a "fundamental right." (See, e.g., Serrano v. Priest (1971) 5 Cal.3d 584—Supreme Court afforded constitutional protection to students from poor districts because state law diminished their fundamental right to an education equal to that of wealthy districts.)

Based on the above, Defendant has met its evidentiary burden, and Plaintiffs have failed to establish the existence of any triable issues of material fact. Therefore, summary adjudication must be granted on the second cause of action.

3rd COA - Unfair Business Practices

The Unfair Competition Law ("UCL"), as codified in Bus. & Prof. Code section 17200 et seq., prohibits any unlawful, unfair or fraudulent business practice. The UCL is written in the disjunctive, which means a business act or practice can be alleged to be all or any of the three prongs. (Berryman v. Merit Property Management, Inc. (2007) 152 Cal.App.4th 1544, 1554.) The UCL was enacted "to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." (Linear Technology Corp. v. Applied Materials, Inc. (2007) 152 Cal.App.4th 115, 135, quoting Kasky v. Nike, Inc. (2002) 27 Cal.4th 939, 949.)

To successfully state a claim for violation of Section 17200, a plaintiff must allege that the defendant engaged in unlawful, unfair, or fraudulent business practices. (Berryman, supra, 152 Cal.App.4th at p. 1554.) A private plaintiff must be able to show economic injury caused by unfair competition. (Kwikset Corp. v. Superior Court (2011) 51 Cal.4th 310, 336.) By proscribing "any unlawful" business practice, the UCL essentially borrows the provisions of other laws and makes violations of those provisions independently actionable. (Zhang v. Superior Court (2013) 57 Cal.4th 364, 370.)

1. Public Trust Doctrine

The public trust doctrine recognizes that the sovereign owns all of its navigable waterways and lands lying beneath them as trustee of a public trust for the benefit of the people. (See, e.g., El Dorado Irr. Dist. V. State Water Resources Control Bd. (2006) 142 Cal.App.4th 937.) The public trust doctrine "is comprised of a set of principles that protect the public's right to use and enjoy property held within the public trust. [Citations.] The doctrine is premised on a ' " 'public property right of access'" to trust lands and 'protects "expansive public use of trust property."' [Citations.]." (San Francisco Baykeeper, Inc. v. State Lands. Com. (2018) 29 Cal.App.5th 562, 569.) The doctrine imposes an obligation on the government trustee " ' "to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust."' [Citations.]" (Ibid.) " 'The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost ....'" (State of Cal. ex rel. State Lands Com. v. Superior Court (1995) 11 Cal.4th 50, 63-64, quoting Illinois Central R.R. v. Illinois (1892) 146 U.S. 387, 452-453, 13 S.Ct. 110, 117-118, 36 L.Ed. 1018.)

Here, Plaintiffs allege that "[u]nder the Public Trust Doctrine," Defendant breached its fiduciary duty to the boaters "by threatening to impose slip rates on the quasi-monopoly marina so excessive as to force boaters out of the marina and putting their boats ... in jeopardy." (Compl., ¶ 67.b.)

However, while Defendant may have acquired rights in the Harbor pursuant to the Master Agreement, Defendant is holding those rights subject to the trust. (National Audubon Society v. Superior Court (1983) 33 Cal.3d 419, 437.) To the extent Defendant may have owed a duty under the doctrine, that duty was to the County. But any duty owed to Plaintiffs under the doctrine is owed by the County—not Defendant.

2. Quasi-monopoly / Price Fixing

Plaintiffs allege Defendant has a "quasi-monopoly" on marinas in the area, and thus has wrongfully charged excessive slip fees. (Compl., ¶¶ 67, 68.) Plaintiffs also allege Defendant "failed and refused to maintain the docks ... in proper and safe conditions so as to justify the excessive slip fee ...." (Id. at ¶ 67.b.) However, Plaintiffs have not proffered any evidence in support of these conclusory allegations. Plaintiffs have also failed to point to any specific provision in the Master Agreement that was allegedly breached by Defendant's purported failure to maintain the docks or mitigate the "invasion" of sea lions at the marinas. (Compl., ¶ 36.)

Defendant asserts that it does not have any involvement with the management of, or the setting of slip fees for, any other harbor or marina. (Ueberroth Decl., ¶ 7.) Instead, Ueberroth attests that several years ago, Defendant's member, Bellwether Group (through a related entity), was involved in managing other Orange County marinas, but has never owned any California marinas or set slip rates for marinas it manages. (Id. at ¶ 8.) Recently, Bellwether has only managed the Balboa Yacht Basin in the City of Newport Beach, but does not set slip rates or collect fees from boaters at that marina. (Ibid.)

Ueberroth also attests that Defendant conducted a survey of Southern California marinas, and determined that the slip fees increases are consistent across other markets. (Ueberroth Decl., ¶¶ 10, 11; Def. Exh. 13.)

Plaintiffs' proffer the "expert" declaration of J. Richard Donahue to support their contention that Defendant's market rate survey was inaccurate. (See, Donahue Decl., ¶¶ 6-10.) However, although Donahue attests that he is a professional real estate appraiser and consultant specializing in valuations related to public agency and right-of-way clients, his CV is not attached to the copy of his declaration provided by Plaintiffs. As a result, the relevance of his experience and propriety of his methodology cannot be determined here. Moreover, the slip fees prices pertain to licenses, not leases. Therefore, it is not clear that Donahue's purported expertise in appraisal and valuation is relevant to the issues in this litigation.

Neither of Plaintiffs' theories are persuasive. Regarding UCL claims, there is a split in the courts as to the correct test for the "unfair" prong. (See, Graham v. Bank of America, N.A. (2014) 226 Cal.App.4th 594, 612.) Under one test, it has been found that a business practice is "unfair" when it "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." (Id., quoting Smith v. State Farm Mutual Auto Ins. Co. (2001) 93 Cal.App.4th 700, 718-719.) Under the second test, a business practice has been found "unfair" if the consumer injury is substantial, is not "outweighed by any countervailing benefits to consumers or competition," and could not reasonably have been avoided by the consumers themselves. (Id. at p. 613, quoting Camacho v. Auto. Club of So. Cal. (2006) 142 Cal.App.4th 1394, 1403.) Under the third test, where the claim of an "unfair" business practice is predicated on public policy, "the public policy which is a predicate to the action must be 'tethered to an underlying constitutional, statutory or regulatory provisions.'" (Id., citing to Gregory v. Albertson's, Inc. (2002) 104 Cal.App.4th 845.)

Generally, the Fourth District of the Court of Appeal has consistently followed the third test, "and has held a plaintiff alleging an unfair business practice must show the 'defendant's conduct is tethered to an[] underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an antitrust law, or violates the policy or spirit of an antitrust law.'" (Graham, supra, 226 Cal.App.4th at p. 613.)

Here, it appears Plaintiffs' claim of unfair business practices relies on the first test. They do not allege Defendant's market rate survey or methodology of determining market rate pricing was tethered to a violation of constitutional, statutory, or regulatory provision, only that they somehow violated the public trust doctrine or the Tidelands Grant. But as discussed above, neither of these arguments is well taken.

Based on the discussion above, Defendant has met its evidentiary burden, and Plaintiffs have not established the existence of triable issues of material fact on their UCL claim. Therefore, summary adjudication must be granted on the third cause of action.

1st and 5th COAs - Injunctive and Declaratory Relief

Generally, a declaratory relief cause of action " 'should not be used for the purpose of anticipating and determining an issue which can be determined in the main action. The object of the statute is to afford a new form of relief where needed and not to furnish a litigant with a second cause of action for the determination of identical issues.' [Citations.]" (Hood v. Superior Court (1995) 33 Cal.App.4th 319, 324.)

Here, Plaintiffs' declaratory relief claim is nothing more than a restatement of their substantive causes of action—namely, that Defendant breached the Master Agreement and engaged in unfair business practices. No separate dispositive issues are alleged in this cause of action.

A cause of action must exist before injunctive relief can be granted, and where a complaint fails to state a cause of action that would afford injunctive relief, no such relief can be granted.

(Major v. Miraverde Homeowners Assn. (1992) 7 Cal.App.4th 618, 623.)

Here, as discussed above, summary adjudication must be granted as to Plaintiffs' remaining substantive causes of action for breach of contract and unfair business practices. Therefore, there are no remaining causes of action upon which injunctive relief could be granted.

Summary adjudication must therefore be granted on Plaintiffs' injunctive and declaratory relief claims.

Supplemental Briefing

On 6/01/23, the Court, after oral argument on the Motion by Counsel, invited the Parties to provide supplemental briefing on two issues [as set forth on page 20 line 22 to page 21, line 5 of the Reporters Transcript of the subject hearing of 6/01/23]: (1) who is a third party beneficiary under the subject contract between the County of Orange and Defendant Dana Point Harbor Partners LLC-not just boat slip owners, but anyone else who might be a third party beneficiary; and (2) whether the question of a third party beneficiary determination is a question of fact or law.

The Parties were given until close of business 6/15/23 to file any supplemental briefing they might wish to file. No page limitation was imposed. Both Parties filed supplemental briefs timely; Plaintiffs' Brief was 21 pages long with 3 Exhibits-portions of the Deposition transcript of Mr. Ueberroth, portions of the Deposition transcript of Mr. Miller, and the transcript of the hearing on this motion of 6/01/23. Defendant filed its brief consisting of 19 pages with no Exhibits.

1. Who is a "Third Party Beneficiary" under the subject Contract?

" 'A third party beneficiary is someone who may enforce a contract because the contract is made expressly for his benefit.'" (Jensen v. U-Haul Co. of California

(2017) 18 Cal.App.5th 295, 301.) "A person 'only incidentally or remotely benefited' from a contract is not a third party beneficiary." (Lucas v. Hamm (1961) 56 Cal.2d 583, 590.)

Historically, the test for determining whether a contract was made for the benefit of a third party is "whether an intent to benefit a third person appears from the terms of the contract." (Prouty v. Gore Technology Group (2004) 121 Cal.App.4th 1225, 1232.) Under this test, California courts generally adopted the classification of third-party beneficiaries as either creditor beneficiaries or donee beneficiaries. These classifications appear in Section 133 of the Restatement First of Contracts (Lake Almanor Assocs. L.P. v. Huffman-Broadway Group, Inc. (2009) 178 Cal.App.4th 1193, 1199, fn. 2.)

" 'A donee beneficiary is a party to whom a promisee intends to make a gift (i.e., a benefit the promisee had no duty to confer) of a promisor's performance.' [Citations.]" (Lake Almanor, supra, 178 Cal.App.4th at p. 1199.) " 'A creditor beneficiary is a party to whom a promisee owes a preexisting duty which the promisee intends to discharge by means of a promisor's performance.' [Citations.]" (Id. at p. 1200.) If the terms of the contract necessarily required the promisor to confer a benefit on a third person, then it was found that the contract, and the parties to the contract, contemplated a benefit to the third person. The parties were presumed to intend the consequences of a performance of the contract. (Prouty v. Gore Technology Group (2004) 121 Cal.App.4th 1225 at p. 1233.) However, the fact that a literal interpretation of the contract would result in a benefit to a third party was not enough to render that party a third-party beneficiary. It also had to be found that the contracting parties **intended t**o confer a benefit on the third party. ["Promisor" being the party manifesting the intent to act or refrain from acting in a specific way; "Promisee" being the party to whom said manifestation is addressed]. (Epitech, Inc. v. Kann (2012) 204 Cal.App.4th 1365, 1372.)

Although the Restatement Second of Contracts retained remnants of the creditor beneficiary and donee beneficiary designations, it focused instead on whether a third-party beneficiary should be considered an **"intentional" beneficiary** or an **"incidental" beneficiary**. (Goonewardene v. ADP, LLC (2019) 6 Cal.5th 817, 828-829.) The Restatement Second provides:

"Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an **"intended"** beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either: (a)

the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." (See, Rest. 2d of Contract, § 302(1).) An **"incidental"** beneficiary, on the other hand, is simply defined as "a person who will be benefited by performance of a promise, but who is neither a promisee nor an intended beneficiary." (Id. at § 315; see also, id. at § 302(2).)

In the seminal case of Goonewardene v. ADP, LLC (2019) 6 Cal.5th 817, [cited by both sides in support of their positions] the Supreme Court examined the issue of third-party beneficiaries. First, the Court acknowledged the historical third-party beneficiary doctrine and its use of the "creditor beneficiary" and "donee beneficiary" categories. (Id. at pp. 828-829.) However, the Court noted that in its past decisions, it had not relied primarily on these labels. Instead, it found that in determining third party beneficiary issues, it examined the **express terms** of the contract **and any other relevant circumstances related to formation of the contract,** in order to determine the following three elements:

(1) whether the third party will in fact benefit from the contract;

(2) whether a motivating purpose of the contracting parties was to provide a benefit to the third party; and

(3) whether permitting the third party to enforce the contract "is consistent with the objectives of the contract and the reasonable expectations of the contracting parties." (Id. at p. 830.)

"Ascertaining whether there was intent to confer a benefit on plaintiff as a third party beneficiary is a question of ordinary contract interpretation. [Citation.]

In interpreting a contract, [the court] give[s] effect to the parties' intent as it existed at the time of contracting. [Citations.] 'Intent is to be inferred, if possible, solely from the language of the written contract. [Citations.]' [Citation.] In construing a contract, the court looks to ' "the circumstances under which it was made, and the matter to which it relates." [Citation.] "In determining the meaning of a written contract allegedly made, in part, for the benefit of a third party, evidence of the circumstances and negotiations of the parties in making the contract is both relevant and admissible." [Citations.] [¶] Additionally, a court may consider the subsequent conduct of the parties in construing an ambiguous contract. [Citation.] In determining intent to benefit a third party, the contracting

"parties' practical construction of a contract, as shown by their actions, is important evidence of their intent." [Citation.]' [Citation.]" (Berger Foundation, supra, 218 Cal.App.4th at pp. 44-45.)

Here, in the current litigation, the County, as promisee, and Defendant, as promisor, entered into the Master Agreement. The Master Agreement governed Defendant's use and management of the Harbor, including slip rentals. Under this Master Agreement, the Defendant was granted the right to increase the slip fees to market rate.

Section 11.9—the operative provision at issue—provides in relevant part: "[Defendant] shall at all times maintain a complete list or schedule of the prices charged by [Defendant] for all goods or services … supplied to the public on or from the Property, whether the same are supplied by Lessee or be its Sublessees, assignees, concessionaires, permittees or licensees." (Def. Exh. 6, AOE-0213.) It is in this context that Section 11.9 then states: "Said prices will be 'market rate' pricing **as reasonably determined by [Defendant]; provided, however, that in all events such prices shall be consistent with the limitations on pricing as mandated by the Tidelands Grant.** In addition to the foregoing, with respect to the Slip Leases specifically, Lessee shall be required to provide advance written notice to County and all tenants and/or licensees under existing Slip Leases of any raises in the slip rental rates, which notice shall include Lessee's rationale for such raise as well as its methodology for determining the same." (Ibid.)

In examining this provision as it pertains to County and Defendant, the only act promised by Defendant is to "reasonably determine" market rate pricing of all good and services supplied to the public on or from the Harbor property—including slip fees charged to the boaters. **Notably, nothing in this provision requires Defendant to charge prices within a certain range or "reasonably determine" market rate pricing using a specific metric or calculation.**

To the extent Defendant may have failed to perform its obligations under the contract, including its obligations in Section 11.9, County—*and County alone*—had various remedies available under Section 14 of the Master Agreement. County, as the promisee, is the beneficiary of Defendant's obligations in Section 11.9 because County is the fee owner of the Harbor, including the marinas. It was "in consideration of the payment of rentals and the performance of all the covenants and conditions" of the Master Agreement that County leased the Harbor to Defendant, and Defendant leased from County the exclusive right, as tenant, the exclusive right to

possess and use the Harbor subject to the terms of the Master Agreement. (See, Master Agreement, Sec. 1.2.) Although the Master Agreement and Defendant's rights under the contract are subject to the SLAs and any other encumbrances, licenses, and reservations existing as of the effective date of the contract, **County's objective in entering into the Master Agreement was two-fold: (1) "the complete and continuous use of the facilities and amenities ... by and for the benefit of the public ...;" and (2) "for the generation and realization by County of revenue [from the Harbor]." (Master Agreement, Section 3.3.1, Def. Exh. 6, AOE-0151.)** ***There is no language in the Master Agreement indicating that any person or entity other than County is the beneficiary of the contract.***

Although Section 11.9 specifically refers to all Slip Lease licensees (i.e., Plaintiffs), Plaintiffs have not pointed to any language in the Master Agreement providing for Defendant's liability to Plaintiffs in the event of a breach, Plaintiffs' right to determine if Defendant breached the Master Agreement, or otherwise demonstrating that Plaintiffs have a right to enforce the terms of the contract. **As a preliminary matter, the Slip Lease Agreements ("SLAs") referenced in Section 11.9 of the Master Agreement are between Defendant and individual Plaintiffs—not between County and Plaintiffs. (AOE-0281, SLA.) Therefore, any obligations Defendant may have to Plaintiffs regarding slip fees are primarily contained in the SLAs.** The SLAs include a provision requiring Defendant to provide boaters with a 30-day notice of any increase in the slip fees. (AOE-0284, SLA, ¶ 5.b.) Under the SLA, the notice may simply be posted on the bulletin board at Defendant's office of the office of Defendant's onsite manager; written notification directly to the boaters is optional. (Ibid.)

It is likely that with the SLA provisions in mind, County and Defendant included the provision in Section 11.9 requiring Defendant to provide advance notice to Plaintiffs and other boaters of a raise in the slip fee rates. As noted above, the parties to the Master Agreement are County, as the promisee, and Defendant, as the promisor. Section 11.9 is a promise made by Defendant to County that market rate pricing as to all goods and services would be "reasonably determined" by Defendant. Since Plaintiffs and other SLA holders were owed certain obligations by Defendants ***under the SLAs***, Defendant's "promise" to County regarding the setting of market rate pricing ***necessarily implicated Defendant's obligations under the SLAs as they relate to the setting of slip fees***. Requiring Defendant to notify Plaintiffs and other SLA holders of any slip fee increases arising from Defendant's performance of its obligations under the Master Agreement was nothing more than a recognition of Defendant's obligations under the SLAs. In that

regard, Plaintiffs did benefit from Defendant's advance written notice of the slip fee increases under Section 11.9.

However, to the extent Plaintiffs were third-party beneficiaries of the Master Agreement, **they clearly were not "intended" beneficiaries; nothing in the language of Section 11.9 establishes that a recognition of Plaintiffs' purported right to Defendant's performance under the provision was appropriate to effectuate the intention of County and Defendant. (See, Rest. 2d Contracts, § 302(1).) Plaintiffs have not pointed to any language in Section 11.9, or any part of the Master Agreement, demonstrating that any act of Defendant needed to be performed to Plaintiffs' benefit in order to effectuate the ultimate intention of County and Defendant—to set market rate pricing through a methodology "reasonably determined" by Defendant as part of Defendant's comprehensive redevelopment project in the Harbor.**

Moreover, Plaintiffs have not shown it was reasonable for them to rely on Defendant's "promise" to reasonably determine market rates as a manifestation of an intent to confer a right on Plaintiffs. "Where there is doubt whether such reliance would be reasonable, considerations of procedural convenience and other facts not strictly dependent on the manifested intent of the parties may affect the question whether under [Restatement Second § 302] Subsection (1), recognition of a right in the beneficiary is appropriate." (Rest. 2d Contracts, § 302, cmt. D.)

Here, Plaintiffs' reliance is misplaced. Section 11.9 does not confer any right on Plaintiffs to challenge whether Defendants "reasonably determined" the market rate pricing for the slip fees. Section 11.9 also does not provide any process or procedure for Plaintiffs to mount such a challenge—either as to County's decision that Defendants complied with their obligation under the provision or as to whether Defendants' reasonably determined the pricing.

Courts have examined this issue in the context of contracts for the development of government projects. In Mission Oaks Ranch, Ltd. V. County of Santa Barbara (1998) 65 Cal.App.4th 713 (disapproved on another ground in Briggs v. Eden Council for Hope & Opportunity (1999) 19 Cal.4th 1106, 1123, fn. 10), a developer's proposed project was denied after the county-hired consultant prepared an environmental impact report that found unmitigable impacts. The developer hired its own consultant who submitted a report to the county stating there were no such impacts. In the final EIR, the county denied approval for the project due to the unmitigable impacts. The developer sued the county, the county's consultant, and

others over the denial of project approval. (Mission Oaks, supra, 65 Cal.App.4th at p. 718.)

The Mission Oaks court concluded the developer was not a third-party beneficiary of the county's contract with the consultant because the county did not owe the applicant a legal duty to "provide a proper EIR. (Mission Oaks, supra, 65 Cal.App.4th at p.724.) The court reasoned that the underlying statutory scheme conferred the duty upon the county "to produce an adequate EIR for dissemination to the public, and the discretion to evaluate the project for the public. [Citation.] These statutory obligations may not be the consideration for a contract or promise, nor may the [c]ounty bargain away its constitutional duty to regulate development. [Citations.] The [c]ounty, as lead agency on the project, owes its duty to the public to release a proper EIR. [Citation.] The [c]ounty owes no duty to assuage the desires of the potential developer." (Id. at pp. 723-724.)

In support of its holding, the Mission Oaks court cited to section 313 of the Restatement Second of Contracts (hereinafter "section 313"), which addresses third party beneficiary claims in the context of government contracts. (Mission Oaks, supra, 65 Cal.App.4th at p. 724.) Section 313 is instructive; section 313(2) provides:

"[A] promisor who contracts with a government or governmental agency to do an act for or render a service to the public is not subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform unless [¶] (a) the terms of the promise provide for such liability; or [¶] (b) the promisee is subject to liability to the member of the public for the damages and a direct action against the promisor is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach."2 (See also, Martinez v. Socoma Companies, Inc. (1974) 11 Cal.3d 394, 402; Lake Almador, supra, 178 Cal.App.4th at pp. 1200-1201; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 691, p. 779.)

Comment (a) to section 313 provides, in part, the following explanation for the rule:

"Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested. In case of doubt, a promise to do an act for or render a service to the public does not have the effect of a promise to pay consequential damages to

individual members of the public unless the conditions of [section 313(2)(b)] are met."

The court in Lake Almanor Associates, supra, also looked to section 313 of the Restatement in a similar case where a developer brought an action against a county-hired consultant who produced a draft EIR for a project. The consultant submitted the EIR late and the county ultimately rejected it as unacceptable. The developer sued for breach of the consultant's contract with the county, among other claims, alleging that the consultant's delay and inadequate work caused it to lose a prospective sale of the property. The court addressed the question of whether the consultant was liable to the developer for damages due to the consultant's failure to timely prepare the EIR. (Lake Almanor, supra, 178 Cal.App.4th at p. 1197.)

The Lake Almanor court found that there were no terms in county's contract with the consultant that provided for the consultant's liability to the developer in the event of a breach or that otherwise demonstrated that the developer was an intended beneficiary. (Lake Almanor, supra, 178 Cal.App.4th at p. 1201.) The court further found that the provisions in the contract that referred to the developer and required that the developer receive a copy of the EIR were "insufficient to demonstrate an intent that [the consultant] be liable to [the developer] in the event of a breach. (Id. at pp. 1201-1202.) The court also found that the developer had not established a basis for liability under Restatement section 313(2)(b), because the developer did not show that the county was subject to liability for the developer's damages. (Id. at p. 1202.)

In The H.N. & Frances C. Berger Foundation v. Perez, supra, although the court did not cite to the Restatement, it seemed to follow its reasoning. In Perez, the owner of subdivision lots brought action against the county, county's transportation department, and the performance bond insurer regarding certain road improvement agreements county had with the developer. The property owner filed a petition for writ of mandate seeking to compel the county and its transportation department to take steps to assure the completion of the agreements. The writ alleged breach of contract under a third-party beneficiary theory and sought declaratory relief. (Perez, supra, 218 Cal.App.4th at p. 41.) The plaintiff argued it did not have to be named in the agreements to be a third-party beneficiary, and the intent to benefit plaintiff did not have to be a mutual intent by both parties to the agreements. The trial court sustained the defendants' demurrer without leave to amend because the plaintiff failed to allege it had standing to bring the claim. The

trial court found the plaintiff was neither a party to the agreements nor a third-party beneficiary. (Id. at p. 43.)

The appellate court affirmed. First, the court stated that in interpreting a contract, it gave "effect to the parties' intent as it existed at the time of contracting." (Perez, supra, 218 Cal.App.4th at p. 44.) The court went on to state that in determining the meaning of a contract allegedly made for the benefit of a third party, evidence of the circumstances and negotiations of the parties to the contract was relevant, and the subsequent conduct of the parties could be considered. (Id. at p. 45.) After noting that the plaintiff was not a named party, not an intended signatory, and not expressly identified in any capacity in the agreements, the court found that the agreements "[did] not reflect the intent of the contracting parties to confer any of the rights or impose any of the obligations of the contracts to anyone or any group or class other than themselves, their successors and assigns." (Ibid.) In addition, the court found the agreements did not refer to any benefit to be conferred to third parties in the general class of private property owners of the affected tract. (Ibid.) While the court acknowledged that the plaintiff did not have to be named in the agreements in order to be a third-party beneficiary, the court did find that there had to be language in the agreements "or extrinsic evidence that the promisor ... understood that the promisee... entered into the Agreements and Bonds with the intent that they benefit plaintiff or a class of individuals encompassing plaintiff." (Id. at p. 46.) After finding there was no such language in the agreements, and that the negotiations and subsequent conduct of the parties did not establish any intent that plaintiff was to benefit from the contract, the court held that neither the plaintiff nor any other property owner was an intended third-party beneficiary. Instead, they were "merely incidental beneficiaries." (Id. at p. 46.)

Here, the same reasoning applies in determining whether Plaintiffs are intended or incidental beneficiaries to the Master Agreement. As discussed above, although Section 11.9 requires Defendant to provide Plaintiffs and the other SLA holders with advance notice of the increase in the slip rental rates, there is no language in the Master Agreement establishing that Plaintiffs are intended beneficiaries. In addition, there is no extrinsic evidence that Defendant, as the promisor, understood that County, as the promisee, entered into the Master Agreement with the intent that it benefit Plaintiffs or the SLA holders. Instead, the express language of the Master Agreement, as well as the conduct of County and Defendant, establish that the purpose of the Master Agreement was to facilitate the redevelopment and renovation of the Harbor.

Furthermore, in following section 313 of the Restatement, Plaintiffs have not demonstrated that the terms of Section 11.9 (the "promise") provide that Defendant is subject to any type of contractual liability to Plaintiffs or the other SLA holders resulting from any failure of Defendant to perform under the provision. Section 11.9 also does not indicate that the County is subject to liability to Plaintiff for any damages arising from Defendant's breach, or that a direct action against Defendant would be consistent with the terms of the Master Agreement. Other than acknowledging that Defendant had certain obligations to Plaintiffs under the SLAs, Section 11.9 does not manifest an intent that Plaintiffs are intended beneficiaries of the provision specifically or the Master Agreement as a whole. Instead, Plaintiffs are merely incidental beneficiaries.

2. Is the question of Third Party Beneficiary one of Fact, or one of Law?

In this Court's view, if the question of who is a third party beneficiary is one of fact, then the issue must go to the trier of fact, not the Court.

"Although, generally, it is a question of fact whether a third party is an intended beneficiary of a contract, 'if "the issue is presented to the court on the basis of undisputed facts and uncontroverted evidence and only a question of the application of the law to those facts need be answered,"' then the issue becomes one of law that the court resolves independently. (The H.N. & Frances C. Berger Foundation v. Perez (2013) 218 Cal.App.4th 37, 43 ("Berger Foundation"); see also, Prouty, supra, 121 Cal.App.4th at p. 1233.)

Here, the facts are not in dispute; and Plaintiffs have produced no extrinsic **evidence** of an intent by either Party to the Lease Agreement to make Plaintiffs an **intended** beneficiary under the Lease Agreement. Plaintiffs argue that the County's "motivating purpose" is demonstrated in citing to County Counsel's response to a proposed deletion of parts of Section 11.9 of the Lease, which refers to deletion of said 11.9 language, causing "...many issues ***with the public*** and the ***overall perception*** of this Lease" [page 5 lines 1-13 of Plaintiffs' Supplemental Brief]; and that this language somehow establishes that the ultimate language in Section 11.9 was intended to benefit Plaintiffs. But this argument ignores the very specific requirements of the plethora of case authority set forth hereinabove that the Plaintiffs must establish to confirm their status as intended beneficiaries rather than incidental beneficiaries.

Plaintiffs argue, on page 9 of their Supplemental Brief, that the determination of Third Party Beneficiary Status "...is a question of fact where extrinsic evidence is in conflict...and because Defendant's evidence raises factual disputes, Plaintiffs have a due process right to a Jury trial to determination of this dispute." Plaintiffs then cite to a host of cases supporting this general proposition.

Ultimately, Plaintiffs set forth the extrinsic evidence which they contend is in conflict starting on page 11 of their Supplemental Brief:

"Here, Plaintiffs submit, as discussed in the previous section, the language of Section 11.9 provides that Plaintiffs are third party beneficiaries. The Lease calls out tenants of existing slip leases directly...and states that they are entitled to simultaneous notice with the County of any proposed increases in slip rates (including the rationale and methodology) for the same. The Lease therefore explicitly provides a benefit to the slip holders because they are entitled to prior notice of the Partner's rationale and methodology as well as "market rate" pricing." This, clearly, is an argument that goes to the Lease itself, not extrinsic evidence.

Plaintiffs go on to argue that the extrinsic evidence which is in dispute is the Declaration of Thomas Miller (in which he states that Section 11.9 was merely to ensure that the process was open and public to the boaters versus the aforementioned County Counsel response during contract negotiations in which County counsel stated that a deletion of parts of Section 11.9 "...will cause many issues ***with the public and the overall perception of this Lease."***

The problem with this assertion is that there is nothing in County Counsel's response, as cited by Plaintiffs, which establishes that Plaintiffs were **intended** beneficiaries as opposed to **incidental** beneficiaries as members of the public.

Plaintiffs go on to argue that the Court's tentative centers on the extrinsic evidence of Mr. Miller's Declaration and the absence of anything proving that the County approved Defendant's methodology as "reasonable" under Section 11.9.

The problem here is that even excising Mr. Miller's Declaration, there is no evidence that can be argued to establish Plaintiffs' status as **intended** beneficiaries under the Lease agreement as opposed to **incidental** beneficiaries.

And an argument that the County never approved the reasonableness of Defendant's methodology under Section 11.9 would result in an action against the County, because the duty to determine such reasonableness rests with the County. Whether or not a reasonable methodology was used, and whether a market rate was

charged, is a decision to be made by the County under the subject contract; and to the extent that the County failed in that duty, the public's remedy would be, at best, an action against the County. And to the extent that the County was "misled", as suggested by Plaintiffs on page 17 of their Supplemental Brief, that is up to the County to act upon under the terms of the contract that the County entered into.

All of Plaintiffs' arguments center on the meaning of the Lease Agreement itself; and no piece of evidence supports Plaintiffs' assertion that a jury must determine what the intention of the County or DPHP was at the time of entry into the contract; because no piece of evidence, extrinsic or otherwise, points to Plaintiffs being intended beneficiaries as opposed to incidental beneficiaries. The only material evidence pointed out by Plaintiffs is the reference ***in the Lease Agreement itself,*** at Section 11.9, that the "Lessee shall be required to provide advance written notice...under **existing Slip Leases** of any raises in slip rental rates..." This is not a factual argument requiring a factual determination by a trier of fact. It is, rather, an interpretation of the terms of the contract itself.

"...the contracting parties must clearly manifest their intent to benefit the third party. The fact that a third party is incidentally named in the contract, or that the contract, if carried out according to its terms, would inure to his benefit, is not sufficient to entitle him to demand fulfillment. It must appear to have been the intention of ***the parties*** to secure to him personally the benefit of its provisions." Kalmanovitz v. Bitting (1996) 43 Cal. App. 4th 311, 314. [Emphasis original], as cited in Sources and Authority, CACI 301.

RULING:

Defendant's motion for summary judgment / summary adjudication is GRANTED as to the first, second, third, and fifth causes of action.

Clerk to give Notice of the Court's Ruling.