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JUDGE OF THE SUPERIOR COURT
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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SONOMA

LAWRENCE SIMONS,

Plaintiff,

v.

WILD OAK HOMEOWNERS ASSOCIATION,

Defendant.

Case No. SCV-268591

STATEMENT OF DECISION

On March 29, 2024, the Court filed and served its Proposed Statement of Decision. ("PSOD") On April 15, 2024, Defendant, Wild Oak Homeowner's Association ("WOHA") filed their objections to the Court's PSOD. Plaintiff did not file any objections to the PSOD. The Court thoroughly reviewed and considered WOHA's objections. The Court made edits and modifications to this final Statement of Decision based on WOHA's objections. The Court rules as follows:

The Court finds that Defendant, Wild Oak Homeowners Association, materially breached the settlement agreement by failing to cooperate with Plaintiff in the preparation of all documents submitted to PG&E as required in Section 5B of the settlement agreement. The Court finds that the cost to move the meters to the location approved by PG&E, and that was selected through cooperation, exceeded $70,000. The Court orders the meters to remain in their current location and that the plaintiff shall submit proposed screening consistent with the surrounding area subject to controlling

documents. WOHA shall not unreasonably withhold approval as outlined in Section 5(B)(v) of the settlement agreement.

I. Procedural History

A. Underlying Action

On July 1, 2016, Wild Oak Homeowners Association (the defendant herein) sued Lawrence Simons (plaintiff herein) for breach of contract and injunctive relief, alleging that Simons failed to comply with the CC & R's by not having a PG&E meter installed on the residence located on his property. See Complaint ¶ 9; Sonoma County Superior Court, Case No. SCV-259071. Attached to the Complaint as Exhibit "A" is a copy of the "First Amended and Restated Declaration of Covenants, Conditions, and Restrictions of Wild Oak", hereinafter referenced as "CC & R". The CC & R's were signed by Wild Oak HOA President Chuck Joseph and its Secretary Jacquie Duncan on April 2, 2003. Simons then filed a cross-complaint alleging various violations, including violations of the Davis Sterling Act by the Wild Oak HOA.

Simons and Wild Oak HOA purportedly settled their claims after mediation and memorialized through a Settlement Agreement. Case number SCV-259071 is currently stayed.

B. Operative Complaint

On June 11, 2021, Lawrence Simons ("Plaintiff") filed a complaint ("Complaint") No. SCV 268591 against Defendant Wild Oak Homeowners Association ("Defendant" or "WOHA"), alleging the following causes of action: (1) Breach of contract, (2) Violation of Law, (3) Breach of Equitable Servitudes, and (4) Breach of Fiduciary Duty. The Complaint prays for injunctive relief, civil penalties pursuant to Civil Code §4955 and §5145, specific performance under the Settlement Agreement, general and special damages, and attorney's fees and costs.

Any lot owner in the Wild Oak subdivision is subject to the CC & R's. See Complaint ¶ 6. Plaintiff is the recorded owner of Subdivision 3, Lot 5, Assessor Parcel

No. 031-370-001, commonly known as 805 White Oak Drive (the "Property"). See Complaint ¶ 7.

II. Relevant Facts

A. Settlement Agreement

The Parties have stipulated that the Settlement Agreement identified as Plaintiff's Exhibit #2 is the operative agreement at issue in the Complaint.

At issue are the following portions of the Settlement Agreement:

Paragraph 5(B)(i) states:

> "[Association] and [Simons] shall pay 50% each of all fees and costs associated with submittal of an application to relocate the utility meters at the Property to [Simons] residence. [Association] and [Simons] *shall cooperate with one another to prepare all submittal documents.* [Association] shall have final approval of what is submitted to PG & E. [Association] approval shall not be unreasonably withheld. [Simons] shall authorize [Association] is to make the relocation application of 5B(i) on its behalf." (Emphasis added.)

Paragraph 5 (B)(ii) states "Should relocation be approved by PG&E, [Association] agrees to pay 50% of the contractors cost to relocate, capped at the sum of $22,000."

Paragraph 5(B)(v) states:

> "*If the cost to relocate the meters from their current location to the Simons residence, pursuant to the requirements imposed by PG&E exceed the total cost of $70,000,* the application will be deemed denied by PG&E for purposes of the Agreements. The "total cost" will be determined by taking the average of an estimate provided by 2 licensed contractors, one chosen by Simons and one chosen by [Association]. These estimates will be simultaneously exchange between [Association] and Simons. If deemed denied, the meters shall remain in their current location. Simons shall submit proposed screening consistent with surrounding area subject to controlling governing documents. The Board of [Association] shall not unreasonably withhold approval." (Emphasis added.)

B. Summary of Facts at Trial

Plaintiff hired a contractor, Jeff Luchetti, to act as his representative during the process of working with WOHA on moving the PG&E utility meters according to the settlement agreement. Mr. Luchetti is a licensed contractor who has worked for Plaintiff in the past and understood his role as the representative assigned to work with WOHA.

Initially, Mr. Luchetti worked cooperatively with Dan Stamps, a WOHA board member, to submit an application to PG&E for a new location to place the utility meters. (Plaintiff Exhibits #3 - #12.) Mr. Luchetti, Mr. Stamps and Matthew Righetti, a PG&E representative, all met at the Simons' property to submit an application to PG&E. At the meeting, Mr. Luchetti expressed his desire to reuse the existing utility trench in order to mitigate the costs to move the meters. PG&E ultimately approved an application to move the meters on approximately August 1, 2018.

Once the application was approved, Mr. Luchetti requested the PG&E-approved engineering drawings for both gas and electricity. Those drawings were supplied within a few days. Once Mr. Luchetti received the drawings he proposed preparing a Request for Proposal ("RFP") so that all the bids would include the same scope of work. Mr. Stamps agreed and stated that all parties would need to agree on the RFP. (Plaintiff Exhibit #13)

The location of the meters approved by PG&E was not the location requested by Mr. Luchetti or Mr. Stamps when they met with Mr. Righetti, the PG&E representative. The new plans did not include using the existing trench, but instead required a new trench.

Approximately one month after receiving the PG&E approved plans, Mr. Luchetti, along with several representatives of WOHA, met at Mr. Simons' property to review and discuss Mr. Luchetti's proposed RFP. (Plaintiff Exhibit #16.) Prior to the meeting, Mr. Luchetti emailed a copy of his proposed RFP to all the WOHA representatives. The first draft of Mr. Luchetti's RFP was prepared in August 2018. (Plaintiff Exhibit #17.)

For the next several months Mr. Luchetti and WOHA exchanged emails with different versions of the RPF. Initially, while Mr. Luchetti was working with Mr. Stamps, it appeared the parties were close to agreement on the RPF. However, once board member Dave Nebel stepped in as the lead for WOHA and as more versions of the RPF were exchanged, the disagreements increased. WOHA stopped sending back RFPs with redline edits but rather sent back "clean" versions of the RFPs that required Mr. Luchetti to review the RFP to determine what edits had been made by WOHA. However, despite the disagreements, the parties continued to communicate until January 6, 2019, and appeared to mutually desire an agreement. (Plaintiff Exhibit #16 – Plaintiff Exhibit #28.) Neither party obtained an estimate from a licensed contractor for the work to move the meters to the location approved by PG&E. Ultimately, on September 27, 2021, as part of this litigation, Mr. Luchetti estimated it would cost $134,600 to move the meters according to his version of the RFP. (Defense Exhibit KK.) WOHA never obtained their own estimate, but during trial Mr. Staggs, the principal of WOHA's chosen contractor Staggs Construction, "ballparked" that it would have cost over $200,000 to move the meters to the location originally approved by PG&E.

After January 6, 2019, there were limited email communications between the parties until April 3, 2019. (Defense Exhibit P-0072.) On that date, Mr. Nebel began the process of meetings between WOHA, PG&E, and WOHA's contractor Mr. Staggs. The process involved meeting approximately two times at the Simons residence. Mr. Luchetti was specifically not invited, and WOHA told him not to participate in those meetings. Mr. Luchetti was never apprised of the discussions that took place during those meetings. He was finally informed about the meetings after WOHA submitted an application to PG&E for a new location for the meters. Mr. Luchetti was not permitted to be part of the application process. (Defense Exhibits P-0073 – P-0080 and Plaintiff Exhibits 29 – 33.)

On May 21, 2019, Mr. Nebel emailed Mr. Luchetti to update him on the status of the submitted PG&E application. (Plaintiff Exhibit 30 and Defense Exhibit P-0085.) The

parties exchanged a few emails, and Mr. Luchetti proposed that if WOHA wanted to pursue the approach set forth in the application to PG&E, then WOHA would need to prepare a written plan and scope of work and the new PG&E design approval. Mr. Nebel emailed the updated electrical and gas drawings to Mr. Luchetti on July 30, 2019. (Plaintiff Exhibit 34 and Defense Exhibits P-0085 – P-0095.) WOHA never prepared a scope of work or RFP, or provided an estimate.

The new PG&E application placed the utility meters on a backboard approximately 20 feet from the house and outside Mr. Simons' large bedroom window. Mr. Simons rejected the new location.

III. Analysis

WAS THERE A CONTRACT BETWEEN THE PARTIES?

At the start of trial, the defense argued there may not actually be an operative contract in this case. The argument was that two different settlement agreements were circulated and it was unclear whether both parties signed the same settlement agreement. The defense stated that WOHA signed and agreed to the first settlement agreement and that Plaintiff agreed to and signed the second one. Therefore, defense argued, neither party actually signed and agreed to the same settlement agreement and therefore there was no contract between the parties. However, during the testimony of the first witness, the parties reached a stipulation that Plaintiff's Exhibit #2 was the settlement agreement at issue in this case. (See Plaintiff's Exhibit #28.) Therefore, based on the stipulation between the parties, the issue of whether there was a contract between the parties was resolved.

WAS THERE A BREACH OF THE CONTRACT? IF SO, WHAT WAS THE BREACH AND WAS IT MATERIAL?

The Court finds that WOHA committed a material breach of the contract.

The Court understands the circumstances of the WOHA board members. They are residents of their community who volunteer their time to assist their fellow residents. The volunteer time involved likely feels akin to a part-time job. This time obligation,

coupled with term limits and inevitable turnover, creates a challenging circumstance for the board members. However, these challenges do not excuse compliance with the terms of the contract.

Whether a contractual obligation is material is a question of fact. (*Los Angeles Unified School District v. Torres Construction Corp.* (2020) 57 Cal. App. 5th 480.) The distinction between a material and inconsequential breach is one of degree, to be answered, if there is doubt, by the trier of fact. The court must weigh the purpose to be served, the desire to be gratified, the excuse for deviation from the letter, and the cruelty of enforced adherence. (*NIVO 1 LLC v. Antunez* (2013) 217 Cal. App. 4th Supp. 1.) Although every instance of noncompliance with a contract's terms constitutes a breach, not every breach justifies treating the contract as terminated. (*Id.* at p. 1.)

The timing of a breach is also relevant in determining its materiality, since a slight breach at the outset may justify termination whereas an equally slight breach later in performance may be deemed insubstantial. (*Whitney Inv. Co. v. Westview Development Co.* (1969) 273 Cal. App. 2d 594) The materiality of a breach does not, however, depend on the amount of money involved. (Ass*ociated Lathing & Plastering Co. v. Louis C. Dunn, Inc.* (1955) 135 Cal. App. 2d 40) Indeed, a willful default in performance may be material even though no economic loss ensues. (*Wilson v. Corrugated Kraft Containers* (1953) 117 Cal. App. 2d 691)

The wrongful, i.e., the unjustified or unexcused, failure to perform a contract is a breach. (See Rest.2d, Contracts § 235(2); 10 Corbin (Rev. ed.), § 53.1 et seq.; 23 Williston on Contracts (4th ed. 2000) (Williston) § 63:1 et seq.; C.E.B., California Law of Contracts § 8.66 et seq.) When a party's failure to perform a contractual obligation constitutes a material breach of the contract, the other party may be discharged from its duty to perform under the contract. (*De Burgh v. De Burgh* (1952) 39 Cal.2d 858, 863 ["in contract law a material breach excused further performance by [an] innocent party"].) Normally the question of whether a breach of an obligation is a material breach, so as to excuse performance by the other party, is a question of fact. (*Whitney*

Inv. Co. v. Westview Dev. Co. (1969) 273 Cal.App.2d 594, 601 ["Whether a breach is so material as to constitute cause for the injured party to terminate a contract is ordinarily a question for the trier of fact"].) Whether a partial breach of a contract is material depends on "the importance or seriousness thereof and the probability of the injured party getting substantial performance." (1 Witkin, Contracts, § 852, pp. 938–940; see also *Sackett v. Spindler* (1967) 248 Cal.App.2d 220, 229 [setting forth various factors as to materiality].) "A material breach of one aspect of a contract generally constitutes a material breach of the whole contract." (23 Williston, *supra,* at § 63:3, p. 440, fns. omitted.) If a party has materially breached any portion of a divisible contract, the aggrieved party is excused from further performance of all uncompleted portions of the contract. (*Filet Menu, Inc. v. C.C.L. & G., Inc.* (2000) 79 Cal. App. 4th 852, as modified, (Apr. 6, 2000).)

The contract required the parties to cooperate "with one another to prepare all submittal documents." (Plaintiff's Exhibit #2, section 5B.) The Court finds that WOHA breached the contract when they failed to cooperate with Plaintiff in the preparation of all the submittal documents for the second application to PG&E.

The Court finds this breach was material. Cooperation was a material term of the contract. This was a contract to do work on Plaintiff's home. The contract provided that WOHA was to have final approval of submitted documents and WOHA was to make the selection application on Plaintiff's behalf. The contract gave WOHA a lot of authority and control over the parties' interactions with PG&E. Plaintiff's participation and input was especially crucial since WOHA had so much control over the process.

WOHA breached the cooperation term of the contract in a manner that made clear their lack of desire to continue to abide by the terms of the contract. WOHA changed the board representative that interacted with Plaintiff. Shortly after the change, WOHA became difficult in their responses to the RFP by sending "clean" versions of the RFP so that Mr. Luchetti would have to go back through the RFP and review it for the edits that were made. Then, WOHA explicitly excluded Mr. Luchetti from meetings on

Plaintiff's own property with PG&E. Finally, WOHA submitted the documents without cooperating with Plaintiff and then sent Mr. Luchetti a completed submittal once the submission was concluded. The second submission to PG&E was not even to put the meters on the house but to put them on a backboard directly outside Mr. Simons' large bedroom window. Mr. Simons could no longer be expected to believe WOHA intended to adhere to the contract.

During trial, the Court found that Mr. Luchetti was a credible witness, that his RFP was reasonable, that his back-and-forth discussions with WOHA representatives were in good faith, and that the RFP was not deliberately inflated.

The Court also found Plaintiff was a credible witness. Although Plaintiff acknowledged his preference for keeping the meters in their current location, the Court found that he did not seek to deliberately inflate the estimates or RFP. The Court found that he sought to move the meters and perform the terms of the contract in good faith. The Court found that Plaintiff's rejection of the unilateral proposal to place the meters in front of his bedroom window was done in good faith. The Court found that Plaintiff's refusal to allow Staggs Construction into his home was done in good faith.

The breach of the settlement agreement consisted of WOHA's failure to cooperate with Plaintiff to prepare all submitted documents to PG&E for the second application to move the meters.

The parties, specifically Dan Stamps and Jeff Luchetti, initially worked together and cooperated to submit an application to PG&E for a location for the meters. That application was approved by PG&E. However, rather than continue to work in good faith with Mr. Luchetti to agree on an RFP, Mr. Nebel decided to submit a new application to PG&E for a new location for the meters. WOHA's decision to submit a new application rather than work with Mr. Luchetti on the RFP led the Court to certain factual findings. The Court found that despite the objections made by WOHA to Plaintiff's RFP and scope of work, WOHA determined that they would not be able to

obtain an estimate of their own to move the meters to the location approved by PG&E for less than $70,000.

Staggs Construction was clearly involved in the planning and application to PG&E for the second meter location and Mr. Staggs testified that he and WOHA discussed the cost of moving the meters based on the plan already approved by PG&E. Mr. Stamps testified that WOHA worked with three different construction companies during the lengthy and protracted course of this litigation. Those companies were Cimino, Staggs and Blanchard. Mr. Stamps testified that WOHA started working with Cimino during the initial litigation and prior to the 2017 settlement agreement.

Mr. Staggs testified that moving the meters to the location approved by PG&E would cost more than $200,000. Mr. Staggs testified that while he was at the Property to prepare the plans for the new proposed meter location, WOHA asked him about the cost to move the meters to the location initially approved by PG&E. Mr. Staggs would not even give WOHA a written estimate because the cost was so high. Therefore, rather than continuing to cooperate with Plaintiff on an RFP, WOHA decided that a different location for the meters might allow them to be moved for less than $70,000.

In order to find a location for the meters that would cost less than $70,000, WOHA met with PG&E and Staggs Construction to prepare and submit an application to PG&E for a new location for the meters. WOHA did not cooperate with Plaintiff to prepare and submit this application to PG&E. WOHA specifically excluded Mr. Luchetti from attending any meetings. (Plaintiff Exhibits #30, #31 and #32.) WOHA did not consult or discuss the new proposal with Mr. Luchetti or Plaintiff. The first time WOHA informed Mr. Luchetti about the new application and new proposed location was after the application had already been submitted to PG&E. (Plaintiff Exhibit #33.) The new application proposed placing the meters directly in front of Plaintiff's bedroom window. Plaintiff reasonably rejected this proposal.

It appears that, for the first time throughout the entire proceedings including trial, the Court's oral tentative ruling, the closing argument briefs and closing arguments,

WOHA is now arguing in Objection 12 to the PSOD, that there were not actually any documents submitted to PG&E during these meetings without Mr. Luchetti and therefore there was no breach of the cooperation clause. This argument strains credulity.

First, the actual words of the contract itself state, "WOHA and Simons shall cooperate with one another to ***prepare*** all submitted documents." (emphasis added) The overwhelming evidence, as already detailed in this SOD, shows that WOHA met with *both* their contractor, Mr. Staggs, *and* representatives from PG&E to determine another location for the utility meters and prepare documents to submit to PG&E. Plaintiff's exhibit #33 shows that these meetings at the plaintiff's residence were specifically to prepare submitted documents. Mr. Nebel's email states, "Jeff, on April 30 we met at the Simons site with our contractor Staggs Construction, and the PGE gas and electric inspectors were able to join us to review the plans. Please see the attached memo which gives an update on that meeting. Dave Nebel." The attached memo further details the preparations taken, without the plaintiff's involvement, to modify the approved PG&E plans. Plaintiff's exhibit #34 are those newly prepared plans. Furthermore, during questioning of Mr. Nebel he was asked as follows:

QUESTION: If you go to Tab 34, page two, does this look familiar to you?

ANSWER: Yes.

QUESTION: Okay. And what is this?

ANSWER: This is - - I believe that's the drawing that Mr. Stagg's submitted to PG&E.

(12/21/23, p. 49:17-22)

QUESTION: Are you aware of the board seeking approval from Mr. Simons of this meter location?

ANSWER: No

QUESTION: Okay

THE COURT: I have a question. Before this meter location was submitted to PG&E, was there a discussion about it with Mr. Luchetti or Mr. Simons?

ANSWER: No.

(12/21/23, p. 51:11-18)

WOHA's argument that these meetings were somehow not meetings to *prepare* documents to submit to PG&E lacks credibility.

This was a material breach by WOHA. WOHA, unilaterally and without cooperation as required by the contract, submitted their own proposed application to PG&E for a new location for the meters. WOHA did not contact Mr. Luchetti and request he participate in submitting a new, or modified, application to PG&E to use the existing trench and reduce the overall cost of the project. Once WOHA made clear that they no longer intended to cooperate with Plaintiff, Plaintiff no longer had any reason to assume that WOHA would attempt to abide by the terms of the settlement agreement.

While the Court found Mr. Stamps was working hard and cooperatively to resolve this dispute and move the meters, a few points of his testimony shed light on the actions of WOHA and their lack of adherence to the terms of the contract. Mr. Stamps testified "I think a year down the road or so, we weren't really necessarily looking at the settlement agreement as the do-all-end-all. You know, so we weren't using that as a roadmap for what we were going to do. We were just trying to get it done." (12/19/23, p.95, ln 10-14.) Mr. Stamps was also asked, "[i]s it your testimony you weren't really paying attention to the settlement agreement at this point? ANSWER: Well, I didn't really know what it had to do with – you know, with this word for word or using it as a map. It really hasn't changed what we had been doing all along, which was trying to determine if the meters could actually be moved and if so, where. And so my scope of work was pretty much the same. We're just trying to get the meters moved." (12/19/23, p.107, ln 15-23.) Mr. Stamps also testified that Plaintiff's Exhibit #1 was the controlling settlement agreement. This is directly contradicted by Plaintiff's Exhibit #28 (and the parties' stipulation) which references the settlement agreement (Plaintiff's Exhibit #2) containing the $70,000 escape clause.

The Court finds Mr. Stamps' testimony indicative of the approach WOHA took to performing the terms of the contract. Mr. Stamps acknowledged moving away from the terms of the contract in order to just finish the task and get the meters moved. He was unclear about which settlement agreement was the operative contract between the parties. In Plaintiff's Exhibit #7, Mr. Stamps proposed getting three bids for the work to include "trenching, backfill and all other requirements." Mr. Stamps also proposed meeting "to determine what contractors we use to submit bids." While this is not a breach, it does show the informal approach taken by WOHA and the continued deviation from the terms of the contract. The contract required each party to obtain a bid from its own contractor and simultaneously exchange bids for a total of two bids.

It is clear to the Court that there was inconsistency in WOHA's approach to performance of the contract. The turnover on the board led to different approaches to performing the contract, a lack of knowledge of the terms of the contract and what was required to perform.

Although WOHA points to Plaintiff's refusal to allow Mr. Staggs in his home to inspect for the electrical connection as a breach by Plaintiff, the Court is not persuaded. First, WOHA's own expert witness testified that entering the home was unnecessary. Second, even assuming entry into his home was required for performance, by this point WOHA had materially breached the contract and Plaintiff was no longer obliged to perform. Based on the testimony of the defense expert, the Court finds Plaintiff was not required to allow Mr. Staggs into his home as it was unnecessary for the work to be completed. In fact, had WOHA cooperated with Plaintiff during the second application process, the WOHA and Staggs Construction representatives would have been at Plaintiff's residence with Mr. Luchetti and would have been able to simply ask him where the connections were made with the house and explain their purported need to enter Mr. Simons' home.

In the defense closing argument brief "Issue 1" filed January 31, 2024, WOHA argues that the contract does not contemplate an RFP, that the contract allows for

multiple submittal documents to PG&E and that the existing utility trench should have been used. None of these arguments are persuasive.

First, the Court finds that the concept of an RFP certainly was reasonable and logical. It was not precluded by the contract. Plaintiff's use of an RFP did not breach the contract or otherwise relieve WOHA from their obligations under the contract. In fact, WOHA immediately agreed to an RFP when it was proposed by Mr. Luchetti, and WOHA repeatedly participated in discussions and back and forth conversations with Mr. Luchetti about the RFP. WOHA never objected to the use of an RFP. (Plaintiff's Exhibit #13.)

Second, the Court agrees the contract allowed for multiple submittals, or modifications, to PG&E. However, WOHA was still required to work cooperatively with Plaintiff on those submittals. There was no exception to cooperation on a second submission, or modification of a submission, to PG&E. As previously stated, "WOHA and Simons shall cooperate with one another *to prepare all submitted documents*." (emphasis added)

WOHA's third argument is essentially a continuation of their second argument. The Court agrees that the existing utility trench could have been used. WOHA was still required by the settlement agreement to work cooperatively with Plaintiff on submitting the documents to PG&E for a new application that included use of the existing utility trench. WOHA was not relieved of the contractual requirement to cooperate on all submittal documents simply because the initial approval required a new utility trench.

WAS THERE A WAIVER OF THE BREACH BY THE PLAINTIFF?

The Court does not find Plaintiff waived WOHA's breach.

Instead of treating the breach as a termination of the contract, the injured party may waive it, i.e., elect to treat the contract as still alive, remaining ready and able to perform on his or her part , and limiting the remedy to compensation for the breach. (*McMillan Process Co. v. Brown* (1939) 33 Cal.App.2d 279, 285 [statute of limitations does not run until election to treat breach as termination]; *B.C. Richter Contracting Co.*

v. Continental Cas. Co. (1964) 230 Cal.App.2d 491, 500) "The burden . . . is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and 'doubtful cases will be decided against a waiver.'" (*City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107-108.) Whether there has been a waiver is ordinarily a question of fact. (*Bardis v. Oates* (2004) 119 Cal. App. 4th 1)

In the defense closing argument brief "Issue 1" filed January 31, 2024, WOHA argues that if there was a breach, it was waived by Plaintiff. The Court disagrees. WOHA cites the Court to Defense Exhibit P-0083. This exhibit is an email from Mr. Luchetti to WOHA, in which Mr. Luchetti objects to the manner in which he was intentionally excluded from the PG&E meeting and application. Then Mr. Luchetti states "*If* this is the direction WOHA would like to pursue *then* we would need the following." (Emphasis added.) The "if" indicates that this email is, at most, a conditional waiver. The list of conditions includes a "written plan and scope of work for the newly proposed service routing" and the "[n]ew PG&E design approval clearly showing the proposed route design and requirements." Specifically, Mr. Luchetti states, "[p]lease provide #1 above for our review and comment. Once we have an agreed upon a [sic] solution you can take it back to PG&E for approval."

WOHA never provided Mr. Luchetti with a "written plan and scope of work" as outlined in the first condition. Thus, even if Mr. Luchetti's email rose to a conditional waiver, the conditions he set out for a waiver of WOHA's breach were never satisfied by WOHA.

IS THE $70,000 "ESCAPE CLAUSE" AMBIGUOUS?

In the first place, the Court found that WOHA breached the cooperation clause of the contract. Therefore, the question of whether the "escape clause" is ambiguous is moot, and there is no need for the Court to address it. In fact, both parties agreed during closing arguments that if the Court finds a material breach of the contract based on the cooperation clause there is no need for the Court to decide this issue.

THE COURT: The question, let me ask, of the 70,000-dollar escape clause, if the Court were to find the breach was the unilateral submission of the proposal to PG&E without cooperating, do I even need to reach the question of the 70,000-dollar escape clause?

MS. PAVONE: No, you don't, your honor. (3/7/24, pp.9:13 – 9:19)

THE COURT: All right. Let me ask you, [directed to Mr. Sullivan] what about the question of if I find there was a breach regarding the preparation of the documents, then do I even need to address the 70,000-dollar escape clause? (3/7/24, pp.41:25– 42:4)

THE COURT: So, if the Court finds a breach on the failure to cooperate, does that, then, result in the meters remaining where they are with screening?

MR. SULLIVAN: I don't think you get to the 70,000-dollar trigger. (3/7/24, pp.43:7– 3:12)

Nonetheless, the Court will address this question, as it was a focal point of the trial and argument by both counsel. Moreover, the Court believes some of the testimony addressed in this section is instructive and ties into the question of whether there was a material breach as discussed in the previous section of this ruling. For example, the fact that the WOHA representatives were unfamiliar with the terms of the contract, stopped following the terms of the contract and made assumptions about the contract illustrate how they got to the point of not cooperating with Plaintiff on the second application to PG&E.

The "escape clause" *reads* "If the cost to relocate the meters from their current location to the Simons residence, *pursuant to the requirements imposed by PG&E*, exceeds a total cost of $70,000, the application will be deemed denied by PG&E for purposes of this agreement." (emphasis added) The Court finds that this is not ambiguous. The Court also finds that even if it were ambiguous, the extrinsic evidence would support Plaintiff's interpretation of the clause.

Interpretation of a written instrument is solely a judicial function unless interpretation turns on the credibility of extrinsic evidence. (*De Guere v. Universal City Studios* (1997) 56 C.A.4th 482, 501) "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." (Civ. Code § 1638.)

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code § 1636; cf. Rest.2d, Contracts § 202(1) ["if the principal purpose of the parties is ascertainable it is given great weight"].) The modern approach, however, "is to avoid the terminology of "intention" and to look for expressed intent under an objective standard." (Mission Valley East v. Kern (1981) 120 C.A.3d 89, 97) The rules of interpretation of written contracts are for the purpose of ascertaining the meaning of the words used therein; evidence cannot be admitted to show intention independent of the instrument. (*Barnhart Aircraft v. Preston* (1931) 212 Cal. 19, 22.)

Acts of the parties, subsequent to the execution of the contract and before any controversy has arisen as to its effect, may be looked to in determining the meaning. "This rule of practical construction is predicated on the common sense concept that 'actions speak louder than words.' Words are frequently but an imperfect medium to convey thought and intention. When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent." (*Crestview Cemetery Assn. v. Dieden* (1960) 54 C.2d 744, 754)

The Court does not find the $70,000 "escape clause" to be ambiguous. The Court finds the plain language of the contract makes it clear that the term "pursuant to requirements imposed by PG&E" means that estimates must abide by the PG&E requirements, and that the parties, or their contractors, may not provide estimates to move the meters in a manner, or to a location, that is not approved PG&E. The unambiguous term "pursuant to requirements imposed by PG&E" does not limit the

estimates to the narrow PG&E requirements, as argued by WOHA. Unlike WOHA's reading of the term "pursuant to the requirements imposed by PG&E," the Court finds the language clarifies that the parties were not permitted to come up with their own determination and estimate on how to move the meters, but rather were required to use location and trenching approved by PG&E.

Not only does the Court find the plain language of the "escape clause" to be unambiguous, but if the Court reads Section 5BV together with 5B(ii), it is even more clear that the term "pursuant to the requirements imposed by PG&E" means the parties are not free to decide for themselves how to move the meters and give an estimate based on their own desire. In the contract, Section 5B(ii) specifically addresses the cost to "relocate" the meters. The section states, "[s]hould relocation be approved by PG&E, WOHA agrees to pay 50% of the contractor's cost to relocate." Thus, the parties must follow PG&E's requirements, i.e. trenching, meter location, etc., when estimating the cost to move the meters. "The contract must be construed as a whole and the intention of the parties must be ascertained from the consideration of the entire contract, not some isolated portion." (*County of Marin v. Assessment Appeals Bd. of Marin County* (1976) 64 Cal.App.3d 319, 324-325) "Any contract must be construed as a whole, with the various individual provisions interpreted together so as to give effect to all, if reasonably possible or practicable." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner and Smith* (1998) 68 Cal.App.4th 445, 473) When the entire contract is read as a whole, it becomes clear that the "requirements of PG&E" clause applies to the cost of relocating the meters.

The Court does not need to explicitly list which items in the RFPs or scopes of work are permitted under the contract and which are not because the parties never reached an impasse on a final RFP and did not come to the trial asking the Court to interpret two competing RFPs. However, the Court found the RFP prepared by Mr. Luchetti generally contained the work required to relocate the meters according to the requirements of PG&E.

Assuming, arguendo, the term "pursuant to requirements imposed by PG&E" is ambiguous, the Court turns to the extrinsic evidence of the parties' conduct. The evidence presented by Plaintiff shows that both parties believed the clause "pursuant to requirements imposed by PG&E" meant the cost to relocate the meters according to the requirements of PG&E such as trenching and location. Plaintiff's interpretation is evidenced by their RFP and the testimony of Mr. Luchetti. The evidence presented by WOHA that they believed this term limited the contractor's estimate to the narrow requirements imposed by PG&E lacks the credibility necessary to persuade the Court.

The first WOHA representative that Jeff Luchetti worked with was Dan Stamps. Mr. Luchetti and Mr. Stamps worked cooperatively to submit an application to PG&E. Once that application was approved, Mr. Stamps agreed to an RFP. Mr. Stamps was the lead representative for WOHA during the initial process with Mr. Luchetti and Mr. Stamps never raised a concern regarding the "pursuant to requirements imposed by PG&E" language of the contract during any discussion with Mr. Luchetti or during his initial involvement with the RFP. In fact, as referenced in the section addressing material breach, Mr. Stamps believed Plaintiff's Exhibit #1 was the operative contract between the parties. Plaintiff's Exhibit #1 does not contain the $70,000 escape clause, yet Mr. Stamps also agreed to work with Mr. Luchetti to prepare an RFP. It is not credible to the Court that WOHA believed the $70,000 escape clause limited the work in the narrow manner argued by WOHA when the initial WOHA representative, Mr. Stamps, did not even believe the operative contract contained the language WOHA now argues is ambiguous.

Second, not only did Mr. Stamps believe Plaintiff's Exhibit #1 was the operative contract, but Mr. Stamps' own testimony establishes that he did not believe the RFP was to be narrowly construed as argued by WOHA. The testimony was:

> QUESTION: What did you understand when Mr. Luchetti said, I would like to prepare an RFP with the project requirements? And then you said we would all have to agree with the RFP. What did you understand that to be?

ANSWER: I didn't understand it to be anything. Again, he hadn't done it at that point.

QUESTION: When he said, I would like to prepare an RFP, you responded right above it. You said, 'I think that would be fine. We would all have to agree to the RFP.' What did you understand that RFP that you were referencing to be?

ANSWER: Like I said, I didn't know what it would be. We had to get together and decide what it was going to be.

QUESTION: Did you have any concept or idea of what it would include?

ANSWER: Well, basically trenching over and relocating the meters.

(12/19/23, pp.110:23 – 111:16.)

ANSWER: "I didn't know what that $70,000 -- you know, I didn't think of it as being a legal -- a legal thing."

(12/19/23, p.121:20 – 21.) Mr. Stamps never testified to the purported narrow interpretation argued by WOHA.

Mr. Nebel's testimony further reinforces the lack of persuasive evidence to show that WOHA believed the narrow interpretation of the $70,000 escape clause:

QUESTION: So you understood that that was outside the scope of this project?

ANSWER: We assumed this was outside, yes.

QUESTION: And why do you say "assumed"?

ANSWER: We thought -- assumed -- we thought it was outside the scope.

QUESTION: And was that based on communications you had with Mr. Nelson or based –

ANSWER: Correct.

QUESTION: What was that based on?

ANSWER: With that and with -- logically, PG&E is required -- their part of the requirements is to put the panels and gas next to -- or on the house. And from the house, in normal -- I guess as a layperson, where they go into the house, where they put it on the house, that's where it goes in. And at that point, I was

under the assumption -- where I got this, I don't -- I guess working before -- that it was the resident's responsibility to hook it up off the panels into the house. (12/20/23, p.113:6-25.)

ANSWER: It was the original version that our group came up with excluding all the items we didn't think were included -- should be included.

QUESTION: Okay. And again, your striking of all of these items was based on your conversations with Mr. Nelson and anything else?

ANSWER: Just common sense.

(12/20/23, p.114:1-7.) Thus, Mr. Nebel's testimony was that it was his assumption, or common sense, that Plaintiff was responsible for certain costs but that assumption was not based on the language of the settlement agreement. In fact, Mr. Nebel was unable to confidently testify that he ever read the settlement agreement:

QUESTION: Do you recall reading the settlement agreement?

ANSWER: At one specific time, I think I did read it.

(12/20/23, p.9:21-24.)

Additionally, Mr. Nelson, the contractor that was a community resident, member of the architectural review committee and advisor to WOHA on the RFP, was similarly unaware of the terms of the contract:

QUESTION: And to your knowledge, was Mr. Nelson familiar with the terms of the settlement agreement?

ANSWER: I believe only talking to myself.

QUESTION: Okay.

ANSWER: And it was, I guess, from me his interpretation that -- I would assume that it's -- didn't include all this other -- and that was his – as a contractor, didn't think we needed to do that either at that point.

QUESTION: But to the best of your understanding, that was not based on any assessment or reading of the settlement agreement; is that correct?

ANSWER: State that again.

QUESTION: To the best of your knowledge, did Mr. Nelson actually read or review the settlement agreement itself?

ANSWER: No, he did not.

QUESTION: Okay. Did you discuss any Greenbook requirements with Mr. Nelson?

ANSWER: Not to my knowledge.

(12/21/23, p.40:6-24.)

Finally, as was clear to the Court throughout the trial, the Greenbook is the term used for the PG&E requirements. If the intent was to limit the $70,000 escape clause in the manner WOHA argues, the contract language would have stated something similar to, "If the cost to relocate the meters from their current location to the Simons residence, pursuant to the requirements imposed by PG&E exceed the total cost of $70,000, the application will be deemed denied by PG&E for purposes of the Agreements. The 'total cost"' will be determined by taking the average of an estimate provided by 2 licensed contractors, one chosen by Simons and one chosen by [Association]. *The $70,000 total cost estimate shall be limited to solely the PG&E Greenbook requirements.*"

WHAT IS THE REMEDY FOR WOHA'S MATERIAL BREACH?

"Specific performance of a contract may be decreed whenever: (1) its terms are sufficiently definite; (2) consideration is adequate; (3) there is substantial similarity of the requested performance to the contractual terms; (4) there is mutuality of remedies; and (5) plaintiff's legal remedy is inadequate." (*Union Oil Co. of Cal. v. Greka Energy Corp.* (2008) 165 Cal. App. 4th 129, 134, citing *Blackburn v. Charnley* (2004) 117 Cal. App. 4th 758, 766; see also *Morrison v. Land* (1915) 169 Cal. 580, 586 ["the exclusive jurisdiction of equity to grant relief by way of specific performance of a contract will be exercised only in those cases where the legal remedy of compensatory damages is insufficient under the circumstances of the case, in the opinion of the court, to do complete justice between the parties"].)

WOHA argues Plaintiff suffered no monetary damages. ("Issue 2" filed January 31, 2024.) WOHA also argues the Court should not order specific performance because the Court would necessarily need to order WOHA to cooperate with Plaintiff on the submission of the application to PG&E and the other terms of the contract. WOHA argues these terms are not "sufficiently certain" and therefore the act to be done is not ascertainable. The Court disagrees. The Court finds the terms sufficiently certain to justify an order for the meters to remain in their current location, with screening consistent with the surrounding area as outlined in paragraph 5(B)(v) of the settlement agreement.

WOHA also argues that if the Court orders specific performance then the Court would have to necessarily order the parties to comply with the terms of the settlement agreement. Those terms include that the parties cooperate on the submission of documents to PG&E for an application and then the parties exchange their estimates. Essentially, WOHA argues that if the Court grants Plaintiff specific performance the Court would be ordering WOHA to follow the terms of the contract. However, WOHA already breached those terms. It would be inadequate and unequitable for the Court to order WOHA's version of specific performance. Not only would WOHA have had the opportunity to fail to follow the terms of the contract and then get a second chance at abiding by the contract, but the Court would not actually be providing Plaintiff any remedy. WOHA's version of specific performance would simply put the parties back at the starting point of the contract. That is not a remedy. It is a do-over.

Plaintiff has established that the meters cannot be moved to a location *approved* by PG&E, and that involved cooperation, for less than $70,000. WOHA's evidence to the contrary is not persuasive. The Court finds that the meters cannot be moved to the location approved by PG&E, and that involved cooperation, for $70,000 or less.

Mr. Luchetti provided his own estimate to move the meters based on his RFP. His estimate was $134,600. (Defendant Exhibit KK 1-4) Although WOHA disputed Mr. Luchetti's RFP and certain items included in his RFP, WOHA never actually provided

the Court with their own proposed RFP and cost estimate to move the meters to the only location that involved cooperation and was approved by PG&E. In fact, WOHA never actually provided the Court with evidence of an estimate to move the meters to any location approved by PG&E.

Mr. Staggs, WOHA's own witness, testified that the cost to move the meters to the PG&E location that was approved through cooperation was so expensive that he would not even provide a written estimate, but he "ballparked" the cost at $200,000.

Mr. Tognela testified about his estimate to move the meters. Mr. Tognela testified that his estimate, Defendant's XX, was based on 2015 pricing. Mr. Tognela's estimate was an estimate to move the meters to a location that was not approved by PG&E. Mr. Tognela speculated that PG&E would approve the location, but WOHA never presented evidence that PG&E approved the location used in Mr. Tognela's estimate. (12/22/23, pp.185:7 – 185:17) Mr. Tognela's estimate was for $58,545.24 with an additional $10,000 in allowances which brings the estimate, potentially, to $68,545.24. However, since Mr. Tognela's estimate was based on a 2015 cost estimate for a location selected without cooperation of the plaintiff and not approved by PG&E, the Court did not find his estimate persuasive.

There was testimony regarding an estimate from Mr. Cimino, but Mr. Cimino's estimate was from 2015 and not based on a PG&E approved location. Ultimately, Mr. Cimino was never called as a witness. The Court did not find the testimony regarding Mr. Cimino's estimate persuasive. (There was an extensive colloquy between the Court and Mr. Sullivan on this issue in the morning of December 22, 2023, prior to testimony.)

When considering the trial evidence of the cost to move the meters to a location approved by PG&E, the Court finds further justification to not order WOHA's version of specific performance. The law does not require futile or idle acts. (Civil Code § 3532) The evidence made clear that the meters could not be moved to the PG&E approved location on the house for $70,000 or less. It would be futile for the Court to send the

parties back to obtain and exchange estimates to move the meters to the approved location when it is clear the work cannot be completed for $70,000.

Alternatively, while not clear in WOHA's objections to the PSOD, it appears WOHA is also arguing that WOHA's version of specific performance would allow the parties, through cooperation, to prepare and submit documents to PG&E for alternative locations for the meters. However, the defendant comes to the Court having breached the agreement by failing to cooperate as required. It was WOHA's lack of cooperation that resulted in only one approved PG&E location. WOHA had the opportunity to cooperate with the plaintiff to determine if there were other locations for the PG&E meter that would cost $70,000. Next, WOHA argued to the Court that the plaintiff conditionally waived the breach. That gave WOHA an opportunity to cure the breach and then cooperate with Plaintiff to find another location for the meters. However, WOHA did not satisfy the conditions as set forth by Mr. Luchetti. Now, WOHA asks the Court to order the parties to cooperate and try to find a new location for the meters that will cost less than $70,000. The Court denies WOHA's request for the parties to now cooperate and find a new location for the meters that may cost $70,000 or less to move.

The Court considered whether monetary damages were an adequate remedy. The Court is unable to quantify the monetary damage suffered by Plaintiff. There was no evidence of monetary damages and the Court could only order nominal damages. This case is not a contract for purchase of widgets in which the Court could simply determine the monetary damage suffered by Plaintiff in purchasing widgets from a new seller. The contract was for a determination as to whether or not the PG&E meters were to be moved. In WOHA's proposed remedy of nominal damages, the Court would award Plaintiff nominal damages and then the CC&Rs would require Plaintiff to move the meters at significant expense despite WOHA's breach. Plaintiff would be forced to spend a substantial sum of money to move the meters despite WOHA's breach. That is not an equitable remedy.

Finally, WOHA argues this remedy was not contemplated by the plaintiff and is punitive. First, this remedy is not punitive. This is what the parties negotiated in the settlement agreement when they all agreed that if the cost to move the meters exceeded $70,000 then the meters would stay in their current location with screening. This is detailed in Section 5B(v) of the settlement agreement. The Court did not create this remedy, the parties contracted for this remedy. Second, this remedy *was* contemplated by the Plaintiff. In Plaintiff's Closing Brief, Section E, he specifically argued that the meters should remain in their current location with screening. Additionally, this requested remedy was repeatedly argued and discussed with the parties during the March 7, 2024, closing argument.

WOHA argues that in the complaint Plaintiff merely prayed that "The Defendant be compelled to perform its obligations under the Settlement Agreement." However, one of Defendant's obligations under the Settlement Agreement was that the "Board of WOHA not unreasonably withhold approval" of the plaintiff's proposed screening should the cost of moving the meters exceed $70,000. Inherently included with the Court's order for specific performance is the requirement that Defendant perform its obligations under the settlement agreement, that is "WOHA shall not unreasonably withhold approval as outlined in Section 5(B)(v) of the settlement agreement." WOHA does not explain how Plaintiff's prayer is inconsistent with the Court's remedy.

The Court orders the meters to remain in their current location and that the plaintiff shall submit proposed screening consistent with the surrounding area subject to controlling documents. WOHA shall not unreasonably withhold approval as outlined in Section 5(B)(v) of the settlement agreement.

IS PLAINTIFF ENTITLED TO HIS ATTORNEY FEES AND COSTS?

The contract between the parties included a provision for reasonable attorney fees and related costs. (Plaintiff Exhibit #2, Section 7) Although Plaintiff may be the prevailing party, the Court will not rule on whether Plaintiff actually is the prevailing party and whether he is entitled to attorney fees and costs as there is no motion for attorney

fees, no memorandum of costs and no motion to tax costs currently pending in this court.

IT IS SO ORDERED.

DATED: May 10, 2024

CHRISTOPHER M. HONIGSBERG
Judge of the Superior Court