G063040

IN THE COURT OF APPEAL OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GROVES, et al.,

Plaintiffs and Appellants,

vs.

DANA POINT HARBOR PARTNERS, LLC,

Defendant and Appellee.

Appeal from a Judgment of the Superior Court,
County of Orange
Case No. 30-2021-01222794
Hon. Lon F. Hurwitz, Judge Presiding

APPELLANTS' OPENING BRIEF

[SERVICE ON ATTORNEY GENERAL REQUIRED BY BUS. & PROF. CODE § 17209]

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL Fourth APPELLATE DISTRICT, DIVISION 3	COURT OF APPEAL CASE NUMBER: G063040
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 144616 NAME: Mohammed K. Ghods; Jeremy A. Rhyne (#217378); Lori L. Speak (#286883) FIRM NAME: Lex Opus STREET ADDRESS: 2100 N. Broadway Street, Suite 210 CITY: Santa Ana STATE: CA ZIP CODE: 92706 TELEPHONE NO.: 714-558-8580 FAX NO.: 714-558-8579 E-MAIL ADDRESS: mghods@lexopusfirm.com; jrhyne@lexopusfirm.com; lspeak@lexopusfirm. ATTORNEY FOR (*name*): N. Papageorges, D. Groves & A.J. Montrella	SUPERIOR COURT CASE NUMBER: 30-2021-01222794-CU-CO-CXC
APPELLANT/ PETITIONER: N. Papageorges, D. Groves, A.J. Montrella RESPONDENT/ REAL PARTY IN INTEREST: Dana Point Harbor Partners, LLC	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): N. Papageorges, D. Groves, A.J. Montrella

2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest *(Explain):*
(1)	
(2)	
(3)	
(4)	
(5)	

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: February 21, 2024

Lori L. Speak
(TYPE OR PRINT NAME)

Lori L. Speak
(SIGNATURE OF APPELLANT OR ATTORNEY)

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Appellants N. Papageorges, D. Groves, and A.J. Montrella appeal the August 23, 2023 judgment of the superior court granting Respondent Dana Point Harbor Partners, LLC's motion for summary judgment.

I. INTRODUCTION

N. Papageorges, D. Groves, and A.J. Montrella are boat owners who rent boat slips in the marina in Dana Point Harbor ("Appellants" or "Tenants"). This public marina is owned by the County of Orange and located in the City of Dana Point. In 2018, Dana Point Harbor Partners, LLC ("Respondent" or "DPHP") signed a lease with the County of Orange ("County") for operation of the Dana Point Harbor and the public marina therein.

The lease signed by DPHP specifically requires that the County and all slip tenants be given notice of any rent increase, including the methodology and rationale for the rate increase. The lease also establishes a reasonableness standard for determining new rates to ensure that prices are consistent with market rates. These requirements reflect the long history of rate restrictions that have been in place in one form or another for boat slips in the harbor.

DPHP, however, elected to impose slip rental rate increases that were far out of step with the strictures of the operative lease and the history of Dana Point Harbor operations. In some cases, the increases resulted in a rate nearly double the prior rate for the same boat slip. DPHP implemented these increases without regard for the effect on marina tenants who reside on their boats

or are of modest means and despite the fact that the marina in Dana Point Harbor is a public marina designed for Orange County boaters of all means.

Given DPHP's unjustified and unreasonable increases in the slip rates to benefit itself, Tenants filed a complaint against DPHP as a class action on behalf of themselves and the other tenants who rent boat slips at the marina in Dana Point Harbor. The class action complaint included, among other allegations, a claim for breach of contract based on rent increases for the boat slips that violated the County's lease with DPHP. However, the trial court erroneously granted summary judgment in favor of DPHP, essentially declaring this wrong has no remedy.

The court's decision runs afoul of the basic California maxim of jurisprudence that "[f]or every wrong there is a remedy." (Civ. Code, § 3523.) Therefore, Tenants appeal the erroneous summary judgment that deprived them of their right to present their evidence to a jury to obtain a just remedy. Summary judgment "is drastic and should be used with caution." (*Y.K.A. Industries, Inc. v. Redevelopment Agency of City of San Jose* (2009) 174 Cal.App.4th 339, 352; *Committee to Save Beverly Highlands Homes Ass'n v. Beverly Highlands Homes Ass'n* (2001) 92 Cal.App.4th 1247, 1260.) Thus, even though a motion for summary judgment may be an available means to address the pleadings, proper procedure is vital to the protection of a litigant's rights. Motions for summary judgment are wont to infringe on "a litigant's hallowed right to have a dispute settled

by a jury of his or her peers." (*Frazee v. Seely* (2002) 95 Cal.App.4th 627, 634.)

As discussed in detail below, the court committed several reversible errors in granting summary judgment:

1) the court granted summary judgment while triable issues of fact remained on Tenants' claims, including third-party beneficiary status, intent, the reasonableness of the methodology used to determine the boat slip rates, and the purported market rates of those slips;

2) the court made improper and unreasonable inferences against the nonmoving party in violation of long-established rules for summary judgment;

3) the court erroneously excluded or strictly construed evidence submitted by Tenants, the nonmoving party, while simultaneously overruling Tenants' objections to similar evidence submitted by DPHP, the moving party;

4) the court ruled in favor of DPHP despite its failure to address all allegations in the Complaint; and

5) the court's ruling was based on incorrect legal analyses as to Tenants' status as third-party beneficiaries of the lease between the County and DPHP.

It is axiomatic that one triable issue of material fact will defeat a motion for summary judgment. (*Homestead Savings v. Superior Court* (1986) 179 Cal.App.3d 494, 498 [opposing party may decide to raise only one triable issue of fact to defeat a motion].) Here, DPHP's separate statement presented 244 purported undisputed facts with an appendix of exhibits and

declarations of over 400 pages. Tenants presented their opposition consisting of approximately 600 pages of additional evidence. Yet the court concluded there were no disputed material facts requiring presentation to a jury. The record, however, shows otherwise. Several triable issues of fact should have been presented to a jury upon a full presentation of evidence, including at least the following:

- Whether benefiting the Tenants was a motivating purpose of the County's insistence on inclusion of the pricing limitations in the lease;
- Whether variations in the lease from prior pricing and notice requirements in other management agreements demonstrated both an intent to benefit the Tenants and also that a lawsuit by the Tenants was consistent with the objectives of the contract and the reasonable expectations of the parties;
- Whether the methodology used by DPHP to determine the slip rates for the Dana Point Harbor was reasonable in light of prior methodologies used;
- Whether the methodology used by DPHP to determine slip rates for the Dana Point Harbor was reasonable in light of evidence that DPHP failed to consider the proper marinas; and
- Whether the testimony of witnesses was credible given other facts in evidence.

These factual disputes, along with the court's failure to consider the evidence presented and reasonable inferences drawn

therefrom in favor of Tenants, warrants reversal of the judgment in this case.

As discussed in detail below, because the trial court erred in granting the motion for summary judgment, Tenants request that the judgment be reversed and the matter be remanded for a proper jury trial.

II. STATEMENT OF APPEALABILITY

This appeal is from a final judgment of the Orange County Superior Court following an order granting a summary judgment motion. (Code Civ. Proc., § 904.1, subd. (a)(1); see also *Saben, Earlix & Associates v. Fillet* (2005) 134 Cal.App.4th 1024, 1030 [judgment following order granting summary judgment is appealable].)

III. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Dana Point Harbor

Dana Point Harbor is "a marine oriented facility" located in the City of Dana Point and owned by the County of Orange "in trust for the public as a small boat marina pursuant to the State Tidelands Grant …." (1 AA 0172.) The Harbor has over 2,000 slips for boaters, including recreational and live aboard boaters as well as commercial and charter fishing boats. (1 AA 0018, ¶23.)

The Tidelands Grant, by which the State of California granted the Dana Point Harbor to the County, requires that the

lands "be used by the county, and its successors, only for the establishment, improvement, and conduct of a harbor, and for the construction, maintenance, and operation thereon of wharves, docks, piers, slips, quays, and other utilities, structures, facilities, and appliances necessary or convenient for the promotion and accommodation of commerce and navigation, and for recreational use, public park, parking, highway, playground, and business incidental thereto …." (1 AA 0180.) The Tidelands Grant also provides that "said lands shall be improved by the county without expense to the State, and shall always remain available for public use for all purposes of commerce and navigation …." (1 AA 0180.) In other words, the Tidelands Grant requires the centralization of usage of the harbor as a harbor, for navigation and boating, with additional businesses and services being incidental thereto.

From time to time, the County has leased the operation of the harbor and marina or otherwise granted outside entities the right to manage it. (See, e.g., 1 AA 0184-0257; 2 AA 0665-0666.)

B. The Parties

N. Papageorges, D. Groves, and A.J. Montrella are tenants of boat slips at the Dana Point Harbor, and D. Groves lives full time on her boat in the marina. Tenants filed this case as a class action on behalf of themselves and other boat slip holders who rent space at Dana Point Harbor. (1 AA 0012-0031.)

DPHP controls and rents the boat slips in the marina in Dana Point Harbor pursuant to an agreement with the County of Orange. (2 AA 0882 – 4 AA 1169.)

C. The Master Lease

In 2018, the County leased the marina to DPHP for a term of 66 years (the "Master Lease") (2 AA 0884, 0906.) Pursuant to the Master Lease, DPHP was given the exclusive right to possess and use, as a tenant, the identified County property, subject to the Tidelands Grant as well as other conditions and limitations. (3 AA 0884, 0904.) The Master Lease contemplated the redevelopment and renovation of the County property and specifically stated that the County entered the Master Lease for the benefit of the public, including the boat slip holders. (2 AA 0884, 0911.) Several provisions specifically identify this public benefit as a key objective of the Lease. (See, e.g., 2 AA 0912, § 3.3.1 ["The Parties acknowledge **that County's objective in entering into this Lease is the complete and continuous use of the facilities and amenities located in Dana Point Harbor by and for the benefit of the public**, without discrimination as to race, gender, religion, or sexual orientation, and for the generation and realization by County of revenue therefrom."] [emphasis added]; 4 AA 1123 ["The **ultimate purpose of this Lease is the complete and continuous public use of the Property for the benefit of the public**, and all facilities and services shall be made available to the public without discrimination."] [emphasis added].)

This focus on public use of the Property, with a central focus on its use as a harbor, was consistent with prior management agreements entered into by the County to maintain and operate the harbor prior to the Master Lease. For example, a

2001 Operating Agreement between the County and Dana Point Marina Company LLC specifically emphasized the primary purpose of the Agreement was related to public services, including the boat slips. (1 AA 0185, § 5 [primary purpose for the operating agreement was to promote the operation of the marina and boat slips, pump-out station, and ancillary boater facilities for the benefit of the public].) In accordance with the Tidelands Grant, all other services were ancillary to the harbor-related services. (*Id.*, §§ 24(A)(4)-(5).) Similarly, a management agreement with T.W.B. Company, required that T.W.B. "make its accommodations and services available to the public on fair and reasonable terms." (1 AA 0245, § 14(A)(7).)

These management and lease agreements, including the Master Lease, specifically restricted usage of the Dana Point Harbor and Marina to usage in compliance with the Tidelands Grant's "marine oriented purposes." (1 AA 0186, § C ["All proposed business activities are subject to review and approval by COUNTY for compliance with marine oriented purposes pursuant to the Tidelands Grant described herein."]; 1 AA 0226, § C ["Use of the Premises is limited to those activities and businesses which are consistent with the Tidelands Grant from the State of California …."]; 2 AA 0904, § 1.2.2 ["This Lease and the rights and privileges granted Lessee in and to the Property are subject to all covenants, conditions, restrictions, and exceptions of record or apparent, including those which are set out in the Tidelands Grant by the State of California to the County of Orange …."]; 2 AA 0909, § 3.2.2(a) ["The Property shall

not be used or developed in any way which violates any Applicable Law, the CDP, the LCP or the Tidelands Grant."].)

D. Boat Slip Leases & Pricing

As a marina, the Dana Point Harbor contains boat slips for lease to the boating public ("Slip Leases").[1] Unlike privately owned marinas, DPHP was required to consider the public boat owners' interests in setting the boat slip rents. Critically here, the Master Lease contains a specific provision regarding pricing of the Slip Leases by which DPHP was required to perform certain acts for the benefit of the Tenants in setting slip rates. Section 11.9 in its entirety reads as follows:

> 11.9 Pricing. Lessee shall at all times maintain a complete list or schedule of the prices charged by Lessee for all goods or services, or combinations thereof, supplied to the public on or from the Property, whether the same are supplied by Lessee or by its Sublessees, assignees, concessionaires, permittees or licensees. The foregoing shall not be deemed a requirement for Lessee to maintain such lists or schedules of the prices charged by Sublessees. Said prices will be "market rate" pricing as reasonably determined by Lessee; 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

[1] The moving party failed to put in any copy of a fully-executed Slip Lease or Slip License Agreement ("SLA") for the class representatives or any other tenant. Therefore, the actual terms for the agreement for each boat slip were not placed in the record. Instead, a form SLA was presented. (1 AA 0425.) Based on this evidentiary deficiency, a triable issue of fact remains as to the actual terms of the agreements for the boat slips.

> 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.

(2 AA 0973.) In other words, the Master Lease requires that the rates set for the Slip Leases be "reasonably determined" "market rates." (*Ibid.*) It further requires DPHP to give advance notice to the tenants (including Appellants herein) of the proposed rate increase for the Slip Leases, including (1) the rationale for the raise; and (2) the specific methodology used to determine the new rate. However, the Master Lease does not require that the County give advance approval of the rents and does not include an internal or administrative procedure for challenging the proposed rent or the methodology by which it was calculated.

The record shows that the restraints on the Slip Lease rates were part of a long history of the marina's operational parameters. Under prior agreements with both Dana Point Marina Company LLC and T.W.B., the rates could be adjusted no more frequently than annually under either of two specified methods to ensure that the prices charged would be "fair and reasonable." (1 AA 0203-204, § 24(A)(5); 0234-235, § 14(A)(7).) The County was also required to approve the new rates in writing. (*Ibid.*) Both methods of calculating the increase in rates required a survey of the rates at marinas across Southern California and required notice to the County of the methodology used in justifying the adjustment. Only a 30-day notice of the price increase and effective date needed to be given to the public under those earlier agreements. (*Ibid.*)

E. The Dispute – Improper Price Increase of the Slip Lease Rents in Violation of the Master Lease.

The present dispute arose when DPHP significantly raised the price of the Slip Leases, increasing the rates far above the prior rates as well as above other rates of comparable public marinas across Southern California. Prior to DPHP's price increase, the Dana Point Harbor Slip Rates were as follows:

Slip Size Per Foot	Monthly Slip Rate Per Foot
21	$13.62
22	$ -
24	$ -
25	$14.88
26	$ -
28	$ -
30	$18.20
35	$19.23
40	$19.68
45	$20.07
50	$20.80
55	$20.45
60	$22.70
65-85	$22.90

(1 AA 0415.)

In a May 14, 2021 letter, DPHP informed the County of its intent to increase the slip rates. (1 AA 0414.) DPHP acknowledged that the increases were "significant" and some even "tremendous," but claimed that other marinas were increasing their rates by 10-20% for that year, though no such evidence was provided. (*Ibid.*; 1 AA 0396.) DPHP's increases, however, ranged from 26% to 95% over the prior rates, with some

slip holders seeing an increase of more than $1,000 a month. (1 AA 0396, 0402.)

Based on a comparison to Orange County marinas alone, DPHP claimed that the average rates for the Slip Leases (without Dana Point Harbor rates included) ranged from $36.81 per foot to $74.50 per foot. (1 AA 0415.) Accordingly, DPHP planned to raise the Dana Point slip rates to $18.69 per foot for a 20-26' slip and $46 per foot for a 60' or larger slip, with increases at each length in between. (1 AA 0416.) The prior rates for these slips had been $13.62 per foot for a 21' slip and $22.70 per foot for a 60' slip. (2 AA 0415.)

On or about May 17, 2021, the County requested that DPHP do a "comparative analysis of slip rates comparing current and projected DPHP rates to other SoCal marinas …." (4 AA 1172.) This broader survey was in line with the expectations of the County under prior management agreements that market rates be determined from a survey conducted across Southern California. (1 AA 0204-205, 0235.) DPHP eventually provided the County with a new survey that included additional marinas across Southern California. (1 AA 0418.) The new survey, however, was still missing relevant data and excluded rates for many less-expensive marinas outside of Newport Beach, thereby skewing the survey results to be higher than actual market rates for Southern California. This survey clearly shows that the Newport Beach marina fees significantly skew the averages across Southern California marinas, being 2-5 times greater than all other marinas outside of Newport Beach. (*Ibid*.) The Southern

California averages based on DPHP's deficient survey ranged from $18.40 a foot to $42.38 a foot when including Newport Beach marinas. But when comparing only marinas outside Newport Beach, DPHP's proposed rates for the Dana Point Harbor slips were more than every other listed marina in virtually every category. (*Ibid*.)

In approximately June 2021, DPHP notified boaters of the slip fee increase scheduled to take effect October 1, 2021. (1 AA 0395-397.) DPHP claimed that these new rates were "market rates" based on the survey of Orange County marinas. The letter sent to slip holders admitted that reaction was likely to be "very negative" given the "sticker shock" of the increases. (1 AA 0396-397.) The post-increase rates were as follows:

Slip Size Per Foot	**Monthly Slip Rate Per Foot**
Inside Side Ties	$13.50
21	$17.15
22	$18.15
24	$18.70
25	$18.75
26	$19.35
28	$21.35
30	$24.60
35	$26.00
40	$33.45
45	$34.10
50	$35.35
55	$39.90
60	$43.15
End Ties	$43.15

(1 AA 0398.)

This significant increase was a surprise to the Dana Point Boaters Association, who had supported the selection of DPHP for the County lease, in part because its "rent proposal (how much they pay to the County) strongly suggests less aggressive slip and rent increases over the duration of the contract." (1 AA 0261.) The Boaters Association sent a letter to the County challenging the rate increase, its rationale, and DPHP's methodology. (1 AA 0400-402.) The Association informed the County that it had received hundreds of complaints. (1 AA 0402.)

This significant rate increase also left some tenants unable to afford the Slip Leases. For example, a tenant and his wife had a 45-foot slip in Dana Point Harbor. They had been renting that slip for just over $900 a month. Following the October 2021 rental increase, their new rate was $1,692.00 per month. Unable to afford that rate, they had to give up their slip and move their boat to another marina. (2 AA 0676-0677.) Similarly, a tenant who was semi-retired and nearing full retirement, had to sell her boat and release the slip when the Slip Lease went from $673 to $910 a month for her 35 ft. slip. (2 AA 0680-681.) The ripple effect of this onerous rate increase was to push the boaters of modest means out of the marina, including those who live aboard their boats, an effect that historically had been safeguarded against at Dana Point Harbor. The County, however, turned a blind eye to this dilemma, forcing the Tenants to take action.

F. The Lawsuit - Tenants File a Complaint Against DPHP and the County for Breach of Contract, Unfair Business Practices, Constructive Eviction, and Injunctive and Declaratory Relief.

In September 2021, the Tenants filed a class action complaint on behalf of a class comprised of slip holders in the Dana Point Marina who held a boat slip as of June 21, 2021, or who had vacated their slips in anticipation of the announced slip fee increase. (1 AA 0017, ¶¶ 15, 16.) The Complaint included five causes of action: injunctive relief, breach of contract, unfair business practices (Bus. & Prof. Code, § 17200 et seq.), damages for constructive eviction, and declaratory relief against DPHP and the County. (1 AA 0023-0030.)

Tenants alleged that DPHP wrongfully and unlawfully threatened to raise the slip rental fees in an unreasonable amount, well in excess of market rates. (1 AA 0023, ¶ 52.) The Tenants sought to enjoin DPHP from implementing the increases, which would cause irreparable injury to tenants who would be forced to leave the Dana Point Harbor with no other place for their boats or would be forced to sell their boats. Some of the tenants were retired or disabled persons living on fixed incomes. (1 AA 0024, ¶ 54.)

The tenants alleged that excessive fees were not only a breach of the Master Lease but an unfair business practice under Section 17200 of the Business and Professions Code. (1 AA 0024-0028, ¶¶ 57-77.) Tenants also alleged that DPHP's quasi-monopoly over local marinas was a violation of Section 17200 as was the failure and refusal to maintain the docks in proper and

safe conditions in an attempt to justify the exorbitant slip fees and force out present slip holders. (1 AA 0026-0028, ¶¶ 65-77.) Tenants also sought a judicial determination as to the duties of DPHP and the County under the Master Lease, the Tidelands Grant, State Law, and the County's own orders and precedent. (1 AA 0029-0030, ¶¶ 83-85.)

G. The Court Overrules DPHP's Demurrer, Sustains County's Demurrer, Denies Preliminary Injunction, and Denies Class Certification Without Prejudice.

DPHP and the County filed a demurrer to the Complaint. The court (Judge Glenda Sanders presiding) granted the demurrer with leave to amend only as to the fourth cause of action for constructive eviction against DPHP and on the fifth cause of action for declaratory relief as to the County. The remainder of DPHP's demurrer was denied. (1 AA 0038-0043.) Tenants did not challenge the dismissal of the County from this action. (4 AA 1466.)

Tenants filed a motion for preliminary injunction. The court (Judge Glenda Sanders presiding) denied the motion for a preliminary injunction but noted that the court was inclined to find Tenants were third-party beneficiaries of the Master Lease.

> The language which limits pricing to "market rates" necessarily confers a benefit on third-parties, seeking to rent slips in the marina. (¶27 of Complaint and Exhibit 1 thereto; See also ¶3 of Eubanks Declaration and Exhibit 1 thereto). Consequently, it appears the parties contemplated a benefit to a class of individuals

> which encompasses at least one Plaintiff (i.e. boat owners). (¶2 of Papageorges Declaration).
>
> While Defendant asserts that any benefit to boat owners is *incidental,* they do not identify a contrary purpose for this language or a benefit conferred on the county, by the provision. The facts here appear analogous to facts within *Zigas v. Superior Court* (1981) 120 Cal.App.3d 927, wherein the Court noted that language "providing that there can be no increase in rental fees, over the approved rent schedule, without prior approval in writing of HUD," was "obviously designed to protect the tenant against arbitrary increases in rents" and "manifest[ed] an intent to make tenants direct beneficiaries, *not* incidental beneficiaries…" (*Id.* at 838-839).

(1 AA 0032-0037, 0033.)

Tenants also filed a motion for class certification, which was denied without prejudice. Additional class counsel associated into the case just prior to the court's decision on DPHP's motion for summary judgment, and the case remains a putative class action. (4 AA 1526, ROA 245; 1532, ROA 375.)

H. DPHP Files a Motion for Summary Judgment, and Appellants Oppose, Submitting Declarations and Documentary Evidence, Including Expert Testimony, in Opposition.

DPHP filed a motion for summary judgment, or in the alternative summary adjudication on each of the remaining four causes of action: breach of contract, unfair competition, and injunctive and declaratory relief. The moving papers included a separate statement of 244 facts (with some duplication of facts) and an appendix of evidence with three declarations and nearly

400 pages of exhibits. (1 AA 0080-0544.) DPHP included declarations from Thomas A. Miller (who became the Chief Real Estate Officer for the County in July 2018) (1 AA 0147, ¶1), Joe Ueberroth (the owner and president of Bellweather Financial Group, a private equity firm that invests in marine investments and is one of the members and managers of Dana Point Harbor Partners, LLC) (1 AA 0160), and Scott R. Laes, counsel for DPHP (1 AA 0168). DPHP did not provide any expert opinions in support of its motion for summary judgment.

Tenants opposed the motion, submitting both declarations and documentary evidence. Tenants submitted the declaration of J. Richard Donahue, a professional real estate appraiser and consultant. (1 AA 0655-0658.) Mr. Donahue has been appraising real estate in Southern California since 1977, specializing in valuation and consulting services related to public agency and right-of-way clients and for major investment grade commercial properties and special purpose properties. Mr. Donahue has been qualified before multiple courts and administrative bodies including Orange County Superior Court and the Orange County Assessors Appeals Court. (2 AA 0655-656, 0770.) Mr. Donahue provided testimony regarding the rental value of the boat slips in the Dana Point Harbor and the flaws in the surveys conducted by DPHP. (1 AA 0657-0658; 0686-0797.) Mr. Donahue provided an appraisal report for the marina boat slips that showed market valuations of between $12.50 and $25.00 for the boat slips. (2 AA 0760.)

Tenants also submitted the following declarations in support of their opposition:

- Robert Langan, PhD, a boater who conducted a survey of the slip-rates in the marinas from San Diego to Santa Barbara (2 AA 0659-664);

- Douglas Whitlock, the manager of Dana Point Marina Company, which operated the East Basin Marina in the Dana Point Harbor until 2018 (2 AA 0665-666);

- Anne Eubanks, the President of the Dana Point Boaters Association (2 AA 0667-0670);

- 5 declarations of current or former tenants of the marina, including N. Papageorges, one the named plaintiffs (2 AA 0671-0681); and
- Dennis C. Winters, counsel for Tenants (2 AA 0682-0685).

Tenants also submitted 16 exhibits:

- The Donahue Appraisal Report (2 AA 0687-0798, Ex. 101);

- The Langan Southern California Marina Slip Rate Comparison (2 AA 0800-802, Ex. 102);

- A May 2017 Letter from DPHP to Ms. Zoila Finch, the CEO Real Estate for the County of Orange re: Proposed Financial Terms (2 AA 0804-808, Ex. 103);

- A March 6, 2001 Orange County Board of Supervisors Minute Order (2 AA 0810-815, Ex. 104);

- A June 19, 2001 Orange County Board of Supervisors Minute Order (2 AA 0817-833, Ex. 105);

- DPHP Financial Projections for Dana Point Harbor (2 AA 0835-866, Ex. 106);

- A Legal Memorandum from Counsel for County to Counsel for DPHP re: Revisions in Draft of Master Lease (2 AA 0868-880, Ex. 107);

- The Master Ground Lease Agreement with all Exhibits (2 AA 0882 - 4 AA 1169, Ex. 108);

- Email to DPHP from County Supervisor Bartlett's office Requesting Full Survey (4 AA 1171-177, Ex. 109);

- DPHP "Southern California Survey" (4 AA 1179, Ex. 110);

- DPHP Truncated "Southern California Survey" (4 AA 1181-182, Ex. 111);

- October 2021 Slip Price List (4 AA 1184, Ex. 112);

- Order on Motion for Preliminary Injunction (4 AA 1186-191, Ex. 113);

- Excerpt from Ueberroth Deposition (4 AA 1193-204, Ex. 114);

- Excerpts from Miller Deposition (4 AA 1206-1229, Ex. 115); and

- Exhibits for Whitlock Declaration (4 AA 1231-1275, Ex. 116)

The court issued a tentative ruling granting summary adjudication on all four remaining causes of action. The court heard oral argument and granted the parties an opportunity to provide additional briefing on the issue of the Tenants' status as third-party beneficiaries. (RT 8-27; 4 AA 1393, 1394-1461.)

I. The Court Erroneously Grants DPHP's Motion for Summary Judgment and Enters Judgment on August 23, 2023.

Following the submission of the parties' supplemental briefs, the Court issued its final ruling granting summary judgment. (4 AA 1463-1500.) The court's minute order incorporated its prior tentative ruling and added additional analysis based on the supplemental briefing. (*Ibid.*)

1. Evidentiary Issues

Tenants had requested judicial notice of three documents: a county minute order dated March 6, 2001 (Ex. 104); a county minute order dated June 19, 2001 (Ex. 105); and the court's order on the preliminary injunction (Ex. 113). (2 AA 0569-570.) The court granted Tenants' request for judicial notice as to Exhibit 105 and 113. (4 AA 1466-467.) On DPHP's objection, the court denied the request to take judicial notice of Exhibit 104 because it was not properly certified or authenticated. DPHP had complained that Exhibit 104's certification was not signed. (4 AA 1467; 1322.) Tenants, however, subsequently submitted a notice of errata submitting the correct version of the minute order with the signed certification. (4 AA 1369-392.)

The court overruled 26 of Tenants' objections and sustained 13 as to the Miller and Ueberroth Declarations. (4 AA 1468-469.) As for DPHP's objections to Tenants' declarations and exhibits, the court sustained DPHP's objection to the entirety of Mr. Donahue's declaration because he had not been disclosed or certified as an expert, and on the grounds that he had not

established his expertise and could not properly provide expert testimony. (4 AA 1470.) Of the remaining 8 declarations submitted by Appellants, the Court sustained 48 out of 50 objections from DPHP, resulting in the exclusion of significant portions of testimony by declarants, in some cases effectively resulting in the exclusion of the declaration in its entirety. (4 AA 1470-473.)

2. Ruling on Causes of Action

The Court granted summary adjudication on each of Tenants' remaining causes of action. As for breach of contract, the court focused solely on the allegations regarding slip fee increases. The court found that the SLAs permitted fee increases with 30 days' notice, quoting the SLA as stating that the "Slip Fee structure … is based upon the greater of the length of the vessel overall or the size of the slip assigned" and that "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 …." (4 AA 1476.) However, DPHP, the moving party, had not submitted any SLAs that were signed by the parties or other class members. Nonetheless, the court treated the single unsigned form as sufficient evidence of the SLAs as to each Tenant. As for the Master Lease, the court concluded that Tenants were not third-party beneficiaries. Thus, they could not bring a claim for breach of contract. (4 AA 1477-484.)

On Appellants' claim for unfair business practices under section 17200 of the Business and Professions Code, the court concluded that Tenants failed to demonstrate violations of the

public trust doctrine or establish a quasi-monopoly on marina slip fees. (4 AA 1484-488.) In ruling on both the second cause of action for breach of contract and the third cause of action for unfair competition, the court cited evidence submitted by DPHP in support of its motion. (See, e.g., 4 AA 1476, 1477, 1479, 1482, 1487.)

The court summarily adjudicated Tenants' first and fifth causes of action for injunctive and declaratory relief as essentially contingent on or duplicative of the Tenants' claims for breach of contract and unfair business practices. (4 AA 1488-489.)

3. Ruling on Supplemental Briefing

At oral argument, the Court agreed to entertain supplemental briefing concerning whether Tenants are third-party beneficiaries of the Master Lease. Following supplemental briefing by the parties, the Court added to its tentative ruling a section on Tenants' third-party beneficiary status, again concluding that they were not intended third-party beneficiaries of the Master Lease. (4 AA 1489-1500.) The Court stated that under Section 11.9 of the Master Lease "the only act promised by Defendant is to 'reasonably determine' market rate pricing of all including slip fees charged to the boaters," and that there was "no language in the Master Agreement indicating that any person or entity other than County is the beneficiary of the contract." (4 AA 1492, 1493.)

The Court claimed that Tenants failed to point 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." (4 AA 1493.) The court stated that any obligations DPHP had to the slip holders, were "primarily contained" in the SLAs. (*Ibid.*)

Finally, the court concluded that in this case, there was no extrinsic evidence of an intent by either party to the Master Lease to make plaintiffs intended beneficiaries. Therefore, the determination of whether plaintiffs had third-party beneficiary standing under the Master Lease was "an interpretation of the terms of the contract itself." (4 AA 1500.) Because the Court concluded that Tenants had failed to establish their status as intended beneficiaries rather than incidental beneficiaries, the court found summary adjudication of the second cause of action was warranted. (4 AA 1498, 1500.)

The court entered judgment on August 23, 2023, granting summary judgment on the four remaining causes of action. (4 AA 1501-502.)

J. Appellants Timely Appeal.

On September 7, 2023, Appellants timely filed their Notice of Appeal, seeking review of the August 23, 2023 judgment. (4 AA 1508-509.)

IV. STANDARD OF REVIEW

The court of appeal reviews the granting of a motion for summary judgment de novo. (*Schachter v. Citigroup, Inc.* (2005)

126 Cal.App.4th 726, 733 [citing *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854–855].) In reviewing an order granting summary judgment, the reviewing court assumes the role of the trial court and redetermines the merits of the motion. (*Doe v. Salesian Society* (2008) 159 Cal.App.4th 474, 478.) The reviewing court "must independently determine as a matter of law the construction and effect of the facts presented." (*Id.*) The court reviews evidentiary rulings for abuse of discretion. (*Doe v. SoftwareONE Inc.* (2022) 85 Cal.App.5th 98, 104.) "When a trial court's judicial notice rulings are challenged, harmless error standards should apply." (*Aquila, Inc. v. Superior Court* (2007) 148 Cal.App.4th 556, 569.)

V. LEGAL ARGUMENT

A. The Trial Court Erred in Granting Summary Judgment Because It Failed to Comply with Well-Established Standards for Summary Judgment Motions.

Courts are required to comply with clearly delineated safeguards when ruling on a motion for summary judgment or adjudication, particularly those set forth in Code Civ. Proc., § 437c. For instance, the motion should be granted only 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." (*Seo v. All-Makes Overhead Doors* (2002) 97 Cal.App.4th 1193, 1200.) Furthermore, "[i]n determining whether the papers show that there is no triable issue as to any material

fact the court shall consider all of the evidence ... and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted ... on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact." (*Ibid.* [quoting Code Civ. Proc., § 437c, subd. (c)].) A court ruling on such a motion must consider all of the evidence and all of the inferences reasonably drawn from that evidence "in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at 843.)

Where triable issues as to material facts exist ***or credibility determinations must be made***, they must be decided by a jury. (See *Stofer v. Shapell Industries, Inc.* (2015) 233 Cal.App.4th 176, 179.) The existence of a single material disputed fact regarding any of plaintiff's claims will defeat the motion. (See *id.* at 186 [a court properly grants summary judgment only if "no issues of triable fact appear"]; *Homestead Savings v. Superior Court*, *supra*, 179 Cal.App.3d at 498 [an opposing party may decide to raise only one triable issue of fact to defeat a motion].)

Here, the court failed to comply with these substantive safeguards and as a result improperly granted summary adjudication as to each of Tenants' remaining causes of action, resulting in summary judgment in favor of DPHP. Each of the court's errors warrant reversal of the judgment.

1. Disputed material facts remained as to the applicable terms of the SLA, the status of Tenants as third-party beneficiaries, the reasonableness of the methodology used to determine increased slip rates, and whether the rates were market rates.

Two key issues related to Tenants' breach of contract claim against DPHP were third-party beneficiary status and the reasonableness of the methodology used to arrive at the increased slip rates. In granting summary adjudication on Tenants' claim for breach of contract, the court disregarded disputed material facts that remained for both key issues. These disputes required denial of DPHP's motion for summary adjudication of Tenants' breach of contract claim. (See *Stofer v. Shapell Industries, Inc.*, *supra*, 233 Cal.App.4th at 189–90; *Homestead Savings v. Superior Court*, *supra*, 79 Cal.App.3d at 498.)

a. Third-Party Beneficiary Status

First, disputed material facts exist as to whether Tenants are third-party beneficiaries of the Master Lease. As an initial matter, third-party beneficiary status must be determined after careful examination of the express provisions of the contract "as well as all of the relevant circumstances under which the contract was agreed to." (*Goonewardnene v. ADP, LLC* (2019) 6 Cal.5th 817, 830.) To the extent interpretation of the contract or consideration of the relevant circumstances requires the weighing of evidence, it is a question of fact reserved for the jury. The Judicial Council of California has promulgated a standard jury instruction for use in jury

trials to determine whether a plaintiff has third-party beneficiary standing. (CACI 301 "Third-Party Beneficiary" ["[Tenants] may be entitled to damages for breach of contract if [they] prove that a motivating purpose of [the County/DPHP Lease] was for [Tenants] to benefit from their contract. You should consider all of the circumstances under which the contract was made."].)

Furthermore, the determination of whether a person is a third-party beneficiary turns on the motivating purpose of the parties. (*Goonewardene v. ADP, LLC*, *supra*, 6 Cal. 5th at 830 [court used the phrase "motivating purpose" because of "the ambiguous and potentially confusing nature of the term 'intent'"].) The law is clear that intent based on extrinsic evidence is a question of fact for the jury. (See *Prouty v. Gores Technology Group* (2004) 121 Cal.App.4th 1225, 1233 ["Generally, it is a question of fact whether a particular third person is an intended beneficiary of a contract."]; *Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1028 ["With this extrinsic evidence of defendants' understanding in conflict, plaintiff's status under the lease should not be adjudicated as a matter of law"]; see also *Shell v. Schmidt* (1954) 126 Cal.App.2d 279 [jury finding that there was a third-party beneficiary contract that was breached].)

Nonetheless, the court concluded that the "motivating purpose of the Master Agreement was not to protect Tenants and other boaters against unreasonable slip fee increases, but rather to facilitate the redevelopment of the Harbor." (4 AA 1479.)

However, both the interpretation of the Master Lease and the extrinsic evidence presented were disputed as to whether a motivating purpose of the Master Lease was to benefit Tenants. The Master Lease itself contains statements of varying purposes. (See, e.g., 2 AA 0911, § 3.3.1 ["The Parties acknowledge that County's objective in entering into this Lease is the complete and continuous use of the facilities and amenities located in Dana Point Harbor by and for the benefit of the public, without discrimination as to race, gender, religion, or sexual orientation, **and** for the generation and realization by County of revenue therefrom."] [emphasis added]; 4 AA 1123 ["The ultimate purpose of this Lease is the complete and continuous public use of the Property for the benefit of the public, and all facilities and services shall be made available to the public without discrimination."].)

The court relied on a County declaration that stated that the County did not intend Tenants to be third-party beneficiaries. (4 AA 1480.) According to the declarant, the notice provision in Section 11.9 was included so that the process was open and public but not to convey any rights to Tenants. (*Ibid.*) Not only should the credibility of this statement have been reserved for a jury given the self-serving nature of the declaration (the County financially benefits from slip rate increases), but Tenants submitted contrary evidence showing different representations by the County.

Specifically, Tenants submitted a letter from County's counsel to DPHP's counsel during the Master Lease negotiations

that expressed near outrage that DPHP's counsel had deleted the rationale and fair pricing language from the draft Master Lease, stating such a move was a "deal-breaker". (2 AA 0876 ["The proposed changes to this section [pricing] are extremely problematic to the County, are not acceptable, and are completely contrary to the spirit of this Lease. The **deletion of the fair pricing language alone is a deal-breaker** and will cause many issues with the public and the overall perception of this Lease."].) This conflicting evidence alone strongly supports Tenants' position that a motivating purpose of the Lease was to benefit the public, specifically the slip holders like Tenants. A jury should have been permitted to weigh this evidence in light of the County's post hoc position that it had no such purpose (as stated through one individual who was not even the Chief Real Estate Officer at the time).

But that was not the only contrary evidence the Tenants submitted. Tenants also submitted evidence of a long history of pricing restraints for the boat slips in the Harbor to ensure fair and reasonable public rates. (See, e.g., 2 AA 0203-204; 0234-235 [prior management agreements contained particular parameters for ensuring fair pricing; 2 AA 1374 [a March 2001 certified County document noting the distinctive position of the Dana Point Harbor and the need to set policies that ensure reasonable and fair prices, consistent with market prices, requires a special pricing policy for Dana Point Harbor]; 4 AA 1377-378 [a June 2021 certified count documents rejecting an appeal by TBW for

increased slip rental rates].) Tenants should have been able to present this conflicting documentary evidence to a jury.

What purpose would be served by requiring DPHP to provide the slip holders with advance notice of the rationale and methodology for the increases if the slip holders could not challenge the increases? Prior management agreements did not include the requirement for such fulsome notice to the tenants. But in those agreements, not only did the managing company have to follow more structured parameters for the fee increases but the County itself had a clear requirement to approve those increases. The evidence suggests that a less structured procedure for reasonably establishing the rates resulted in greater notice to the only ones who benefitted from the protections – the Tenants. Thus, disputed material facts remain as to the Tenants third-party beneficiary status that must be resolved by a jury, and the court erred in concluding otherwise as a matter of law.

b. Reasonable Methodology for Rate Increases

Second, material factual disputes exist as to the reasonableness of DPHP's methodology in calculating the new slip rates. Reasonableness is a question of fact for the jury. (See *Brasher's Cascade Auto Auction v. Valley Auto Sales & Leasing* (2004) 119 Cal.App.4th 1038, 1059 ["questions of reasonableness are regarded as questions of fact or mixed questions of law and fact"]; *Tesoro del Valle Master Homeowners Assn. v. Griffin* (2011) 200 Cal.App.4th 619, 630 [determination of whether CC&R's and design guidelines imposed "reasonable" restrictions was necessarily a question of fact for the jury].)

In this case, there were evidentiary disputes about the methodology employed by DPHP. DPHP claimed that the new rates were reasonably determined based on a market survey of Orange County marinas and provided declarations from Miller for the County and Ueberroth for DPHP in support of that claim. (See, e.g., 1 AA 0156, ¶ 38; 0162-163, ¶¶ 9-11.) DPHP also submitted two slip market surveys: one solely considering Orange County marinas and one considering other marinas across southern California. (1 AA 0415, 0418.)

Tenants, however, presented evidence and relied on DPHP's own evidence to show that the new rates were not reasonably determined and the surveys performed by DPHP were inadequate. This evidence included but was not limited to the following:

> (1) prior management agreements requiring broader surveys of southern California (1 AA 0203-204, 0234-235);
>
> (2) the expert declaration of J. Richard Donahue, including a full appraisal report for market rates for the Dana Point Harbor well-below DPHP's (2 AA 0655-658, 0686-0798);
>
> (3) the declaration of Robert Langan, PhD, a boat owner in the Dana Point Harbor who reviewed the DPHP survey and performed an analysis comparing of slip rates from San Diego to Santa Barbara with results that contradicted DPHP's survey (2 AA 0559-665, 799-802);
>
> (4) the declaration of Douglas Whitlock, a prior manager of the East Basin Marina in Dana Point from

> 1971-2018, who provided another southern California survey conducted during his management period (2 AA 0665-666, 4 AA 1230-241); and
>
> (5) a letter from the County rejecting rate increases and questioning the validity of a prior survey that focused primarily on Newport Beach marinas and excluded Oceanside, just like DPHP did (2 AA 08265.)

This evidence was sufficient to raise a triable issue of fact as to the reasonableness of the surveys provided by DPHP. DPHP's "surveys" were not performed by an independent company. (1 AA 0163, ¶ 11; 0414-415, 0418.)

The court, however, either erroneously excluded the above evidence or ignored it, focusing instead on the County's decision not to challenge the reasonableness of DPHP's methodology. (See, e.g., 4 AA 1482.) This was error. (*Zigas v. Superior Court* (1981) 120 Cal.App.3d 827, 841 [concluding it would be unconscionable for a party to secure benefits of a government contract upon a promise to charge no more than a certain amount and then find there is no remedy by which that party can be forced to disgorge rents in excess of the agreement because the government did not act].) The disputed evidence in the record on the reasonableness of DPHP's methodology required presentation of the facts to a jury for Tenants' breach of contract claim.

2. The court failed to consider all evidence and draw all reasonable inferences in the light most favorable to Tenants.

In granting summary judgment, not only did the court ignore material factual disputes, but it failed to consider all

evidence and the inferences drawn therefrom in the light most favorable to the Tenants, the nonmoving party. On a key issue, namely the motivating purpose for the inclusion of the notice requirement in section 11.9, the court stated as follows:

> 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.

(See 4 AA 1480.) And, again at the end of its order it made a similar error:

> It is likely that with the SLA provisions in mind, County and Defendant included the provisions in Section 11.9 requiring Defendant to provide advance notice to Plaintiffs and other boaters of a raise in the slip fee rates. … 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.

(4 AA 1493.) In reading Section 11.9, it is at least as reasonable to conclude that the notice requirement in the Master Lease reflected the County's intent to ensure the purposes of the Tideland Grants, the County's history of rental restrictions, and concern that the public have full access to the use of the harbor and marina via restricted pricing. Given two reasonable inferences, the court should have favored Tenants, the nonmoving party. The court did not.

Furthermore, the inference the Court made that the Master Lease was only echoing the SLAs is not supported by the facts and is, therefore, unreasonable. As an initial point, it appears from the record that the SLAs were drafted or submitted to the County or the boaters after the Master Lease was approved. In addition, the form SLA submitted by DPHP with its motion did not include any requirement that DPHP give the boat slip holders notice of the rationale and the methodology for determining the slip rental rates. (1 AA 0426, § 5(b).) The two notice provisions are not coterminous. The Master Lease afforded the slip holders something they were not directly entitled to under the SLAs: advance explanation of the methodology and the rationale for the slip fee increases. The court incorrectly inferred otherwise in contravention of the requirements for granting summary judgment.

3. The court's evidentiary rulings failed to comply with the evidentiary standards for summary judgment and substantially prejudiced Tenants.

The court also failed to adhere to the liberal approach to be given to the nonmoving parties' evidence, including declarations, in opposing a motion for summary judgment. (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1322 [reviewing court "construe[s] the moving party's affidavits strictly, construe[s] the opponent's affidavits liberally, and resolve[s] doubts about the propriety of granting the motion in favor of the party opposing it"].) Tenants submitted 10 declarations in support of their motion and 16 exhibits. Rather than liberally construing this

evidence, the court liberally granted DPHP's evidentiary objections. For 8 of the declarations submitted by Tenants, the Court sustained 48 out of 50 of DPHP's objections. (4 AA 1470-1473.)

But the court was not nearly as unforgiving when considering the declarations and evidence submitted by DPHP. The court overruled 26 of Plaintiffs' objections and sustained 13. (4 AA 1468-469.) The court's approach was not even-handed. For instance, Miller, the Chief Real Estate Officer for the County, made legal arguments or gave improper opinion testimony regarding the legal effect of documents:

> The Lease supersedes prior agreements and policies related to the administration of the Harbor. (1 AA 0152, ¶ 23)
>
> Any and all prior methodologies regarding rates in the Harbor are not relevant and are superseded by Section 11.9, including any methodology agreed to in connection with the prior management agreements. The March 6, 2001 Minute Order is no longer applicable, given the change in language in the agreements and the change in methodology for boat slip adjustments. (1 AA 0153, ¶ 25)
>
> The Board is not bound to follow a Minute Order from 2001. (1 AA 0158, ¶ 46.)

Tenants objected to each of these statements on grounds that he was impermissibly offering legal conclusions, improper opinions, or failed to provide sufficient foundation. (2 AA 064, 0645, 0650.) The Court overruled all of them. (4 AA 1469.)

Furthermore, the court excluded the entire declaration of Tenants' expert J. Richard Donahue on the grounds that Donahue had not been disclosed or certified as an expert, had not established his expertise, and, therefore, could not provide expert testimony. (4 AA 1470.) This was error. First, there had been no demand yet for expert disclosures, and the time for disclosures had not passed. At the time DPHP filed the motion for summary judgment, no trial date was set. (1 AA 0052; see also Code Civ. Proc., § 2034.230 ["[t]he specified date of exchange shall be 50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date"].)

Second, Donahue did establish his qualifications. Addendum A to the Appraiser Report (Ex. 101 in Tenants' Appendix of Evidence) is the "Appraiser Qualifications." (2 AA 0770.) This document states that "Mr. Donahue's services include a wide range of specialized studies including tax appeals, market demand, feasibility, investment analysis, assessment allocation, reuse analysis, and the valuation of partial interests including leasehold, leased fee and minority interests.") (Ibid.)

The court also questioned Mr. Donahue's expertise because "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." (4 AA 1487.) This license vs. lease distinction was emphasized by DPHP, likely in order to avoid the implications of the rights afforded under leases. Regardless, the Master Lease also refers to them as leases or rental agreements and the holders as tenants. (See, e.g., 2 AA

0910, subd. (f) ["all of Lessee's **slip leases** shall provide that any newly **tenanted vessel** which does not so comply shall be ineligible for continued **slip tenancy**"]; 2 AA 09721 § 11.3 ["Lessee shall require in its **slip rental agreements** that, as a condition of slip rental and continued slip **tenancy**, all new slip tenanted vessels be required to be seaworthy and all of Lessee's **slip leases** shall provide that any newly tenanted vessel which is not seaworthy shall be ineligible for continued **slip tenancy** on the Property"] [emphases added].) This license vs. lease distinction was, therefore, not a valid ground for excluding Donahue's expert opinion.

Under the rules for summary judgment, the court was required to consider the Donahue declaration and to construe it liberally in the Tenant's favor. (See *Jennifer C. v. Los Angeles Unified School Dist.* (2008) 168 Cal.App.4th 1320, 1332–1333 ["In considering whether Cunningham's opinions were sufficient to raise triable issues of fact, we must take into account that his declaration was submitted by appellant in opposition to the respondent's motion for summary judgment. In these circumstances, the expert's declaration is to be liberally construed."]; *Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 189 ["The rule that a trial court must liberally construe the evidence submitted in opposition to a summary judgment motion applies in ruling on both the admissibility of expert testimony and its sufficiency to create a triable issue of fact."].)

> The requisite of a detailed, reasoned explanation for expert opinions applies to "expert declarations in *support* of summary judgment," not to expert declarations in *opposition* to summary judgment. (*Citation*.) This is because a defendant moving for summary judgment bears the heavy "'burden of persuasion that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law.' [Citation.]" (*Citation*.) On the other hand, a plaintiff opposing a motion for summary judgment need only raise a triable issue of fact.

(*Jennifer C. v. Los Angeles Unified School Dist.*, *supra*, 168 Cal.App.4th at 1332–1333; *AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1065 ["Counter-affidavits and declarations need not prove the opposition's case; they suffice if they disclose the existence of a triable issue …."].) The court's evidentiary rulings were an abuse of discretion.

4. The court erroneously granted summary adjudication on Tenants' cause of action for unfair business practices.

The court also erroneously granted DPHP's motion for summary adjudication as to Appellants' third cause of action for unfair business practices under California's Unfair Competition Law (Cal. Bus. & Prof. Code, § 17200 et seq) ("UCL"). Tenants' complaint alleged several violations of the UCL:

1) threatening excessive slip fee rent in violation of the Public Trust Doctrine, the Tidelands Grant, and Section 40 of the California Harbor and Navigation Code.
2) threatening excessive slip fees rent based on a quasi-monopoly in violation of the Public Trust Doctrine and threatening lawful competition; and

3) failing and refusing to maintain the docks as required by law and the Tidelands Grant and fraudulently create the purported need to charge excessive slip fees.

(1 AA 0026-028, ¶¶ 65-77].)

DPHP's motion for summary adjudication, however, did not address all of Tenants' UCL claims. There are no facts and no legal arguments in DPHP's moving papers regarding its fraudulent, unfair, and unlawful failure to maintain the docks. None. (1 AA 0076-077; 0111-126.) DPHP merely repeated its 60 facts that it used for its breach of contract issue and added two new facts addressing the claim of a monopoly. (1 AA 0126, UMFs 181, 182.) DPHP also did not address allegations of its failure to determine fair market rates for slip price increases as defined by Section 40 of the Harbors & Navigation Code, which requires that all "[f]acilities in harbors and connecting waterways established under the provisions of this division shall be open to all on equal and reasonable terms.") (1 AA 0027, ¶ 69.)

For this reason alone, the trial court improperly granted DPHP's motion for summary adjudication of the third cause of action. A motion for summary adjudication must dispose of the claim ***in its entirety***, and the failure to address particular allegations is fatal. (See Code Civ. Proc., § 437c, subd. (c) [movant must "show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law"]; *Jameson v. Desta* (2013) 215 Cal.App.4th 1144, 1165 [granting summary adjudication erroneous where movant did not address some of the allegations as to that cause of action in the

complaint]; *Tesselle v. Mcloughlin* (2009) 173 Cal.App.4th 156, 172, 173 ["'[A] summary judgment motion is addressed to the pleadings,' and 'ignoring a key allegation' is a 'fatal flaw.'"].)

Despite this failure by DPHP, the court improperly faulted Tenants for failing to produce evidence in support of their claim:

> Plaintiffs have not proffered any evidence in support of these conclusory allegations [about the failure to maintain the docks]. 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 marina.

(4 AA 1486.)

The court once again improperly shifted the burden to Tenants. Because DPHP had not addressed those allegations, Tenants had no obligation to produce any evidence. "There is no obligation on the opposing party … to establish anything by affidavit unless and until the moving party has by affidavit stated facts establishing *every element* … necessary to sustain a judgment in his favor …." (*Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468 [emphasis in original].) DPHP simply failed to meet its initial burden, and the court should have denied summary adjudication as to Tenants' third cause of action for unfair and unlawful competition under the UCL. (See *Johnson & Johnson v. Superior Court* (2011) 192 Cal.App.4th 757, 761 ["the party moving for summary judgment [or summary adjudication] 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"]; *Davis v. Kiewit Pac. Co.* (2013) 220 Cal.App.4th 358, 364 [the moving party bears "the burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact …."].)

5. The court's rulings on Tenants' injunctive and declaratory relief claims should be reversed.

The court also erred in granting summary adjudication as to Tenants' causes of action for injunctive and declaratory relief. As for injunctive relief, the court granted summary adjudication on this claim solely on the basis that both the breach of contract cause of action and the UCL cause of action could not be maintained, there were "no remaining causes of action upon which injunctive relief could be granted." (4 AA 1488.) Therefore, upon reversal of the court's grant of summary adjudication on Appellants' other claims, the Court should also reverse the court's decision with regard to the claim for injunctive relief.

Second, to the extent the declaratory relief claim was also denied because there were no substantive causes of action left, the court's decision should be reversed as to the declaratory relief claim upon reversal of the judgment on the other causes of action. To the extent the court determined that Tenants' cause of action for declaratory relief was deficient because it was a restatement of other causes of action, the court erred. (4 AA 1488-489.) Section 1060 of the Code of Civil Procedure expressly allows for such a claim. (*Moran v. Prime Healthcare Management, Inc.* (2016) 3 Cal.App.5th 1131, 1153 [recognizing that Section 1060

allows an interested person under a written instrument who desires a declaration of his or her rights or duties with respect to another to bring an original action in court if there is an actual controversy relating to the legal rights and duties of the respective parties].) Here, there is an ongoing controversy regarding DPHP's obligations under the Master Lease, the Tidelands Grant, and other law. In fact, Judge Sanders had already rejected this same argument. (1 AA 0042.)

For all of the above reasons, the court erred in granting summary judgment to DPHP. The court failed to comply with the standard for determining a motion for summary judgment, and the judgment should be reversed.

B. The Trial Court's Legal Analysis Was Wrong as to Tenants' Status as Third-Party Beneficiaries of the Master Lease.

Not only did the trial court err in granting summary judgment because it failed to comply with the standards for summary judgment motions, but its legal analysis was wrong on the issue of Tenants' status as third-party beneficiaries. "California law permits third-party beneficiaries to enforce the terms of a contract made for their benefit." (*Spinks v. Equity Residential Briarwood Apartments*, *supra*, 171 Cal.App.4th at 1021; see also Civ. Code, § 1559 [contract, made expressly for the benefit of a third person, may be enforced by him at any time before parties rescind].) The law is well established that "it is not necessary that the beneficiary be named and identified as an individual; a third-party may enforce a contract if he can show he

is a member of a class for whose benefit it was made." (*Prouty v. Gores Technology Group*, *supra*, 121 Cal.App.4th at 1232.)

In fact, here, in ruling on Tenants' motion for preliminary injunction at an early stage in the case, the prior assigned trial judge (Hon. Glenda Sanders) held that she was "inclined to find that Plaintiffs were intended third-party beneficiaries of the provision limiting prices to 'market rate,'" finding the factors analogous to those in *Zigas v. Superior Court*, *supra*, 120 Cal.App.3d 927. (1 AA 0033; 4 AA 1478.)

Under the test set forth in *Goonewardene v. ADP, LLC*, a third-party may bring a breach of contract action against a party to a contract by establishing: (l) that the third-party would benefit from the contract; (2) that a motivating purpose of the contracting parties is to provide a benefit to the third-party; and (3) that permitting the 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 v. ADP, LLC*, *supra*, 6 Cal. 5th at 829-30.)

On DPHP's motion for summary judgment, the court erred in its assessment of the *Goonewardene* factors, concluding that at best Tenants were incidental beneficiaries, not intended beneficiaries. To reach this conclusion, however, the court ignored material factual distinctions in cases, failed to engage in proper contract interpretation, and misinterpreted and misapplied the law. Accordingly, the judgment should be reversed.

1. *Goonewardene* Element 1: Does the third-party benefit from the contract?

Appellants, as tenants and slip holders in the marina, benefit from the Master Lease. Not only are the slip holders members of a class for whose benefit the Master Lease was made, *i.e.*, the public (see *Kaiser Engineers, Inc. v. Grinnell Fire Protection Systems Co.* (1985) 173 Cal.App.3d 1050, 1055), but the Master Lease includes specific obligations to the slip holders in Section 11.9. Under this provision, the prices set for the slip rates must not only comply with the limitations of prices mandated by the Tidelands Grant but must be "reasonably determined" "market rate" prices. (2 AA 0973.) Furthermore, the rates cannot be raised without advance notice of the increase and with the methodology and rationale set forth in the notice. (*Ibid.*) The boat slip holders, who are specifically mentioned in the Master Lease, plainly benefit by the limitations on pricing in Section 11.9. (*Lucas v. Hamm* (1961) 56 Cal.2d 583, 590 ["[U]nder a contract for the benefit of a third person, performance is usually to be rendered directly to the beneficiary …."].)

In fact, it is the slip holders alone who benefit from pricing restrictions in this provision. They pay the rent. Given that DPHP is paid for the slip spaces and the County receives a portion of that revenue generated by the slip fees, both DPHP and the County benefit by higher rates. (2 AA 0915, § 4.2.2 (a)(1) [the County receives 10-11% of the Gross Receipts from boat slips].) Thus, the requirement that the market rate prices for boat slips be reasonably determined, in accordance with the

Tidelands Grant and upon notice to the slip holders of the rationale and methodology, only benefitted the slip holders. (See *Zigas v. Superior Court*, *supra*, 120 Cal.App.3d at 834 [finding third-party beneficiary status in part because the requirement of HUD approval of rent increases "could only benefit the tenants"].) It is the slip holders who pay DPHP, not the County.

By contrast, in *Martinez v. Socoma Companies, Inc.*, where the court found no third-party beneficiary status, government funds were provided to the contractor to hire and train "hard core unemployed" residents of a "Special Impact Area" in East Los Angeles. (*Martinez v. Socoma Companies, Inc.* (1974) 11 Cal.3d 394, 398.) Accordingly, "it was the government that was out of pocket as a consequence of the breach and should be reimbursed therefore, not the people to be trained and given jobs." (*Zigas v. Superior Court*, *supra*, 120 Cal.App.3d at 837, distinguishing *Martinez*.) However, in *Zigas*, and in this case, "the government suffered no loss as a consequence of the breach, it was the renter here … that suffered the direct pecuniary loss." (*Id.* at 837-38.)

Despite these facts and the applicable law on this issue, the trial court concluded that the Slip Lease holders did not benefit under the Master Lease. In so concluding, the court made several errors. First, the court imported an "intent" element into the first *Goonewardene* factor: "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." (4 AA 1480 [emphasis added].) There is no

requirement of intent for the first element. (*Goonewardene v. ADP, LLC*, *supra*, 6 Cal. 5th at 830 [stating that the first element is whether the third-party would in fact benefit from the contract and addressing "intent" under the second element].)

Second, the court read section 11.9 of the Master Lease in an extremely narrow fashion to avoid finding a benefit to Tenants, claiming there was only a single promised act in Section 11.9 to the County: to reasonably determine market rate pricing. (4 AA 1492.) That, however, is not the sole "promise." To minimize the promises made in the rest of Section 11.9, the court made an unsupported inference that the slip holders received no greater benefit under the Master Lease than they had under the SLAs. As discussed in Section A.2 above, the court concluded that "[r]equiring 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." (4 AA 1493.) Section 11.9, however, did much more than merely require notice of a rate increase. It required pricing controls for the benefit of the slip holders, requiring as a condition of any increase that the slip holders be notified not only of the increase, as was required under the SLAs, but also of the rationale and methodology for that increase. The price limitations and notice requirements were benefits conferred specifically to the slip holders only under the Master Lease, and the court erred in concluding otherwise as a matter of law.

2. *Goonewardene* Element 2: Was providing a benefit to the third-party a motivating purpose of the contracting parties?

The court also erred in concluding that element two of the *Goonewardene* test – that a motivating purpose of the contracting parties was to provide a benefit – was not met as a matter of law. The court found that "the motivating purpose of the parties in entering 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." (4 AA 1481.)

This conclusion, however, ignores not only the broad public interest language of the Master Lease, but the emphasis in the Master Lease on renovation of the marina and docks, the specific provision insisting on pricing limitations for Slip Leases, and the requirement that operations be in compliance with the Tidelands Grant. Furthermore, it ignores that the parties may have had multiple purposes for entering the Master Lease. (*Prouty v. Gores Technology Group, supra*, 121 Cal.App.4th at 1232 ["[T]he contract need not be exclusively for the benefit of the third-party. He does not need to be the sole or the primary beneficiary."] (emphasis added); *Murphy v. Allstate Ins. Co.* (1976) 17 Cal. 3d 937,943 ["although the contract may not have been made to benefit him alone, he may enforce those promises directly made for him"].) Given that no one other than those with Slip Leases benefit from the inclusion of the market rate limitation in Section

11.9, it follows logically that a motivating purpose was to benefit the slip holders. Nonetheless, a factual dispute as to the motivating purpose remained as to the parties' motivating purpose, and the court erred in concluding as a matter of law that a benefit to the slip holders was not a motivating purpose for the Master Lease.

3. *Goonewardene* Element 3: Was permitting a third-party to bring its own breach of contract claim consistent with the objectives of the contract and the reasonable expectations of the contracting parties?

Finally, the court erred in concluding that the third element of the *Goonewardene* test – that permitting the third-party to bring its own breach of contract action is consistent with the objectives of the contract and the reasonable expectations of the contracting parties – was not met as a matter of law. The court's conclusion was rooted in the fact that the County could have sued for breach of contract but chose not to do so. (4 AA 1482; 1492.) However, "[i]t is no objection to an action by the third-party that the contracting party (here the government) could also sue upon the contract for the same breach." (*Shell v. Schmidt*, *supra*, 126 Cal.App.2d at 290.)

The Master Lease gave the County broad power to obtain all legal remedies available for breach of any obligation under the lease. For example, Section 14.3 of the Master Lease states that "[u]pon the occurrence of an Event of Default … County shall have, **in addition to any other remedies in law or equity**,

the following remedies which are cumulative: … County may continue this Lease in effect and **bring suit** from time to time for rent and other sums due, and **for Lessee's breach of other covenants and agreements herein**." (2 AA 0993-994, §§ 14.3.1 and 14.3.2 [emphases added].) The fact that it is the County that is afforded these rights under the Master Lease does not mean that Tenants cannot also pursue these remedies. (See *Zigas v. Superior Court*, *supra*, 120 Cal.App.3d at 839 [finding that the section in the agreement authorizing HUD to obtain relief that would allow for recovery of tenant overcharges showed an intent by the government to secure excessive rent on behalf of the tenants].) Thus, because the County could recover rent, declaratory relief, and injunctive relief under the Master Lease, allowing Tenants to do so is consistent with the objectives of the Master Lease and the contracting parties. As the court stated in *Zigas* regarding excessive rent collected, "To whom should they be liable? To ask the question is to answer it. It is not the government from whom the money was exacted; it was taken from the tenants. Therefore, it should be returned to the tenants." (*Id.* at 839.)

It makes no sense to set forth in an agreement that the rates must be a "reasonably determined" "market rate" and then prohibit those who benefit from this pricing restriction from enforcing the agreement. (See *Service Employees Internat. Union, Local 99 v. Options—A Child Care & Human Services etc.* (2011) 200 Cal.App.4th 869, 880 ["A member of the public may enforce these provisions as a member of the class for whose benefit the

contract was made. The enforcement of such a provision in a government contract should not depend on action by the public agency, which may have little incentive to enforce the provision."].)

> Surely it would be unconscionable if a builder could secure the benefits of a government guaranteed loan upon his promise to charge no more than a schedule of rents he had agreed to and then find there is no remedy by which the builder can be forced to disgorge rents he had collected in excess of his agreement simply because the government had failed to act.

(*Zigas v. Superior Court*, *supra*, 120 Cal.App.3d at 841.)

None of the indicia in other cases that independent litigation by individuals of the benefited class would be contrary to the objectives of the contract or the reasonable expectations of the parties are present here. For example, in *Martinez v. Socoma Companies, Inc.*, the contract contained both administrative proceedings for contractual disputes and a liquidated damages provision limiting liability for breach to repayment of money paid by the government for the project. (*Martinez v. Socoma Companies, Inc.*, *supra*, 11 Cal.3d at 402-03.) Accordingly, the court stated, "[t]o allow plaintiffs' claim would nullify the limited liability for which defendants bargained and which the Government may well have held out as an inducement in negotiating the contracts." There are no administrative proceedings under the Master Lease for Slip Lease rates and there is no liquidated damages provision. (See *Zigas v. Superior Court***,** *supra*, 120 Cal.App.3d at 838 [because no governmental

administrative procedure was provided in the agreement for resolution of disputes "permitting the litigation would in no way affect the efficiency and uniformity of interpretation fostered by these administrative procedures permit this litigation."].) Nor does the Master Lease contain a liquidated damages clause. Litigation was the contemplated remedy for default.

The court also was persuaded that allowing slip holders to sue on the Master Lease, would make DPHP's performance substantially more difficult, based in part on strawmen arguments by DPHP about ice cream cones and cups of coffee forming the basis of litigation. (See, e.g., RT 15:1-24; 16:3-19; 4 AA 1481-482.) This argument is a red herring and without merit. It is worth repeating a portion of Section 11.9 here:

> Pricing. Lessee shall at all times maintain a complete list or schedule **of the prices charged by Lessee** for all goods or services, or combinations thereof, supplied to the public on or from the Property, whether the same are **supplied by** Lessee or by its Sublessees, assignees, concessionaires, permittees or licensees. The foregoing shall not be deemed a requirement for Lessee to maintain such lists or schedules of the **prices charged by Sublessees**.

(2 AA 0973.)

Under Section 11.9, DPHP (the Lessee), must maintain a complete list or schedule of the prices "**charged by Lessee**" for all goods or services supplied to the public. It must do so even if the goods and services it is charging for are "**supplied**" by a sublessee, assignee, etc. Those prices (i.e., ones charged by

Lessee) must be "market rate" as reasonably determined by DPHP. Importantly, under Section 11.9, DPHP has no obligation to maintain a list or schedule of the prices "**charged by Sublessees**." DPHP provided no evidence that it (the "Lessee" in Section 11.9) charged the public for hot dogs, ice cream, or coffee, thereby subjecting the prices for those types of goods and services to the pricing limitations of Section 11.9. DPHP does indisputably charge the public for the boat slip rents. Thus, DPHP's fabricated litany of horrors about litigation over all types of consumer goods sold on the property is not supported by the terms of the Master Lease itself.

The court pointed to *Marina Tenants Assn. v. Deauville Marina Development Co.* (1986) 181 Cal.App.3d 122, in support of the conclusion that allowing Tenants to sue as third-party beneficiaries would unduly burden DPHP's performance under the Master Lease. (4 AA 1481.) First, the court in *Marina Tenants* disagreed with the trial court and found that the contractual clause requiring "fair and reasonable" rent was susceptible to the interpretation that tenants are intended beneficiaries thereof. (*Id*. at 130-32.) In this case, the multiple purposes of the Master Lease (benefits to the public, revitalization, and revenue to the County) at a minimum create an ambiguity as to its purpose. (*Marina Tenants v. Deauville Marina Development Co.*, *supra*, 181 Cal.App.3d at 130-32.)

Second, in *Marina Tenants*, the tenants were requesting greater rights than the county had under the lease. A specific procedure was set forth for the county to challenge the rental

rates set by the lessee. The county was to give notice to the lessee and provide an opportunity for the lessee to justify its rents. If it was still determined that the rents were not "fair and reasonable," the lessee was to modify the rents as directed, with the right to appeal to the County Board of Supervisors, whose decision would be "final and conclusive" (*Id.* at 132-33.) Therefore, the court concluded that because the determination of the county board of supervisors was final and conclusive as to the county and the lessee, it was final as to any third-party beneficiary.

In this case, however, Plaintiffs are seeking to enforce the *exact* same rights the County has but declined to exercise. DPHP has failed to establish that the County is the sole evaluator of whether the slip rates are "market rates" "reasonably determined." No provisions state that the determination of the County will be final and conclusive. No provision of the Master Lease sets up an administrative procedure to challenge or appeal the slip rates. Nor is DPHP given unfettered discretion. Instead, litigation is the method for resolving claims for breach of contract, including breach of Section 11.9. Thus, Tenants are not seeking greater rights than those afforded to the County. The fact that DPHP may be subject to suit by slip holders is not inconsistent with the objectives of the contract and the reasonable expectations of the contracting parties. (*Goonewardene v. ADP, LLC*, *supra*, 6 Cal.5th at 830.)

Additional cases cited by the court are also inapposite because they address circumstances in which there is no specific

obligation owed to the party seeking third-party beneficiary status. (See *Mission Oaks Ranch, Ltd. V. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 723-24, *disapproved on another ground in Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123, fn. 10 [because there was no duty to provide developer with a complete and accurate EIR, the developer was not a third-party beneficiary of the agreement between the contractor and the county]; *Lake Almanor Associates L.P. v. Huffman-Broadway Group, Inc.* (2009) 178 Cal.App.4th 1194 [developer not a third-party beneficiary of the agreement between the county and the consultant]; *The H.N. & Frances C. Berger Foundation v. Perez* (2013) 218 Cal.App.4th 37 (*"Berger Foundation"*) [no third-party beneficiary status because the agreements and bonds did not reference any benefits to be conferred to third persons in the general class of private property owners of the affected tract].) The difference in this case is that the specific party to whom the reasonably determined market rates are owed is the slip holders, and the slip holders are expressly named in section 11.9. They are not part of a broad, nebulous public group.

Additionally, the Court's emphasis on Section 313 of the Restatement (2d) of Contracts does not change the analysis in this case. Not only is the Restatement not binding, but the *Goonewardene* factors essentially take into account the additional elements set forth for government contracts in Section 313. As cited by the court, Section 313(2) states as follows:

> [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."

(4 AA 1495.) Section 313(2)(b) is essentially the third *Goonewardene* factor. (*Goonewardene v. ADP, LLC*, *supra*, 6 Cal. 5th 817, 829-30 ["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"].) Furthermore, the *Goonewardene* court noted that the California Supreme Court has not relied on the "Restatement formulations" in prior cases discussing and applying the third-party beneficiary doctrine, noting that problems have been identified with the Restatement on the third-party beneficiary doctrine. (*Id.* at 829, n. 4.)

The court's erroneous legal analysis and narrow interpretation of Master Lease led the court to myopically claim that **the** purpose of the Master Agreement was to facilitate the redevelopment and renovation of the Harbor with Tenants only incidental beneficiaries thereof. The court, however, ignored all language regarding the broader purposes of the Master Lease for the benefit of the public, including specifically the boat slip

holders, its required compliance with the Tideland Grants, the limitations on the rental rates for boat slips, and the importance of these limitations to the County during negotiations. In other words, to conclude "as a matter of law" that the slip holders were not third-party beneficiaries, the court failed to interpret the Master Lease as a whole in light of the relevant circumstances under which the Master Lease was agreed to. This is reversible error.

V. CONCLUSION

Because the trial court erred in granting DPHP's motion for summary judgment, the Appellants/Tenants respectfully request that this Honorable Court reverse the judgment issued in favor of DPHP and remand for trial on merit.

DATED: February 21, 2024 LEX OPUS

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CERTIFICATE OF COMPLIANCE PURSUANT TO THE CALIFORNIA RULES OF COURT, RULE 8.204(c)(1)

Pursuant to the California Rules of Court, Rule 8.204(c)(1), I certify that the foregoing brief has a typeface of 13 points, is at least one-and-a-half-spaced, and based upon the word count feature contained in the word processing program used to produce that brief contains 13,944 words.

DATED: February 21, 2024

Lori L. Speak

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 2100 N. Broadway, Suite 210, Santa Ana, California 92706.

On February 21, 2024, I served the foregoing documents described as:

APPELLANT'S OPENING BRIEF

on the interested parties in this action.

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[VIA OVERNIGHT MAIL] Orange County Superior Court Civil Complex Center Clerk of the Court 751 W. Santa Ana Blvd. Santa Ana, CA 92701	**[VIA ELECTRONIC SUBMISSION PURSUANT TO CRC 8.212(c)(2) to:]** California Supreme Court 350 McAllister Street San Francisco, CA 94102-4797
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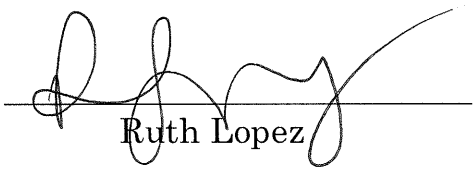
I declare under penalty of perjury under the laws of the State of California that foregoing is true and correct and was executed on February 21, 2024, at Santa Ana, California.



Ruth Lopez