No. 17-

IN THE

Supreme Court of the United States

GERAGOS & GERAGOS, APC,

Petitioner,

v.

FIRST SOLAR, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

On September 8, 2015, the decedent's widow signed a "Stipulation with Request for Award" to accept workers' compensation benefits for herself and her two minor children. The Stipulation was not approved and had no legal import until February 2, 2016.

On September 14, 2015, aware that plaintiffs were already receiving workers' compensation benefits and unsure whether the instant federal action was barred, the district court ordered limited discovery and a motion for summary judgment on the workers' compensation exclusivity issue. On January 25, 2016, <u>a week before the Stipulation was approved</u>, defendant filed a motion for summary judgment and a motion for Rule 11 sanctions arguing, *inter alia*, that plaintiffs' claims were barred by the exclusivity of the Workers' Compensation Act ("WCA"). The district court sanctioned counsel $110,784.15 under Rule 11 for fees incurred by defense counsel from January 7, 2016, almost a month before the Stipulation was signed and had any legal effect.

The questions presented are as follows:

(1) Whether a district court may impose Rule 11 sanctions on counsel for fees incurred by the opposing party prior to the date a Stipulation with Request for Award is approved by a signed order, where California Labor Code section 5001 explicitly provides that a compromise agreement is not valid until it is approved by a judge or the appeals board.

(2) Whether a district court may impose Rule 11 sanctions on counsel for opposing a summary judgment motion challenging the exclusivity of the WCA where the district court specifically ordered limited discovery and a motion for summary judgment on the workers' compensation exclusivity issue.

(3) Whether the doctrine of judicial estoppel can be applied pursuant to *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) to an unapproved and as-of-yet invalid stipulation where a party has not yet persuaded a court to accept the party's earlier position and there is a lack of prejudice to the opposing party if not estopped.

(4) Whether a Rule 11 sanctions order which includes defense fees incurred before the workers' compensation judge approved the Stipulation is causally connected to Petitioner's alleged misbehavior as required by this Court's holding in *Goodyear Tire v. Haeger*.

LIST OF PARTIES

The Estate of Jeffrey Randall and Jennifer Randall, individually, as successor-in-interest to the Estate of Jeffrey Randall, and as guardian ad litem to M.R. and C.R. ("plaintiffs"), were the plaintiffs in the district court proceedings.

First Solar, Inc. ("First Solar") was the defendant in the district court proceedings and the appellee in the Ninth Circuit proceedings.

Petitioner Geragos & Geragos, APC ("Petitioner"), was counsel to plaintiffs in the district court proceedings and the appellant in the Ninth Circuit proceedings.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner provides the following disclosures:

Petitioner has no parent company and no publicly-held corporation owns 10 percent or more of Petitioner's common stock.

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RULES

Petitioner Geragos & Geragos, APC, as counsel for plaintiffs in the underlying action, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

This case, involving a $110,784.15 sanctions award against a law firm, implicates an exceptionally important question about the exclusivity of the Workers' Compensation Act ("WCA") and the time in which a party is required to elect a remedy. The district court's sanctions order, as affirmed by the Ninth Circuit, has the effect of requiring an injured employee or his/her dependents to prematurely elect a remedy, thereby risking the forfeiture of benefits in the other forum if their initial election is incorrect.

The law firm in this case was sanctioned for maintaining a civil action on behalf of the widow and children of a deceased employee based on a Rule 11 motion which was filed by the defendant ***before*** the workers' compensation Stipulation and Award had been approved by the administrative law judge. California Labor Code section 5001 explicitly provides that a stipulation and request for such an award is not valid until it is approved by the appeals board or a judge. As further confirmation that the September 8, 2015 Stipulation had no legal effect until it was signed, the docket on the Division of Workers' Compensation website actually reflects that the Stipulation was not only granted but also filed on February 2, 2016. Appendix to the Petition ("Pet. App.") at 51a.

Notwithstanding the clear statutory language of section 5001, the district court found that plaintiffs were judicially estopped from continuing to prosecute the civil action. The court, however took entirely inconsistent positions as to when Petitioner should supposedly have known that plaintiffs' claims were barred. In one instance, the district court said "counsel knew this case should be dismissed in September of 2015." Pet. App. at 39a. Later the court noted that "upon receipt of the December 17 letter, Plaintiffs' counsel knew or should have known that the action it had filed and prosecuted lacked merit both legally and factually." *Id.* at 12a.[1] Yet the district court refused to award defendant its requested attorneys' fees since September or even December 2015, instead dating the fees back to January 7, 2016. *Id.* at 13a. The district court's inconsistent positions, including on-the-record admissions at a September 14, 2015 status conference that it was far from clear whether WCA exclusivity barred the instant action, undercut the court's entire premise for imposing Rule 11 sanctions in this case.

Had counsel prematurely dismissed the civil action in September, December, or even January, and the administrative law judge failed to approve the workers' compensation award, plaintiffs would be left with no remedy, except perhaps suing their attorney for malpractice. The WCA is not intended to put injured workers or their counsel between a rock and a hard place.

There are well established exceptions to the exclusivity of the WCA and attorneys should be encouraged, or at the very least permitted, to zealously advocate on behalf of their clients whose cases may fall within such exceptions,

1. As the Ninth Circuit recognized, "It is not clear from the order granting Defendant's motion for Rule 11 sanctions whether the district court found that the signing of the Stipulations [*sic*] With Request for Award, standing alone, rendered continued prosecution of this case untenable." *Id.* at 2a.

as in the case here. In order not to chill zealous advocacy on behalf of injured workers or their dependents, this Court should accept certiorari, and reverse the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit Court was not published but is available at *Estate of Randall v. First Solar, Inc.*, 711 F. App'x 410 (9th Cir. 2018). It is reproduced in the Appendix to this Petition at 1a. The order of the United States District Court for the Central District of California granting defendant's motion for summary judgment and granting defendant's motion for Rule 11 sanctions is published at *Jeffrey Randall v. First Solar, Inc.*, No. EDCV151066VAPDTBX, 2016 WL 6089816 (C.D. Cal. Mar. 9, 2016) and reproduced in the Appendix to this Petition at 18a. The order of the United States District Court for the Central District of California setting the amount of the sanctions at $110,784.15 is not published but is reproduced in the Appendix to this Petition at 4a.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was issued on February 2, 2018. This timely Petition followed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

California Labor Code section 3600(a) provides, in pertinent part: "Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as otherwise specifically provided in Sections 3602, 3706, and 4558, shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur: . . . (2) Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment."

California Labor Code section 4909 provides: "Any payment, allowance, or benefit received by the injured employee during the period of his incapacity, or by his dependents in the event of his death, which by the terms of this division was not then due and payable or when there is any dispute or question concerning the right to compensation, shall not, in the absence of any agreement, be an admission of liability for compensation on the part of the employer, but any such payment, allowance, or benefit may be taken into account by the appeals board in fixing the amount of the compensation to be paid. The acceptance of any such payment, allowance, or benefit shall not operate as a waiver of any right or claim which the employee or his dependents has against the employer."

California Labor Code section 5001 provides: "Compensation is the measure of the responsibility which the employer has assumed for injuries or deaths which occur to employees in his employment when subject to this division. No release of liability or compromise agreement is valid unless it is approved by the appeals board or referee."

Rule 11(b) of the Federal Rules of Civil Procedure, provides, in pertinent part: "By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; [and] (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery."

STATEMENT OF THE CASE

This Petition arises from an action brought by the widow and surviving children of Jeffrey Randall, who died on August 26, 2013 at the age of 35 in a horrific plane crash outside of First Solar's solar energy plant. *See* Pet. App. at 19a. Mr. Randall died participating in an exceptionally dangerous aerial survey not remotely contemplated by either Mr. Randall or First Solar in their employment agreement.

First Solar hired Mr. Randall in July 2012 as a ground-based construction site supervisor in First Solar's construction of the Desert Sunlight Solar Farm in the County of Riverside, California. *Id.* at 25a. Mr. Randall's job duties included supervising on-site construction, managing subcontractors, ground-based surveying, and grading land, among other tasks. *Id.* at 26a-27a. Upon his hiring, Mr. Randall received no special training for his position, other than in first aid and working around electrified equipment. Mr. Randall had never flown in an aircraft as part of his job duties at First Solar. Pet. App. at 17a.

On August 25, 2013, the area near the construction site sustained heavy damage as a result of Tropical Storm Ivo. *Id.* To assess what, if any, damage was sustained to the construction of the solar power-plant, First Solar improperly asked one of its employees, Michael Cyr, to fly over the site and take aerial photographs of any damage sustained to the site. *Id.* No one from First Solar had ever previously asked Mr. Cyr to conduct an aerial survey; however, Mr. Randall's supervisor, David Pappicco asked Mr. Cyr to do this because he knew Mr. Cyr owned an airplane. *Id.* Mr. Pappico did not ask Mr. Randall to participate. *See id.* at 28a.

First Solar did not own an airplane and at no time did it provide training regarding aerial surveillance to either Mr. Randall or Mr. Cyr. Moreover, Mr. Pappico admitted that he did not know whether or not Mr. Cyr had a valid pilot's license, whether Mr. Cyr's plane was insured at the time of the crash (it was not), *see id.* at 27a, whether the plane was properly credentialed, whether Mr. Cyr actually owned the plane, or what type of plane it was. In fact, Mr. Pappico had never even seen Mr. Cyr's plane at the time he asked him to perform the aerial survey.

The day before the crash, Mr. Randall sent Mr. Pappicco an email informing him that he would be accompanying Mr. Cyr on the flight. *Id.* at 28a. On Monday, August 26, 2013, Mr. Cyr and Mr. Randall took off in Mr. Cyr's aircraft, a small, "two-place" trainer known as an American Aviation. *See id.* A sheriff's deputy watched the airplane maneuver; he saw it make erratic maneuvers, then a steep turn. During the turn, Mr. Cyr lost control of the aircraft. It entered a spin and crashed, killing Mr. Randall and Mr. Cyr. *See* Pet. App. at 28a.

As noted above, Mr. Randall had no experience conducting aerial surveys, and First Solar had provided no training for him to do so. First Solar did not provide the plane used in the survey or even the camera Mr. Randall took with him to photograph the site. *See id.* at 27a-28a. In fact, First Solar regularly employs a contractor to perform aerial photography on a monthly basis, rather than having its own employees engage in this work, and Mr. Randall did not even supervise First Solar's aerial photographers. *Id.* at 27a.

On April 3, 2015, The Estate of Jeffrey Randall and Jennifer Randall, individually, as successor-in-interest to the Estate of Jeffrey Randall, and as guardian ad litem to M.R. and C.R., the deceased's minor children, filed a Complaint in the Superior Court of the State of California, County of Riverside against First Solar for survival and wrongful death based on negligence and negligent retention and supervision. First Solar thereafter removed the action to the United States District Court for the Central District of California.

With no source of income to support herself and her two young children, on April 14, 2015, Mrs. Randall also filed a claim for workers' compensation. *See id.* at 51a. As part of the workers' compensation process, Mrs. Randall signed a "Stipulation with Request for Award" form on September 8, 2015 because she thought "that my children and myself, but mostly my children, should be getting workers' compensation." Page 3 of the Stipulation contained a phrase stating that Mr. Randall's death was "arising out of and occurring in the course of [his] employment." Pet. App. at 29a; 31a. The Stipulation was not signed by a workers' compensation administrative law judge until February 2, 2016—nearly five months later. *Id.* at 7a.

On September 14, 2015, the parties attended a status conference in the instant federal action; from the outset of the hearing, the district court noted that "the primary issue in this case is the exclusivity of the workers' comp remedy." *Id.* at 42a. At that hearing, Petitioner advanced one of its theories on which it believed there was a nonfrivolous argument that Jeffrey Randall's death did not occur in the course and scope of his employment, namely that "going up to take an aerial survey of the solar array after a storm is so far outside the scope of any contemplated job requirements for these particular individuals that it takes it out of workers' comp." *Id.* at 42a-43a.

During the hearing, the court expressly recognized the uncertainty surrounding whether workers' compensation exclusivity barred the instant action. Having been told that plaintiffs were already receiving workers' compensation benefits from First Solar, the court asked counsel: "Well, I guess my question, and I don't know the answer to it, but my question is, is there an issue with the inconsistency of accepting the benefit -- applying for and accepting the benefits which your clients would only be entitled to if the accident was within the scope?" *Id.* at 44a. Even defense counsel admitted that the answer was not clear: "I can't tell you they're barred from bringing another action right now under the law, but the two are inconsistent. And this has to be a threshold issue before any further discovery goes on, we think." Pet. App. at 44a. Counsel and the court then acknowledged that there are various factors to determine whether an employee was acting within the course and scope of employment and that the parties would need to conduct discovery on this issue. *See id.* at 44a-46a. And the court set a discovery deadline as well as a deadline for the defendant to file a motion for summary judgment on this issue:

THE COURT: Well, I think what I'm going to do now is I'm going to order that -- I'm going to set a deadline for the summary judgment motion on this issue; that is, whether or not the action is barred under the premise of the exclusive remedy of workers' compensation. So that's the summary judgment motion.

And the discovery, I think three months to do discovery limited to the issues raised by that would be sufficient. If the parties -- and I hope you could work out any discovery issues, but if not, those motions would be heard by Judge Bristow. So that would mean your discovery -- this first discovery cutoff would be December -- let's make it the end of December.

MR. JANICKI: And if I understand it, limited to the workers' comp issue.

THE COURT: Right.

MR. JANICKI: And within the course and scope of employment.

THE COURT: Yes.

MR. CAMPBELL: December the 31st?

THE COURT: Right. And I'm not going to set other dates at this time except that the motion has to be filed by January 5th. So let's make the discovery cutoff December 15th. Let me make your lives a little better. Otherwise, we all work to deadlines, so you'll be trying to take some deposition on like the 28th. But it's December 15th. So that's your discovery cutoff and then file the motion by January 25th.

MR. JANICKI: We're most agreeable to that.

THE COURT: All right. And then it would be heard - - it'll be heard on the regular briefing schedule and be heard on February 29th. And then depending on the outcome of that motion, at the hearing on it I will either give further dates, including a discovery cutoff throughout the case and a trial date or not, depending on the outcome.

Pet. App. at 47a-49a.

Following limited discovery on the workers' compensation exclusivity issue, on December 17, 2015, First Solar's counsel wrote to plaintiffs' counsel citing legal authorities that maintenance of plaintiffs' action against defendant violated Rule 11 (b)(2) and (3), and further stating that unless the action was dismissed within five days, defendant would serve a Rule 11 motion seeking sanctions. Pet. App. at 10a. Petitioner disagreed, believing that the facts and law showed that Mr. Randall was killed outside the course and scope of his employment and that plaintiffs' claims potentially fell within two different exceptions to workers' compensation exclusivity.[2]

On January 4, 2016, more than a month before the Stipulation and Request for Award was approved, First Solar served on Petitioner (but did not file with the court) its motion for Rule 11 sanctions. *Id.* On January 25, 2016, First Solar filed a motion for summary judgment and a motion for Rule 11 sanctions arguing, *inter alia*, that plaintiffs' claims were barred by the exclusivity of the WCA. *Id.* Unaware that after approximately five months, the administrative law judge had finally approved the

2. One exception to the exclusivity of workers' compensation is the so-called "going and coming rule," which provides that an employee commuting to work is not covered by workers' compensation. Here, it was an undisputed fact that the crash at issue was off site. *Id.* at 28a. Thus, because the decedent used an airplane to get to work that day, his death off premises could have been within the going and coming rule. Another exception to the exclusivity of workers' compensation is conduct by an employer that violates public policy. Here, plaintiffs had a good faith argument that defendant had engaged in illegal activity, or activity that violates public policy, by directing its employee to use a plane not certified for aerial photography.

Stipulation six days earlier, plaintiffs filed an opposition to First Solar's motion for summary judgment and an opposition to First Solar's motion for sanctions on February 8, 2016. Pet. App. at 18a. On February 29, 2016, the district court heard oral argument on the motions and took them under submission.

On March 9, 2016, the district court granted First Solar's motion for summary judgment and motion for Rule 11 sanctions. *Id*. Although the court recognized that the cases warranting imposition of sanctions for frivolous actions are "rare and exceptional," *id.* at 24a, and despite the fact that the court itself specifically ordered limited discovery and a motion for summary judgment on the workers' compensation exclusivity issue because it was far from clear that the action should be barred, *id.* at 47a-48a, the court nonetheless found that sanctions were warranted against plaintiffs' counsel in an amount to be determined, *id.* at 40a. Specifically, the court found that "Plaintiffs' counsel did not have a non-frivolous basis for opposing the Motion [for summary judgment], counsel failed to supply any evidence that would invalidate the stipulation, and counsel knew this case should be dismissed in September of 2015." *Id.* at 39a. The court ordered First Solar's counsel to submit their billing records from September 9, 2015 to the present and plaintiffs' counsel would be able to respond to the amount of sanctions. *Id.* at 40a.

First Solar thereafter sought sanctions in the amount of $308,519.95; plaintiffs objected. *See id.* at 5a; 8a. On August 11, 2016, the court fixed the amount of reasonable attorneys' fees at $110,784.15 to account for fees incurred from January 7, 2016 and awarded that amount as sanctions payable to First Solar by plaintiffs' counsel within 60 days of the date of the order. Pet. App. at 17a. The March 9, 2016 order imposing Rule 11 sanctions and the August 11, 2016 order fixing the amount at $110,784.15 are hereafter collectively referred to as the "sanctions order."

Counsel for plaintiffs appealed the sanctions order and the judgment entered thereon to the United States Court of Appeals for the Ninth Circuit. Despite the tremendous consequences which sanctions inflict on counsel, the panel unanimously concluded that this case was suitable for decision without oral argument. *Id.* at 2a. In an unpublished memorandum opinion issued on February 2, 2018, the Ninth Circuit affirmed the district court's imposition of Rule 11 sanctions against Petitioner in the amount of $110,784.15 with hardly any analysis. *Id.* at 2a-3a. In the two-page opinion, the Ninth Circuit summarily held that the district court did not abuse its discretion in awarding sanctions. *Id.* The Ninth Circuit also held that the district court did not abuse its discretion in setting the sanctions amount at $110,784.15. *Id.* at 3a. The court rejected Petitioner's argument that fees incurred by First Solar's lawyers before the date on which the Stipulation with Request for Award was approved "because it rests on the incorrect premise that Plaintiffs' lawyers could not have known that this case lacked merit until the stipulation was approved." *Id.*

REASONS FOR GRANTING REVIEW

I. The Ninth Circuit Decision Affirming the Sanctions Order Threatens to Chill Vigorous Advocacy on Behalf of Injured Employees and Their Dependents in Contravention of Rule 11's Stated Purpose.

This Court has recognized that Rule 11 "must be read in light of concerns that it will . . . chill vigorous advocacy." *Cooter & Bell*, 496 U.S. 384, 393 (1990). In fact, the 1983 Amendment to Rule 11 expressly provides that "[t]he rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted." Fed. R. Civ. Proc. 11, 1983 Amendment; *see also id.* ("Arguments for extensions, modifications, or reversals of existing law or for creation of new law do not violate subdivision (b)(2) provided they are 'nonfrivolous.'").

Here, plaintiffs' claims were not barred by case law or statute and Petitioner was not advancing a position that had been rejected by the courts. On the contrary, Petitioner consistently used existing legal authorities and logical extensions of precedent to argue that plaintiffs' claims fell outside the exclusivity of the WCA. Rule 11 is not intended to punish litigants who zealously advocate for their clients and try to set new precedent where none exists.

The Ninth Circuit has repeatedly recognized that Rule 11 sanctions are not appropriate when there are differing interpretations of the law, or when contrary controlling authority is not obvious or settled. *See Riverhead Sav. Bank v. Nat'l Mortg. Equity Corp.*, 893 F.2d 1109, 1116 (9th Cir. 1990) (claim for indemnity which stated arguable cause of action under state law was objectively reasonable); *Westlake N. Prop. Owners Ass'n. v. City of Thousand Oaks,* 915 F.2d 1301, 1307 (9th Cir. 1990) (amended complaint was not frivolous since law was not settled). But notwithstanding the notions above, the Ninth Circuit affirmed a sanctions order in a case where the district court and defense counsel explicitly recognized that any authority on the issue was ***not*** obvious or settled. *See* Pet. App. at 44a.

In its order imposing sanctions, the district court claimed that "counsel knew this case should be dismissed in September of 2015." *Id.* at 39a. However, at the September 14, 2015 status conference, having been advised that plaintiffs were already receiving workers' compensation benefits from First Solar, the court itself did not know whether workers' compensation exclusivity barred the instant action. And neither did defense counsel. On the contrary, all parties agreed that the law was not clear and that discovery and briefing on this issue would be required. Moreover, the court specifically ordered limited discovery and a motion for summary judgment solely on the workers' compensation exclusivity issue. To later sanction Petitioner for complying with the court's scheduling order and timely opposing the summary judgment motion is fundamentally unfair and unfairly punitive.

This Court should not let stand a decision under which attorneys will fear advancing novel or creative legal theories which have not been barred or rejected by the courts. It has been said that the law is not static; it is always changing and constantly being interpreted and redefined. It is precisely as a result of zealous and creative advocacy that new precedent is established in courts across the country ever day, allowing the law to keep up with the times. Without action by this Court, an attorney's core duty to his/her client, in this case to zealously advocate on behalf of injured employees and their dependents, will be severely chilled.

II. The Question Presented Is Important, and This Case Presents a Good Vehicle for Resolving It.

This Court should resolve the issue presented because the confusion over the election of remedies as it applies to workers' compensation exclusivity significantly impacts the rights of injured employees and their dependents. Parties and their counsel are entitled to a clear answer on when in the workers' compensation process they must elect their remedy, *i.e.,* dismiss a parallel civil action. Allowing litigants to elect their remedy after the workers' compensation award has been finalized ensures that injured employees and their dependents do not forfeit their right to recover from the employer in the event that the workers' compensation award is not approved. On the other hand, a stay of proceedings and/or offset is available to employers to address any potential prejudice that the employer might suffer.

The California Supreme Court has long held that

> []t is a familiar principle that, where inconsistent courses are open to an injured party and it is

> doubtful which ultimately may lead to full relief, he may follow one even to defeat, and then take another, or he may pursue all concurrently, until it finally is decided which affords the remedy. The assertion of one claim which turns out to be unsound so long as it goes no further, is simply a mistake. It is not and does not purport to be a final choice, nor an election. A party is not obliged to select his procedure at his peril.

Atchison, T. & S. F. R. Co. v. Superior Court of Contra Costa Cty., 12 Cal.2d 549, 556–57 (1939). The district court's order, as affirmed by the Ninth Circuit, eviscerates this longstanding precedent regarding a party's right to the election of remedies and creates dangerous new precedent for injured employees and their dependents who may incorrectly seek relief in the wrong forum.

The Ninth Circuit decision also improperly interprets sanctionable frivolous conduct to include a zealous advocate's efforts to establish that workers' compensation exclusivity should not apply in a given case simply because it conflicts with a not-yet approved position in a workers' compensation proceeding. The decision also misapplies the *New Hampshire v. Maine* factors to assert judicial estoppel, despite a lack of success in persuading a court to accept the party's earlier position, and a lack of prejudice to the opposing party if not estopped. As such, the Ninth Circuit decision improperly expands the application of judicial estoppel far beyond what has been sanctioned by this Court in well-settled precedent.

This Court should intervene to remedy the farreaching effects the Ninth Circuit decision could have on the election of remedies in the workers' compensation context, as well as on zealous advocacy and judicial estoppel in general. This Court's guidance is necessary to establish clear standards to guide injured employees and their dependents in such matters, as well as counsel who seek to zealously advocate on behalf of their clients but who do not want to risk getting sanctioned by the court.

III. Maintenance of the Civil Action by Petitioner Was Not Frivolous Under Rule 11.

From the outset, Petitioner vigorously argued based on existing law and the facts that WCA exclusivity did not apply because Mr. Randall was killed outside the course and scope of his employment.

California Labor Code section 3600(a) defines the circumstances in which the exclusive remedies of the WCA apply. In this case, the central question is whether, "at the time of the injury, the employee [wa]s performing service growing out of and incidental to his or her employment and [wa]s acting within the course of his or her employment." Cal. Lab. Code § 3600(a)(2). "The requirement that the employee be acting in the course of employment . . . generally means the injury happened at a time when the employee was working and in the place of employment. It further requires that the employee, when injured, was doing those reasonable things which his contract with his employment expressly or impliedly permits him to do." *Lee v. W. Kern Water Dist.*, 5 Cal.App.5th 606, 624-25 (2016) (citations and internal quotation marks omitted).

Here, Petitioner consistently alleged facts, later established during discovery, showing that Mr. Randall was not acting in the course and scope of his employment when he perished in a plane crash. First, Mr. Randall was not killed on First Solar's premises, but some short distance away. None of First Solar's employees instructed Mr. Randall to conduct the aerial survey; rather, he volunteered. More importantly, First Solar provided no training to Mr. Randall in aerial survey work. First Solar did not provide the means to conduct the survey, not even the camera Mr. Randall used, and the aerial survey did not benefit First Solar, as many of the pictures were unusable for diagnosing damage to the site. First Solar put forth no evidence that Mr. Randall or First Solar contemplated any risk associated with aerial survey work in their employment agreement—let alone survey work performed in an uninsured private crop-duster flown by an amateur pilot.

In *Charles J. Vacanti M.D., Inc. v. State Compensation Insurance Fund*, 24 Cal.App.4th 800 (2001), the court explained that "[t]he underlying premise behind this statutorily created system of workers' compensation is the 'compensation bargain.'" *Id*. at 811 (citing *Shoemaker v. Myers*, 52 Cal.3d 1, 16 (1990)). Courts "have struggled with the problem of defining the scope' of the compensation bargain . . . . Where the alleged injury is collateral to or derivative of an injury compensable by the exclusive remedies of the WCA, a cause of action predicated on that injury may be subject to the exclusivity bar." *Id*. However, "[i]f the alleged injury falls within the scope of the exclusive remedy provisions, then courts consider whether the alleged acts or motives that establish the elements of the cause of action fall outside the risks encompassed within the compensation bargain." *Id*. at 811-812.

In this case, there was no evidence whatsoever demonstrating that Mr. Randall assumed the risk of dangerous aerial survey work when he made his compensation bargain. Mr. Randall's job involved a mix of office work and field work: supervising contractors, conducting surveys on foot or by motorized vehicle, and acting as liaison between the project manager and the crews on site. The risks involved are those normal to an office environment and to a construction site. On the day of the crash, Mr. Randall was not performing the same services he did during regular working hours—Mr. Randall had never performed an aerial survey before, and First Solar had never requested he do so. Further, Mr. Randall was not hired nor trained to conduct aerial surveys, much less in an uninsured plane flown by an inexperienced co-worker—who also was not hired or trained by First Solar to fly—without any surveying materials provided by First Solar.

Therefore, Petitioner had a good faith argument supported by the facts and existing law that Mr. Randall's death did not occur during the course and scope of his employment. At the very least, the underlying facts of the case show that Mr. Randall's death was not so clearly within the course and scope of his employment so as to render plaintiffs' civil action frivolous. As detailed in the pleadings in the lower court, the cases relied upon by First Solar to argue that Mr. Randall's death occurred in the course of his employment were wholly inapposite and there was no settled or controlling authority barring plaintiffs' from advancing their position.

Aside from arguing that Mr. Randall's death did not occur within the course and scope of his employment, Petitioner also had a good faith basis to argue that (1) Mr. Randall could have been "coming and going" at the time of the crash such that the civil action below may have been his only remedy, and/or (2) plaintiffs' claims might be outside WCA exclusivity due to First Solar's illegal conduct in directing its employee to use a plane not certified for aerial photography. In short, the decision errs in concluding that maintenance of the civil action by Petitioner prior to the Stipulation being approved by an administrative law judge was frivolous under Rule 11.

IV. The Decision Below Misapplies the *New Hampshire v. Maine* Factors and Improperly Expands the Doctrine of Judicial Estoppel.

The district court erred in applying the *New Hampshire v. Maine* factors to find that Petitioner was judicially estopped from pursuing plaintiffs' claims.

As this Court has explained, "[u]nder the judicial estoppel doctrine, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. *New Hampshire v. Maine*, 532 U.S. 742, 742 (2001) (citing *Davis v. Wakelee,* 156 U.S. 680, 689 (1895)). In *New Hampshire v. Maine*, this Court set forth the three main factors which will typically inform the decision whether to apply the doctrine in a particular case:

> First, a party's later position must be "clearly inconsistent" with its earlier position.

> Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled." Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

New Hampshire, supra, 532 U.S. at 750-51 (2001) (internal citations omitted).

Here, the district court clearly erred when it found that the *New Hampshire v. Maine* factors supported a finding that judicial estoppel applied. First, the court incorrectly found that Petitioner "successfully advanced an earlier position in a judicial proceeding" simply because plaintiffs had been receiving workers' compensation benefits. In fact, plaintiffs had been receiving the workers' compensation benefits ***prior*** to filing the September 8, 2015 Stipulation. *See* Pet. App. at 29a (noting that "Mrs. Randall successfully sought California's Workers' Compensation benefits in 2013 following the death of Decedent, and she receives a biweekly benefit payment").

Furthermore, under workers' compensation law, a signed Stipulation with Request for Award form, like the one Mrs. Randall signed, has no legal effect unless and until it is signed by the administrative law judge. *See* Cal. Labor Code § 5001; *see also Sumner v. Workers' Comp. Appeals Bd.* 33 Cal.3d 965, 971 (1883) ("A tort release is effective upon execution, but a workers' compensation release is invalid until approved by the workers' compensation judge. . . This inquiry by the [appeals board or] referee should carry out the legislative objective of 'protecting workmen who might agree to unfortunate compromises because of economic pressure or lack of competent advice'.") (internal citations omitted); *Jefferson v. Department of Youth Authority,* 28 Cal.4th 299, 304 (2002) (section 5001's requirement for Board approval protects the interest of employees by ensuring fairness in settlement agreements).

Thus, contrary to the court's position, the earliest that plaintiffs would have been judicially estopped from pursuing their claims would have been after February 2, 2016, the date on which the Stipulation was signed by the administrative law judge. Until that time, Petitioner had not "succeeded in persuading a court to accept that party's earlier position." *New Hampshire, supra*, 532 U.S. at 750.

In *Reed Elsevier, Inc. v. Muchnick,* 559 U.S. 154, 170 (2010), this Court explained that although "[w]e agree that some statements in the parties' submissions to the District Court and the Court of Appeals are in tension with their arguments here. . . we decline to apply judicial estoppel." The Court explained that because prior statements made by the parties when negotiating or defending the settlement agreement had not been accepted by the court, they could not therefore create "inconsistent court determinations" in their favor. *Id*. *See also Zedner v. United States,* 547 U.S. 489, 505 (2006) (holding that

Petitioner was not judicially estopped from challenging the excludability under the Speedy Trial Act of the district court's grant of a continuance despite a signed waiver, where "Petitioner did not 'succee[d] in persuading' the District Court to accept the proposition that prospective waivers of Speedy Trial Act rights are valid.").

The court therefore incorrectly concluded that "counsel knew this case should be dismissed in September of 2015," and that "[o]nce Randall signed the Stipulations [sic], Plaintiffs' counsel should have dismissed its claims here, or filed a non-opposition to the Motion." Pet. App. at 39a.

In fact, because the administrative law judge did not sign the Stipulation until February 2, 2016, almost five months after the Stipulation was signed on September 8, 2015, it was reasonable, prudent, and certainly not frivolous for Petitioner to prepare an opposition to First Solar's motion for summary judgment to preserve plaintiffs' claims in the event that the Stipulation was rejected by the administrative law judge for any reason. This is in addition to the fact that the district court had specifically requested briefing on the WCA exclusivity issue and ordered First Solar to file a motion for summary judgment on that very issue.

Even if wrong, Petitioner certainly had a nonfrivolous basis for opposing First Solar's motion for summary judgment both because it had arguable claims that the case was not barred by WCA exclusivity and because at the time it filed its opposition, it was not aware that after five months, the Stipulation had finally been approved by the workers' compensation judge six days earlier. *See*

BE & K Const. Co. v. N.L.R.B., 536 U.S. 516, 522 (2002) ("The Ninth Circuit reversed the District Court's award of Rule 11 sanctions . . . after petitioner explained that it had realleged decided claims based on Circuit precedent suggesting that doing so was necessary to preserve them on appeal. . . Although the Ninth Circuit decided that rule did not apply to amended complaints following summary judgment, it held that petitioner's view was not frivolous and that its counsel could not be blamed for 'err[ing] on the side of caution.'") (citing *USS-POSCO Industries v. Contra Costa County Bldg. & Const. Trades Council, AFL-CIO,* 31 F.3d 800, 810 (9th Cir. 1994)); *see also Conn v. Borjorquez*, 967 F.2d 1418, 1421 (9th Cir. 1992) ("The key question in assessing frivolousness is whether a complaint states an arguable claim—not whether the pleader is correct in his perception of the law."); *The Movie 1 & 2 v. United Artists Commc'ns, Inc.*, No. C 86-20390 RPA, 1988 WL 75238, at *1 (N.D. Cal. Mar. 4, 1988) ("Rule 11 should not be used to punish a losing party merely because his argument ultimately fails on the merits before the Court.").

The district court also erred in concluding that the *New Hampshire v. Maine* factors supported a finding that judicial estoppel applied because there was never any danger of prejudice to First Solar in this action. First Solar's Rule 11 motion asserted that plaintiffs were attempting to achieve double recovery by pursuing their civil court action. Mrs. Randall accepted the death benefits from First Solar shortly after her husband's death because she had no other source of income and needed the benefits to support herself and her two young children. However, California Labor Code section 4909 provides that "[t]he acceptance of any such payment, allowance, or benefit shall not operate as a waiver of any right or claim which the employee or his dependents has against the employer." Cal. Lab. Code § 4909. Indeed, if plaintiffs were to subsequently recover in a civil suit, First Solar could offset any workers' compensation benefits already paid against the civil award. *See Johns-Manville Prod. Corp. v. Sup. Ct.*, 27 Cal.3d 465, 478-79 (1980); *Felix v. Workmen's Comp. Appeals Bd.*, 41 Cal.App.3d 759, 765-66 (1974). In fact, at the September 14, 2015 status conference, Petitioner explained this to the district court: "The insurer has been making payments. Benefits have been accepted. First Solar is asserting a set-off based on any payments that have been made." As such, the district court abused its discretion in concluding that maintenance of this civil action would result in prejudice to First Solar, since any damages recovered in this case would be offset by the worker's compensation award.

Thus, in misapplying the *New Hampshire v. Maine* factors, the Ninth Circuit decision improperly expands the application of judicial estoppel in ways not sanctioned by this Court.

V. The Sanctions Order for Defense Fees Incurred Before the Administrative Law Judge Approved the Stipulation Is Not Causally Connected to Petitioner's Alleged Misbehavior as Required by this Court's Holding in *Goodyear Tire v. Haeger.*

In *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1182, 197 L. Ed. 2d 585, 581 U.S. ___ (2017), this Court held that "a sanction must be compensatory, rather than punitive, when imposed pursuant to civil procedures" (citing *Mine Workers v. Bagwell,* 512 U.S. 821, 826-830

(1994)). The Court rejected the Ninth Circuit's temporal, as opposed to causal, limitation on fees incurred, explaining that "[a] sanctioning court must determine which fees were incurred because of, and solely because of, the misconduct at issue (however serious, or concurrent with a lawyer's work, it might have been)." *Id.* at 1189. Thus, if any award was to be granted here at all, that award must be causally linked to the litigant's alleged misbehavior. *See id.* at 1182.

But instead of awarding defendant its attorneys' fees based on a casual connection, the district court arbitrarily chose to date back the fees to January 7, 2016 because this was "21 days after transmission of the December 17 letter [threatening to serve a Rule 11 motion]"; the court reasoned that this would "suffice[] to deter repetition of the conduct or comparable conduct by others similarly situated." Pet. App. at 13a.

The amount of the sanctions award is excessive and improperly awards sanctions based on fees incurred nearly an entire month before the Stipulation and Award was approved by the administrative law judge. But for the approval of the Stipulation and Award by the administrative law judge on February 2, 2016, the district court could not have sanctioned Petitioner for maintaining the civil suit on behalf of plaintiffs. Indeed, had the administrative law judge refused to approve the Stipulation and denied plaintiffs workers' compensation benefits, workers' compensation exclusivity would not bar plaintiffs' claims and Petitioner would not have been sanctioned for maintaining this action. Thus, the sanctions order may only reach back to the date Petitioner could have discovered that plaintiffs' claims were barred by the exclusivity of the WCA, which was no sooner than February 2, 2016.

Rodriguez v. Marble Care Int'l, Inc., 863 F.Supp.2d 1168 (S.D. Fla. 2012), is instructive. There, the court had ordered defendants to turn over bank statements relevant to Fair Labor Standards Act jurisdiction by February 11, 2011. *Id.* at 1175. "Although Plaintiffs' counsel should certainly have been highly skeptical of the existence of the requisite jurisdictional grounds when they filed the lawsuit without knowing if there was evidence to support the fundamental FLSA requirements, the fact is that Judge Graham afforded them additional discovery. Plaintiffs' counsel cannot necessarily be sanctioned for pressing forward at that time in light of Judge Graham's order." *Id.* at 1184-85. Thus, only fees incurred after February 11, 2011 were part of the sanctions award. *Id.* at 1186.

The reasoning in *Rodriguez* is sound and demonstrates why the district court abused its discretion in awarding fees dating back to January 7, 2016. At that time, plaintiffs' Stipulation in the workers' compensation proceeding had not been approved by a judge and had no legal force or effect. Moreover, the district court had previously ordered that the defendant file a motion for summary judgment on the workers' compensation exclusivity issue and Petitioner should not have been sanctioned for complying with the court's request for briefing on the issue. The absolute earliest that Petitioner could have known that plaintiffs' claims should be abandoned was after the administrative law judge had approved the Stipulation on February 2, 2016. As such, the sanctions order awarding fees dating back to January 7, 2016 violates *Goodyear Tire v. Haeger.*

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED FEBRUARY 12, 2018

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-56324

THE ESTATE OF JEFFREY RANDALL; JENNIFER RANDALL, INDIVIDUALLY, AS SUCCESSOR IN INTEREST TO THE ESTATE OF JEFFREY RANDALL, AND AS GUARDIAN AD LITEM TO M. R. AND C. R.,

Plaintiffs-Appellants,

v.

FIRST SOLAR, INC., A DELAWARE CORPORATION; *et al*.,

Defendants-Appellees.

Appeal from the United States District Court for the Central District of California. D.C. No. 5:15-cv-01066-VAP-DTB. Virginia A. Phillips, Chief Judge, Presiding.

MEMORANDUM*

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appendix A

February 8, 2018, Submitted, Pasadena, California;
February 12, 2018, Filed**

Before: GRABER and HURWITZ, Circuit Judges, and MARBLEY***, District Judge.

Plaintiffs' lawyers[1] challenge the district court's decision to impose sanctions on them under Federal Rule of Civil Procedure 11. "We review the district court's decision to impose Rule 11 sanctions—and, if they are warranted, the reasonableness of the actual amount imposed—for abuse of discretion." *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1126 (9th Cir. 2002). A district court abuses its discretion if its decision to award sanctions rests on a clearly erroneous factual finding or a "materially incorrect view of the relevant law." *Id.* at 1126-27 (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)).

** The panel unanimously concludes that this case is suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

*** The Honorable Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

1. Plaintiffs are named as the appellants in the notice of appeal. But the only issue on appeal is whether the district court erred by imposing sanctions on Plaintiffs' lawyers. Accordingly, the proper appellants are Plaintiffs' lawyers. *Cabrera v. City of Huntington Park*, 159 F.3d 374, 382 (9th Cir. 1998) (per curiam). Because it is clear from the notice of appeal that those lawyers intended to appeal the orders imposing sanctions on them, they are parties to this appeal under Federal Rule of Appellate Procedure 3(c) despite not being listed as the appellants. *Retail Flooring Dealers of Am., Inc. v. Beaulieu of Am., LLC*, 339 F.3d 1146, 1149 (9th Cir. 2003).

1. The district court did not err in finding that Plaintiffs' lawyers should have known at least as of December 17, 2015, that this case lacked merit.[2] By that time, it should have been clear to Plaintiffs' lawyers that there was no nonfrivolous argument that Jeffrey Randall's death did not occur in the course and scope of his employment. *Lefiell Mfg. Co. v. Superior Court*, 228 Cal. App. 4th 883, 175 Cal. Rptr. 3d 894, 900 (Ct. App. 2014). By continuing to advocate for Plaintiffs' tort claims after that date, Plaintiffs' lawyers violated Rule 11, and the district court did not abuse its discretion by imposing sanctions. Fed. R. Civ. P. 11(b)(2) & (3).

2. Plaintiffs' lawyers argue that the district court abused its discretion by including, as part of the sanctions imposed under Rule 11, fees incurred by Defendant's lawyers before the date on which the Stipulations With Request for Award was approved. We reject that argument because it rests on the incorrect premise that Plaintiffs' lawyers could not have known that this case lacked merit until the stipulation was approved.

AFFIRMED.

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2. It is not clear from the order granting Defendant's motion for Rule 11 sanctions whether the district court found that the signing of the Stipulations With Request for Award, standing alone, rendered continued prosecution of this case untenable. But in its order setting the amount of sanctions, the court clarified that the signing of the stipulation was merely one fact that bore on the ultimate question whether Plaintiffs' lawyers had a nonfrivolous basis for continuing to pursue this case.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, FILED AUGUST 11, 2016

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EDCV 15-1066-VAP (DTBx)

The Estate of Jeffrey Randall *et al.*,

Plaintiffs,

v.

First Solar, Inc.,

Defendant.

ORDER AWARDING REASONABLE ATTORNEY'S FEES TO DEFENDANT

On March 9, 2016, the Court granted Defendant's Motion for Summary Judgment, as well as Defendant's Motion for Sanctions ("Rule 11 Motion"). (See generally Doc. No. 47, "Order.") In its Order, the Court found "Rule 11 sanctions should be imposed on Plaintiffs' counsel. The Court has reviewed the entire record in this case and finds that Plaintiffs' counsel did not have a non-frivolous basis for opposing the Motion, counsel failed to supply any evidence that would invalidate the [S]tipulation [and Request for Award in the Workers' Compensation Appeals Board], and counsel knew this case should be dismissed in September of 2015." (*Id.* at 20.) The Court ordered Defendant's counsel to submit its billing records from September 9, 2015 to the time of the issuance of the Order. (*Id.* at 21.)

On March 21, 2016, Defendant's counsel submitted its billing records in accordance with the Court's Order. (Doc. No. 48, Declaration of Kathryn N. Richter in Support of Rule 11 Sanctions Against Plaintiffs' counsel ("Richter Decl.").) On April 29, 2016, Plaintiffs filed their objections to the amount sought (Doc. No. 55, "Objections"), as well as the Declaration of Kenneth B. Peterson in support of Plaintiffs' objections. (Doc. No. 56, Declaration of Kenneth B. Peterson.) On May 13, 2016, Defendant filed its reply in support of the amount of sanctions sought (Doc. No. 60, "Reply"), the declaration of Michael G. Gerson in support of the amount of sanctions to be awarded (Doc. No. 62, Michael G. Gerson Declaration), the declaration of Kara Mullins in support of the amount of sanctions sought (Doc. No. 61, Kara Mullins Declaration), as well as Defendant's objections to the Peterson Declaration (Doc. No. 63). Plaintiffs then filed a Request for Judicial Notice. (Doc. No. 65, Request for Judicial Notice, "RJN.") After consideration of all papers filed in support of, and opposition to, the amount of sanctions sought, the Court rules as follows.

I. REQUEST FOR JUDICIAL NOTICE

The court can judicially notice facts that are not subject to reasonable dispute in that they are generally known within the territorial jurisdiction of the court or they are capable of ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b). A court may take judicial notice of court filings and other matters of public record. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (citing *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1364 (9th Cir. 1998)). A court may also take judicial notice of information and documents that are "made publicly available by government entities [], and neither party disputes the authenticity of the websites or the accuracy of the information displayed therein." *Daniels-Hall v. Nat'l Educ. Ass'n.*, 629 F.3d 992, 998-99 (9th Cir. 2010) (courts may take judicial notice of information posted on an official government website).

Plaintiffs request the Court take judicial notice of the Stipulation and Award in the proceedings before the Workers' Compensation Appeals Board in *Randall v. First Solar, Inc.*, ADJ9917584 ("Stipulation"). (RJN at 1-2.) As it is a public record, the Court takes Judicial Notice of Exhibit A.[1]

II. DISCUSSION

Plaintiffs object to the amount of attorney's fees sought by Defendant on the following grounds: (1) Defendant is not entitled to sanctions because the

1. The Court previously took judicial notice of the Stipulation signed by both Plaintiffs and Defendant. (*See* Order at 4.) The Court now takes judicial notice of the final version of the Stipulation in Plaintiffs' Workers' Compensation case.

Stipulation and Request for Award was not executed by the WCAB Administrative Law Judge until after Defendant filed its Rule 11 Motion; (2) the execution of the Stipulation did not estop Plaintiffs from filing this action; (3) Plaintiff's Decedent fell within an exception to the Workers' Compensation Act exclusivity rule; (4) Rule 11 sanctions cannot be awarded before the service of the Rule 11 Motion; (5) Defendant's own pleadings recognize that the WCA might not apply; and (6) Rule 11 Sanctions do not apply to discovery requests, responses, or motions to compel. (See generally Objections.) Plaintiffs also made specific objections to certain time entries for vagueness, for block billing, and for excessive billing. (See generally Objections.)

The Court declines to revisit the arguments Plaintiffs unsuccessfully advanced in their Opposition to Defendant's Motion for Summary Judgment. (*See* Order at 13 (finding Plaintiffs were estopped by the Stipulation), 18 ("Decedent was acting within the course of his employment"), and 19-21 (finding Defendant is entitled to sanctions)). The other general objections lack merit as well.

Plaintiffs contend, for the first time, that Plaintiff Jennifer Randall's execution of the Stipulation and Request for Award on September 8, 2015 was of no significance because it was not executed by the Administrative Law Judge until February 2, 2016. As Defendant filed its Motion for Sanctions before that date, Plaintiffs contend the Motion was premature. (Objections at 1-3.) Plaintiffs did not raise this issue in its opposition to the Motion for Sanctions, and they are untimely in advancing it now.

More importantly, however, the argument has no merit. Defendant relied on the Stipulation signed by Ms. Randall as evidence to support its contention that Plaintiffs' counsel was aware this action was barred by the exclusivity of the Workers' Compensation Act. It specifically pointed to the Stipulation's language establishing that Mr. Randall was acting within the course and scope of his employment when he was injured, as well as evidence obtained during discovery; neither the summary judgment motion or the sanctions motion were premised "solely" on the Stipulation, as Plaintiffs now claim. (Objections at 4.)

As to the other challenges to the fees sought, their objection that sanctions cannot be awarded for defense fees and costs incurred before the service of the Rule 11 motion lacks legal merit, as subsection (c)(4) specifically provides otherwise. Finally, to the extent their objections are based on a theory that a movant is not entitled to attorney's fees incurred in connection with the discovery process, that contention too is legally flawed. Subsection (d) merely prohibits the use of Rule 11 with regard to efforts to enforce discovery, as sanctions for failure to comply with the discovery rules are governed by Title V of the Federal Rules of Civil Procedure. *See Patelco Credit Union v. Sahni*, 262 F.3d 897, 913 n.15 (9th Cir. 2001) (awarding attorneys' fees in sanctions and noting Rule 11(d) "specifically exempts discovery motions and objections from its procedural requirements"); *Nilon v. Natural-Immunogenics Corp.*, 2015 WL 6510540, at *4 (S.D. Cal. Oct. 28, 2015) ("under section (d), Rule 11 sanctions cannot be imposed based on alleged improprieties in discovery because Rules 26 through 37 of the Federal Rules of Civil Procedure set forth the available sanctions for discovery abuses.").

A. The "Safe harbor" Provision in Rule 11

Rule 11(c)(2) requires a motion for sanctions must be served "but . . .not . . .filed or . . .presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets." Fed. R. Civ. Pr. 11(c)(2). "After 21 days, if the offending party has not withdrawn the filing, the movant may file the Rule 11 motion with the court. This period is meant to give litigants an opportunity to remedy any alleged misconduct before sanctions are imposed." *Truesdell v. S. California Permanente Med. Grp.*, 293 F.3d 1146, 1151-52 (9th Cir. 2002); *see Portnoy v. Veolia Transp. Services, Inc.*, No. 2:13-CV-00043-MCE-EFB, 2014 WL 3689366, at *5 (E.D. Cal. Jul. 24, 2014) (awarding sanctions when plaintiff "continue[d] to proceed with this action after receiving [defendant's] safe harbor letter"); *Ayvazian v. Moore Law Group*, No. 2:12-CV-01506-ODW (Ex), 2012 WL 2411181 (C.D. Cal. Jun. 26, 2012) (awarding sanctions after plaintiff received a safe harbor letter).

The following summary sets out the chronology of the communications and filings in this case relevant to the sanctions issue:

- May 29, 2015: Defendant removed this action from the California Superior Court, County of Riverside (Doc. No. 1);

- July 21-22, 2015: Defendant wrote to Plaintiffs' counsel pointing out the exclusivity of the Workers' Compensation Act remedy (Doc. No. 31, Ex. 3);

- September 8, 2015: Plaintiff Jennifer Randall signed the Stipulation with Request for Award (RJN, Ex. A (Doc. No. 38));

- December 17, 2015: Defendant's counsel wrote to Plaintiffs' counsel citing legal authorities that maintenance of Plaintiffs' action against Defendant violated Rule 11 (b) (2), (3), and further stating that unless the action was dismissed within five days, Defendant would serve a Rule 11 motion seeking attorney's fees, costs and sanctions dating back to July 21 and 22, 2015;

- January 4, 2016: Defendant served on Plaintiffs' counsel (but did not file with the Court) its Motion for Rule 11 Sanctions (Doc. No. 31, Ex. 5);

- January 11, 2016: Plaintiffs' counsel notified Defendant it would serve discovery and that Mrs. Randall would be available for her deposition (Doc. No. 32 at 4); and

- January 25, 2016: Defendant filed its Motion for Sanctions (Doc. No. 31-2, Ex. 4).

B. Appropriate Measure of Sanctions

Subsection (c)(2) of Rule 11 provides: "If warranted, the court may award to the prevailing party [on a motion for sanctions under this rule] the reasonable expenses, including attorney's fees, incurred for the motion." Subsection (c)(4) further requires that any sanction imposed under the rule "must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situation," and may include "an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation." Fed. R. Civ. P. 11(c)(4); *accord Chambers v. NASCO, Inc.*, 501 U.S. 32, 57 (1991) ("It was within the court's discretion to vindicate itself and compensate NASCO by requiring Chambers to pay for all attorney's fees."); *Logtale, Ltd. v. IKOR, Inc.*, No. C-11-5452 EDL (DMR), 2015 WL 581513, at *4-7 (N.D. Cal. Feb. 11, 2015) (awarding sanctions in the amount of attorneys' fees incurred).

Here, Plaintiffs' counsel had been told of Defendant's intent to seek sanctions based on the exclusivity of the Workers' Compensation Act remedy as early as July 21, 2015. (Doc. No. 31, Ex. 3.) The same counsel who represents Plaintiffs in this action represented them in the proceedings before the Workers' Compensation Appeals Board when Plaintiff Jennifer Randall executed the Stipulation. (Order at 11.) The Stipulation stated: "Jeff Randall . . .while employed as a Civil Project Engineer by First Solar, Inc., on 8/26/13 sustained injury *arising out of and occurring in the course of his . . .employment*, proximately resulting in the death of said employee on 8/26/13." (*Id.*, emphasis added.) Defense counsel's December 17, 2015 letter cited its legal authorities and factual bases for seeking Rule 11 sanctions based on the exclusivity of the Workers' Compensation Act remedy. Defendant served its Rule 11 Motion on Plaintiffs' counsel on January 4, 2016 – but did not file it, pursuant to Rule 11(c)(2) – again setting forth the basis for the sanctions request. Despite these opportunities to dismiss a case whose claims, as the Court found in its March 9, 2016 Order were judicially estopped, Plaintiffs continued to prosecute the case.

Defense counsel cited the law regarding the exclusivity of the Workers' Compensation Act remedies, as well as the evidence uncovered in discovery regarding the scope of the decedent's employment, in its December 17, 2015 letter. Defendant did not attach a Rule 11 Motion to that correspondence, but it did serve its Motion on January 4, 2016, 21 days before it filed it, in compliance with Rule 11(b)(2). At the very latest, then, upon receipt of the December 17 letter, Plaintiffs' counsel knew or should have known that the action it had filed and prosecuted lacked merit both legally and factually, thus running afoul of the Rule 11 requirement that the claims in this action were "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new" and that the factual contentions had "evidentiary support or . . .[would] have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b)(2), (3).

Pursuant to Rule 11(c)(4), the Court finds an award of sanctions to Defendant against Plaintiffs' counsel,[2] in the form of the reasonable attorney's fees incurred by Defendant from January 7, 2016, 21 days after transmission of the December 17 letter, would "suffice[] to deter repetition of the conduct or comparable conduct by others similarly situated." The Court now turns to the determination of the reasonable attorney's fees to be awarded.

C. Reasonable Attorney's Fees Incurred by Defendant Post January 7, 2016

"In determining a reasonable attorney's fee, the district court's first step is to calculate a 'lodestar' by multiplying the number of hours it finds the prevailing party expended on the litigation by a reasonable hourly rate." *McGrath v. County of Nevada*, 67 F.3d 248, 252 (9th Cir. 1995) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

For work performed after January 7, 2016, Defendant seeks fees for each of its billing attorneys and paralegals in the following amounts:

- Kathryn Richter: $64,942.50, based on an hourly rate of $525.00 and 123.7 hours billed;

2. Rule 11(c)(5) forbids an award of sanctions against a represented party for violating Rule 11(b)(2).

- William Janicki: $74,812.50, based on an hourly rate of $475.00 and 157.5 hours billed;

- Lilian Loh: $16,929.50, based on an hourly rate of $245.00 and 69.1 hours billed;

- Stephen Dye: $210.00, based on an hourly rate of $525.00 and 0.4 hours billed;

- David Brandt: $88.00, based on an hourly rate of $220 and 0.4 hours billed.

Katherine Richter submitted a declaration describing defense counsel's billing practices. She notes that her firm offered Defendant a 10% discount on the total fees. (Richter Decl., at ¶ 2.) That discount is not reflected in the amounts set forth above.

Defendant's counsel bears the burden of establishing entitlement to an attorney's fee award and "documenting the appropriate hours expended and hourly rates." *Hensley*, 461 U.S. at 437. The Court maintains discretion to reduce the number of hours requested where an attorney's block billing makes it difficult to identify whether the hours were reasonably expended. *See Cunningham v. County of Los Angeles*, 879 F.2d 481, 484 (9th Cir. 1988), *cert. denied,* 493 U.S. 1035 (1990) (holding a Court can reduce the hours if the time claimed is excessive, redundant, or otherwise unnecessary). The trial court, due to its familiarity with the case, is in the best position to evaluate the reasonableness of the hours requested. *Moreno v. City of Sacramento*, 534 F.3d 1106, 1116 (9th Cir. 2008).

The Court has reviewed each and every billing entry in Defendant's fee request for the period January 7, 2016, forward, and finds the descriptions of the tasks performed were sufficiently detailed. The Court eliminated fees requested for (1) tasks on which excessive time was spent, (2) unnecessary, excessive, or duplicative entries, and (3) time charged for clerical or secretarial tasks. The chart below summarizes the deductions for the fees requested by each billing professional, as well as the overall 10% reduction discussed above.

Appendix B

Attorney/ Paralegal	Hourly Rate	Hours Requested	Deduction	Hours Awarded	Lodestar
Richter	$525	123.7	20.0	103.7	$54,442.50
Janicki	$475	157.5	40.7	116.8	$55,480.00
Loh	$245	69.4	16.0	53.4	$13,083.00
Brandt	$220	0.4	0.0	0.4	$88.00
Total					$123,093.50
10% Deduction					$12,309.35
Total					$110,784.15

III. CONCLUSION

For the reasons stated above, the Court having granted Defendant's Motion for Sanctions, now fixes the amount of reasonable attorneys' fees at $110,784.15 and awards that amount as sanctions payable to Defendant by Plaintiffs' counsel within 60 days of the date of this Order.

IT IS SO ORDERED.

Dated: 8/11/16

/s/
Virginia A. Phillips
Chief United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, EASTERN DIVISION, FILED MARCH 9, 2016

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

EDCV 15-1066-VAP (DTBx)

THE ESTATE OF JEFFREY RANDALL *et al.*,

Plaintiffs,

v.

FIRST SOLAR, INC.,

Defendant.

ORDER (1) GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (2) GRANTING DEFENDANT'S MOTION FOR RULE 11 SANCTIONS

Before the Court is Defendant's Motion for Summary Judgment ("Motion"), filed on January 25, 2016. (Doc. No. 30.) Plaintiffs filed their Opposition on February 8, 2016. (Doc. No. 37.) Defendant also filed a Motion for Sanctions on January 25, 2016. (Doc. No. 31, "Motion for Sanctions.") Plaintiffs opposed the Motion for Sanctions on February 8, 2016. (Doc. No. 36, "Sanctions Opposition.") Defendant filed its Reply on February 12, 2016. (Doc. No.

39, "Sanctions Reply.") After considering the papers filed in support of, and in opposition to, the Motions, the Court GRANTS Defendant's Motion for Summary Judgment, and GRANTS Defendant's Motion for Sanctions.

I. BACKGROUND

A. Allegations in the Complaint

On August 25, 2013, following Tropical Storm Ivo, Jeffrey Randall ("Decedent") went to investigate the damage sustained by the First Solar, Inc. ("Defendant") solar-power-plant. (Complaint, Ex. A, Doc. No. 8, "Complaint," at ¶ 3.) Decedent and Defendant's employee, Mike Cyr, flew over the sight in Mr. Cyr's single-engine aircraft. (*Id.*) The plane crashed, and Decedent did not survive. (*Id.* at ¶ 1.) Plaintiffs are Decedent's Estate, his wife, and his two children.

Plaintiffs contend Defendant "improperly required [Decedent] to fly in unsafe condition[s] for their own pecuniary interests at the expense of unreasonably exposing [Decedent] to foreseeable bodily injury and death." (*Id.* at ¶ 4.) Plaintiff's Complaint sets out four claims for relief: (1) negligence; (2) negligent hiring; (3) wrongful death under a theory of negligence; and (4) wrongful death under a theory of negligent hiring. (*See generally Complaint.*)

Defendant contends Plaintiffs' civil action is barred because California's Workers' Compensation Act provides Plaintiffs with an exclusive remedy, under which Defendant has already begun to pay death benefits and will continue to pay out death benefits until 2024. (Memorandum of Points and Authorities, Doc. No. 30-1, "Memo. of P&A") at 1.)

II. EVIDENTIARY RULINGS

Before setting forth the uncontroverted facts, the Court examines the admissibility of the evidence offered by both sides in support of, and opposition to, the Motion for Summary Judgment. "A trial court can only consider admissible evidence in ruling on a motion for summary judgment." *Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. 2002). At this stage, however, a district court should "focus on the admissibility of the [evidence's] contents," "not . . . on the admissibility of [its] form." *See Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003); *Block v. City of Los Angeles*, 253 F.3d 410, 418-19 (9th Cir. 2001). Moreover, "objections to evidence on the ground that it is irrelevant, speculative, and/or argumentative, or that it constitutes an improper legal conclusion are all duplicative of the summary judgment standard itself" and thus need not be considered on a motion for summary judgment. *Burch v. Regents of Univ. of Cal.,* 433 F. Supp. 2d 1110, 1120 (E.D. Cal. 2006). Plaintiffs did not file any evidentiary objections. Defendants object to the declaration of Chris Campbell, and Exhibit B to that declaration, arguing they lack foundation and are hearsay. Such objections are "boilerplate recitations of evidentiary principles or blanket objections without analysis applied to specific items of evidence." *See Stonefire Grill, Inc. v. FGF Brands, Inc.*, 987 F. Supp. 2d 1023, 1033 (C.D. Cal. 2013). "On this basis alone, the Court will not scrutinize each objection and give a full analysis of identical objections raised as to each fact." *Id.*

Exhibit B to the Campbell declaration has not been considered for the "truth of the matter asserted," namely, whether Cyr had insurance at the time of the accident. The Court has considered this evidence for the limited purpose of determining whether it is "new information."

III. JUDICIAL NOTICE

A court "may take judicial notice on its own" of facts that are "generally known" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b), (c); *see also Edie v. Baca,* No. CV 03-6917 ABC (JC), 2009 WL 3417844, at *3 (C.D. Cal. Oct. 19, 2009) (citing Fed. R. Evid. 201(b), (c)). In their Reply, Defendants filed the Stipulations with Request for Award, signed by Plaintiffs and Defendants, and filed with the Workers Compensation Appeals Board. (Ex. A, Doc. No. 38-1, "Ex. A.".) As this Stipulation is "not subject to reasonable dispute" because both parties acknowledge signing it, its "accuracy cannot reasonably be questioned," and therefore, the Court takes judicial notice of Exhibit A. *See* Fed. R. Evid. 201(b)(2).

IV. LEGAL STANDARD

A. Motion for Summary Judgment

A motion for summary judgment or summary adjudication shall be granted when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party must show that "under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson,* 477 U.S. at 250.

Generally, the burden is on the moving party to demonstrate that it is entitled to summary judgment. *Margolis v. Ryan,* 140 F.3d 850, 852 (9th Cir. 1998); *Retail Clerks Union Local 648 v. Hub Pharm., Inc.*, 707 F.2d 1030, 1033 (9th Cir. 1983). The moving party bears the initial burden of identifying the elements of the claim or defense and evidence that it believes demonstrates the absence of an issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).

Where the non-moving party has the burden at trial, however, the moving party need not produce evidence negating or disproving every essential element of the non-moving party's case. *Celotex,* 477 U.S. at 325. Instead, the moving party's burden is met by pointing out that there is an absence of evidence supporting the non-moving party's case. *Id.*

"If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000). "In such a case, the nonmoving party may defeat the motion for summary judgment without producing anything." *Id.* at 1103.

If the moving party carries its burden of production, however, the burden then shifts to the non-moving party to show that there is a genuine issue of material fact that must be resolved at trial. *See* Fed. R. Civ. P. 56(e); *Celotex,* 477 U.S. at 324; *Anderson,* 477 U.S. at 256; *Nissan Fire*, 210 F.3d at 1103. The non-moving party must make an affirmative showing on all matters in issue by the motion as to which it has the burden of proof at trial. *Celotex,* 477 U.S. at 322; *Anderson,* 477 U.S. at 252. *See also* William W. Schwarzer, A. Wallace Tashima & James M. Wagstaffe, Federal Civil Procedure Before Trial, § 14:144. "This burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence." *In re Oracle Corp. Secs. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citing *Anderson,* 477 U.S. at 252).

A genuine issue of material fact will exist "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson,* 477 U.S. at 248. In ruling on a motion for summary judgment, a court construes the evidence in the light most favorable to the non-moving party. *Barlow v. Ground,* 943 F.2d 1132, 1135 (9th Cir. 1991); *T.W. Elec. Serv. Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987).

B. Rule 11 Sanctions

Rule 11 of the Federal Rules of Civil Procedure ("Rule 11") imposes a duty on attorneys to certify that (1) they have read the pleadings or the motions they file, and (2) the pleading or motion is well-grounded in fact, has a colorable basis in law, and is not filed for an improper purpose. *Sec.*

Farms. v. Int'l Bhd. Of Teamsters, 124 F.3d 999, 1016 (9th Cir. 1997) (citing Fed. R. Civ. P. 11(b)). "An attorney is subject to Rule 11 sanctions when he or she presents to the court 'claims, defenses, and other legal contentions ... [not] warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law[.]'" *Turcios v. Carma Laboratories, Inc.*, No. CV 12-08487 JGB (Ex), 2013 WL 11238485, at *1 (C.D. Cal. May 2, 2013) (quoting *Hogaye v. Baldwin*, 425 F.3d 671, 676-77 (9th Cir. 2005)). Attorneys can only make claims when they can certify that it is the result of a "reasonable inquiry." *Id.* (citing *Westlake North Prop. Owners Ass'n v. City of Thousand Oaks,* 915 F.2d 1301, 1305 (9th Cir. 1990)).

A claim is not "warranted by law" where no "plausible, good faith argument can be made by a competent attorney" in support of the claim asserted. *Zaldivar v. City of Los Angeles,* 780 F.2d 823, 822 (9th Cir. 1986). Where there is no legal or factual basis for a claim, the Court can deduce improper purpose following a review of the facts and the law. *Turicos*, 2013 WL 11238485, at *1.

The cases warranting imposition of sanctions for frivolous actions are "rare and exceptional." *Operating Eng'rs Pension Trust v. A–C Co.*, 859 F.2d 1336, 1344 (9th Cir. 1988). Sanctions are "an extraordinary remedy, one to be exercised with extreme caution." *In re Keegan Mgmt. Co. Sec. Litig.,* 78 F.3d 431, 437 (9th Cir. 1996). "District courts enjoy much discretion in determining whether and how much sanctions are appropriate." *Oliver v. In-N-Out Burgers*, 945 F. Supp. 2d 1126, 1130 (S.D. Cal. 2013) (citing

Haynes v. City & Cnty. of San Francisco, 688 F.3d 984, 987 (9th Cir. 2012). A district court's determination of whether to enter sanctions is reviewed for abuse of discretion. *Id.*

V. FACTS

To the extent certain facts or conclusions are not mentioned in this Order, the Court has not relied on them in reaching its decision. In addition to considering the evidentiary objections raised by the parties, the Court has considered independently the admissibility of the evidence that both parties submitted and has not considered facts that are irrelevant or inadmissible evidence.

A. Uncontroverted Facts

The following material facts are supported adequately by admissible evidence and are uncontroverted. They are "admitted to exist without controversy" for the purposes of this Motion. *See* L.R. 56-3.

In August of 2011, First Solar began construction on a photovoltaic power plant, Desert Sunlight Solar Project ("DSL"), near Desert Center, California. (David Pappicco Deposition ("Pappicco Dep.") at 9:20-10:1, 31:15-20.) Decedent became a First Solar employee in approximately July 2012. (*Id.* at 17:2-6.) The aircraft accident which took Decedent's life and the life of Mr. Michael Cyr ("Cyr") occurred on Monday, August 26, 2013 at 1:30 P.M. ("the accident"). (Jennifer Randall Deposition, ("Randall Dep.") at 23:25-24:1; 28:2-5.)

By August 2013, Decedent was a Construction Site Supervisor. (Pappicco Dep. at 31:21-32:14.) Decedent supervised the work performed by subcontractors, including working with post crews for perimeter fencing, assembling solar panels, large excavations, setting schedules for vendors and subcontractors, and site surveying. (*Id.* at 14:14-23, 18:7-19:5.) His job description read:

> The Construction Site Supervisor will be responsible for site construction, management of civil, mechanical and electrical subcontractors, compliant with contract terms & conditions, installation, schedule, logistics, safety, quality, and constructability of all aspects of photovoltaic projects. Construction Site Supervisor will be responsible for the delivery of site-specific contractual obligations in the construction of solar photovoltaic power plants, as well as identifying areas for continuous cost reduction.

(*Id.* at 31:21-32:14, Ex. 4.) Decedent was also responsible for maintaining access to the construction site, including clearing and maintaining roads, managing and detaining water run-off in containment ponds to avoid erosion, and maintaining the required perimeter fencing. (Nathan Rudolph Declaration ("Rudolph Decl.") at ¶ 4.) Decedent conducted and supervised site surveys of DSL as part of his job duties for First Solar. (Pappicco Dep. at 58:9-12.) In these surveys, Decedent observed the construction installation, the perimeter fencing, and the road. (*Id.* at 57:3-8.) These surveys were conducted for daily and monthly reports on the quantity of the electrical installation. (*Id.* at 57:9-23.) Decedent and other employees conducted surveys of DSL using pickup trucks and modified golf carts, and these employees were issued cameras to document DSL surveys. (*Id.* at 57:24-58:25.)

First Solar used an outside contractor to take monthly aerial photographs of the facility. (*Id.* at 20:14-18.) Decedent was not involved with the contractor's aerial photography. (*Id.* at 20:22-24.)

Defendant hired Cyr in 2011 to work on the DSL project. (*Id.* at 22:1-12.) In 2013, Cyr was the assistant site manager coordinating the work of the civil and electrical construction supervisors. (*Id.* at 23:3-8.)

In August 2013, DSL experienced a storm that caused damage to the site, blocked access roads with mud and debris, damaged water containment ponds, and downed the perimeter fencing. (*Id.* at 25:9-11.) Mr. Pappicco ("Pappicco"), the Director of Construction from August 2011 through August 2013, was concerned about the potential damaged caused to DSL. (*Id.* at 9:9-13; 29:3-9.) Pappicco, knowing Cyr had access to an airplane and had flown over the site before, emailed Cyr to ask him if it was possible to survey DSL from the air to assess the damage. (*Id.* at 23:9-11; 24:14-19, Ex. 3.) Cyr responded he would "make it happen." (*Id.* at 27:22-28:23, Ex. 3.) Cyr's aircraft was uninsured. (*Id.* at 24:6-8.)

First Solar was under a 48-hour requirement to repair the perimeter fencing around DSL. (*Id.*) The electrical power lines fell down onto the road, and the electricity company turned off the power. (*Id.* at 44:17-45:3.) Broken glass had also fallen down, which would create a hazard. (*Id.* at 46:10-19.)

The day before the accident, Decedent emailed Pappicco, informing him that he and Cyr were going to take aerial photos of DSL if weather permitted, and that he would have the debris cleared from the front of DSL in order to gain access to the site. (*Id.* at 40:14-41:11, Ex. 5.) Pappicco was not surprised Decedent agreed to help out because Decedent "would be there whenever you need the help for whatever you need to be done." (*Id.* at 42:8-13.)

The aircraft accident occurred on Monday, August 26, 2013 at 1:30 p.m. (Randall Dep. at 23:25-24:1; 28:2-5.) Cyr and Decedent were surveying the site to document the storm damage and determine needed repairs. (Pappicco Dep. at 42:25-43:17.) Aerial photographs allowed First Solar to obtain information about the extent of the damage at DSL. (*Id.* at 42:25-43:17.)

The airplane went down just outside of the DSL facility, after it entered an accelerated maneuver stall followed by a spin. (*Id.* at 54:14-18; Tommy McFall Declaration, "McFall Decl." at ex. 2.) Weather conditions did not contribute to the cause of the accident. (McFall Decl. at ¶ 5.) A Canon Powershot camera, owned by Mrs. Randall, was recovered from the accident scene. (Randall Dep. at 24:13-26:23, 25:16-21.) The camera contained photographs taken from the air by Decedent of the DSL facility before the accident. (*Id.* at 26:21-27:16, 35:25-36:24; 38:21-39:15.) The photographs taken show damage to the water retention ponds and perimeter fencing. (Rudolph Decl. at ¶ 13.) This damage was within the scope of work managed by Decedent on a daily basis. (*Id.*)

On behalf of herself and the other Plaintiffs in this action, Mrs. Randall successfully sought California's Workers' Compensation benefits in 2013 following the death of Decedent, and she receives a biweekly benefit payment. (Randall Dep. at 13:1-23.)

Mrs. Randall was represented by Chris Campbell and Zack Muljat from the Geragos and Geragos Law Firm in connection with her claim for death benefits before the Workers' Compensation Appeals Board. (Randall Dep. at 92:11-25.) On September 8, 2015, Mrs. Randall and her attorneys accompanied her to a mandatory settlement conference. (*Id.* at 100:22-102:1, 106:6-18.) The settlement conference resulted in a resolution of the Workers Compensation case, and Mrs. Randall signed a Stipulation With Request for Award at the workers' compensation hearing. (Ex. A.)

Under the terms of the Stipulation, Mrs. Randall agreed that Decedent "*while employed at Riverside County as a civil project supervisor by First Solar, Inc.,* on 8/26/2013 sustained injury arising out of and occurring in the course of his employment, proximately resulting in the death of said employee on 8/26/2013." (*Id.* at 117:4-24, Ex. 39 at 3) (emphasis added.) The stipulation Mrs. Randall signed also stated that both First Solar and Decedent "were subject to the provisions of the Labor Code of the State of California." (*Id.* at 117:25-118:8, Ex. 39 at 3.)

B. Disputed Facts

The parties dispute (1) whether DSL experienced a storm annually (Statement of Genuine Issues, Doc. No. 137-1, "SGI," at 30); (2) whether the storm in August 2013 was more significant than any prior storm experienced at DSL (SGI at 33); (3) whether Cyr and Decedent's aerial survey were part of their "respective job duties," or in the course of their employment (SGI No. 45, 70, 76-79, 85, 96); and (4) whether it was necessary for a civil/construction engineer to take the photographs (SGI No. 75). None of these facts are material to the resolution of this Motion.

VI. DISCUSSION

A. Defendant's Motion for Summary Judgment

California Labor Code § 3600(a), the California's Workers' Compensation Act ("WCA"), provides that "[l]iability for the compensation provided by [the Act], in lieu of any other liability whatsoever . . . shall . . . exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment . . . ."

Compensation under California Labor Code is the "sole and exclusive remedy of the employee or his or her dependents against the employer." Cal. Lab. Code § 3602(a). For a claim to be preempted by the WCA, (1) both the employer and employee "must be subject to the compensation provisions" of the California Labor Code; (2) the employee must be "performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment;" and (3) the injury must be "proximately caused by the employment, either with or without negligence." Cal. Lab. Code § 3600(a)(1)-(3).

Defendant argues WCA provides the exclusive remedy to Plaintiffs because: (1) Decedent was Defendant's employee and both he and Defendant were subject to the compensation provisions of the WCA; (2) at the time of his death, Decedent was "performing a service growing out of his and incidental to his employment and was acting within the course of his employment;" and (3) Decedent's death was "proximately caused by his employment." (Motion at 10.) Defendant also argues Plaintiffs are estopped from presenting their claims as a result of a stipulation Plaintiffs and Defendant signed after Plaintiffs filed a claim for benefits under the WCA. (Motion at 12.) The Court will examine first whether Plaintiffs are judicially estopped from pursuing their claims.

B. Whether Plaintiffs are Estopped

After Plaintiffs filed a claim for benefits under the WCA, Randall signed a stipulation with Defendant ("stipulation") in order to receive workers' compensation benefits. (Motion at 12.) The stipulation read "[Decedent] sustained injury arising out of and occurring in the course of his/her employment, proximately resulting in the death of said employee . . . and both the employer and employee were subject to the provisions of the Labor Code of the State of California." (Motion at 12.) Plaintiffs' current claims are irreconcilable with this Stipulation; therefore, Defendant argues, Plaintiffs should be judicially estopped from pursuing their claims. (Motion at 12.)

"Judicial estoppel, sometimes also known as the doctrine of preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Rissetto v. Plumbers and Steamfitters Local 343,* 94 F.3d 597, 600 (9th Cir. 1996). "It is an equitable doctrine intended to protect the integrity of the judicial process by preventing a litigant from 'playing fast and loose with the courts.'" *Helfand v. Gerson,* 105 F.3d 530, 534 (9th Cir. 1997) (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990) (internal citations omitted). "[F]ederal law governs the application of judicial estoppel in federal court." *Rissetto*, 94 F.3d at 603. The doctrine applies to positions taken in the same action or in different actions. *Id.* at 605.

"Factors relevant in deciding whether to apply the doctrine include: (1) whether the party's later position is 'clearly inconsistent' with its earlier position; (2) whether the party has successfully advanced the earlier position, such that judicial acceptance of an inconsistent position in the later proceeding would create a perception that either the first or the second court had been misled; and (3) 'whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.'" *Ducre v. Veolia Transp.,* No. CV-10-02358 MMM (AJWx), 2011 WL 13046882, at *11 (C.D. Cal. Mar. 29, 2011) (citing

New Hampshire v. Maine, 532 U.S. 742, 749 (2001) (laying out the test for judicial estoppel)).

"A party may invoke the doctrine of judicial estoppel in a motion for summary judgment to bar a claim based on an inconsistent position. . . . A party seeking to defeat summary judgment on judicial estoppel grounds must 'sufficiently explain' a prior judicial position that is inconsistent with an essential element of its current claim." *Ducre,* 2011 WL 13046882, at *11 (citing *Cleveland v. Policy Mgmt Sys. Corp.*, 526 U.S. 795, 806 (1999)).

Thus, in order to defeat summary judgment on the basis of judicial estoppel, Plaintiffs must explain the apparent inconsistency between the previous stipulation and her legal claims at issue here.

Plaintiffs contends that after Randall signed the Stipulation, she discovered additional information, i.e., that Decedent was not actually working in the scope of his employment. (Opposition at 3.) Plaintiffs have not specified what information they subsequently learned; however, from the arguments advanced here, the Court surmises the "new information" was that Cyr did not have liability insurance. Hence, the Court will review the factors articulated in *New Hampshire v. Maine*.

1. Whether Plaintiffs Assert an Inconsistent Position

The first factor relevant in deciding whether to apply the doctrine is whether the party's later position is "clearly inconsistent" with its earlier position. *New Hampshire*, 532 U.S. at 749. The stipulation Randall signed clearly articulated that, in order to receive benefits under California Labor Code § 3600, Decedent must have been acting in the course of his employment. (Motion at 12.) Further, to receive benefits under the WCA, conduct must be in the course of employment, pursuant to California Labor Code § 3600(a)(2).

Plaintiffs contend the terms of the Stipulation should not bar this action because they "concern the admissibility of her statements." (Opposition at 4.)

2. Whether Plaintiffs Successfully Advanced the Earlier Position

The second factor relevant in deciding whether to apply the doctrine is whether the party "successfully advanced the earlier position, such that judicial acceptance of an inconsistent position in the later proceeding would create a perception the first or second court had been misled." *Ducre,* 2011 WL 13046882, at *11. There is no dispute that Plaintiffs have been receiving workers' compensation benefits from the WCA Settlement. (Opposition at 3.) Evidence from a workers' compensation proceeding is "not rendered inapplicable . . . by the fact that plaintiff's prior position was taken in a workers' compensation proceeding rather than in a court." *Rissetto*, 94 F.3d at 604. A favorable settlement is considered equivalent to winning a judgment for purposes of applying judicial estoppel. *Id.* at 604-05. As Plaintiffs received benefits as a result of the settlement of the workers' compensation action, Plaintiffs successfully advanced the earlier position that Decedent's injury occurred in the course of his employment in a judicial proceeding.

3. Whether Allowing Plaintiffs to Assert their Claims Would Result in Prejudice

The third factor the Court considers in deciding whether to apply judicial estoppel is whether the party seeking to assert the inconsistent position "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire,* 532 U.S. at 749. Defendant argues it has "already upheld its end of the [workers'] compensation bargain," is making biweekly workers' compensation benefit payments, and would thus be prejudiced if Plaintiffs are allowed to "double-dip." (Motion at 17, 23.)

Plaintiffs argue they would be prejudiced if their case is barred because Cyr did not have liability insurance and that "lack of insurance deprived [Randall] of compensation that she should have received, as Mr. Cyr's actions were a direct cause of her husband's death." (Opposition at 4.) Plaintiffs further opine that whether or not First Solar would be prejudiced "is the sort of question that a jury should answer." (*Id.)*

In support of their Opposition, Plaintiffs submitted a declaration from Chris Campbell, one of Plaintiffs' lawyers. Mr. Campbell faxed a letter to Joel Cyr of Cyr Aviation requesting a copy of Cyr's liability insurance policy, which he received on February 26, 2014. (Chris

Campbell Declaration, Doc. No. 37-2, at ¶ 3-4.) The policy documents show the policy expired on July 24, 2012, over a year before the accident on August 25, 2013. (*Id.* at ¶ 4, Ex. B.) Plaintiffs contend that this lack of insurance is an "important factor in deciding whether the *New Hampshire v. Maine* test is satisfied" because Plaintiffs will not receive any benefit from the expired insurance policy. (Opposition at 4.)

Plaintiffs knew or should have known the insurance policy expired before the Workers' Compensation proceeding was resolved by way of the stipulation. Mrs. Randall signed the stipulation resolving the Workers' Compensation action in September of 2015, over a year after her lawyers received information confirming the aircraft insurance policy had expired. Thus, Plaintiffs knew or should have had reason to know she would not recover benefits from Cyr's insurance when Randall agreed to resolve the Workers' Compensation case. Plaintiffs presented no admissible evidence of newly-discovered information after the Workers' Compensation proceeding was resolved that would explain the inconsistent positions.

Thus, Plaintiffs have not "sufficiently explained" why they now take a judicial position inconsistent with the stipulation resolving the Workers' Compensation case. *Ducre,* 2011 WL 13046882, at *11 (citing *Cleveland,* 526 U.S. at 806). Under the *New Hampshire v. Maine* test, the Court finds: (1) Plaintiffs now are asserting Decedent was not acting within the course of his employment, although they previously stipulated he was acting in the course of his employment at the time of the accident; (2) Plaintiffs successfully advanced their earlier position and received a favorable outcome; and (3) Defendant would be prejudiced if this case was allowed to continue. Accordingly, the Court finds Plaintiffs are judicially estopped from asserting a claim arguing Decedent was not acting within the course of his employment at the time of the accident.

As Decedent was acting within the course of his employment, Plaintiffs' sole remedy is under the WCA. Cal. Lab. Code § 3602(a) (the California Labor Code is the "sole and exclusive remedy of the employee or his or her dependents against the employer.") Thus, Plaintiffs' claims are estopped, and the Court grants Defendant's Motion for Summary Judgment.

C. Defendant's Motion for Sanctions

Defendant's Motion for Sanctions, which generally duplicates the arguments in Defendant's Motion for Summary Judgment, claims Plaintiffs and their attorneys should be sanctioned for "making legal contentions in their complaint that are not warranted by existing law," and "by making factual contentions in their complaint with no evidentiary support." (Motion for Sanctions at 2.) The court considering a motion for Rule 11 sanctions ought to consider whether a position taken was "frivolous," "legally unreasonable," or "without factual foundation, even if not filed in subjective bad faith." *Zaldivar v. City of Los Angeles*, 780 F. 2nd 823, 831 (9th Cir. 1986), *abrogated on other grounds by Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990).

Courts also use an objective standard to address the conditions for Rule 11 sanctions by looking to whether a reasonable basis for the challenged position existed in law and fact at the time the position was adopted. *Conn v. Borjorquez,* 967 F.2d 1418, 1420 (9th Cir. 1992). When counsel opposes a Motion for Summary Judgment, sanctions are not appropriate if (1) “there is a non-frivolous basis for opposing the motion,” and (2) “the non-frivolous basis constitutes more than an incidental part of the opposition.” *Sitt v. Williams,* 919 F.2d 516, 529 (9th Cir. 1990).

In *Sitt v. Williams,* the plaintiffs filed a complaint alleging claims for RICO and securities fraud. *Id.* at 520. After opportunity for discovery, the defendants moved for Summary Judgment. *Id.* The plaintiffs opposed the Motion for Summary Judgment, and the District Court granted the Motion, holding most of the federal claims were time-barred and that plaintiffs “had failed to offer any evidence of a scheme or artifice to defraud.” *Id.* The District Court then imposed sanctions on the plaintiffs, finding the opposition was “entirely without merit.” *Id.* at 527. On appeal, the Ninth Circuit held that the plaintiffs provided some evidence of securities fraud, including the declarations of three certified public accountants to support their allegations of fraud. *Id.* The Ninth Circuit held opposing the Motion for Summary Judgment was non-frivolous based on this evidence. *Id.* at 527-28. Therefore, the Court held sanctions for opposing summary judgment were improper. *Id.* at 527-28.

Exercising its discretion, the Court finds Rule 11 sanctions should be imposed on Plaintiffs' counsel. The Court has reviewed the entire record in this case and finds that had Plaintiffs' counsel did not have a non-frivolous basis for opposing the Motion, counsel failed to supply any evidence that would invalidate the stipulation, and counsel knew this case should be dismissed in September of 2015. This case was removed from the Superior Court of the State of California, County of Riverside on May 29, 2015. (*See generally* Notice of Removal, Doc. No. 1) Randall signed the Stipulation on September 8, 2015. (Ex. A.) On July 21, 2015, and July 22, 2015, Defendant's counsel emailed Plaintiffs' counsel to inform them that Plaintiffs' claims were barred by the exclusive remedy rule under the WCA. (Motion for Sanctions, Doc. No. 31-2, Ex. 2-3.) On September 14, 2015, the parties came before the Court for a scheduling conference, and this Court questioned the counsel as to whether Plaintiffs' claims were barred by the exclusive remedy of the WCA, given that Plaintiffs were receiving death benefits. On December 17, 2015, Defendant's counsel emailed Plaintiffs' counsel asking Plaintiffs' counsel to dismiss their claims as Plaintiffs' "case must fail by reason of the Exclusive Remedy Provisions of the California's Worker's Compensation Act." (*Id.* at Ex. 4.)

Plaintiffs' counsel continued to prosecute this action, filing the opposition to the Motion for Summary Judgment five months after Randall signed the Stipulation, and after this Court put Plaintiffs' counsel on notice of the issue that Plaintiffs' claims were barred. Once Randall signed the Stipulations, Plaintiffs' counsel should have dismissed its claims here, or filed a non-opposition to the Motion.

A sanctioning court carefully assesses the amount of sanctions to be applied, and issues an itemized award that is objectively reasonable in terms of perceived misconduct. *In re Yagman*, 796 F.2d 1165 (9th Cir.), *amended,* 803 F.2d 1085 (9th Cir. 1986), *cert denied,* 484 U.S. 963 (1987). When courts award fees based "upon attorney's fees and related expenses, an essential part of determining the reasonableness of the award is determining the reasonableness of the claimed fees." *Id.* at 1184-85.

Hence, the Court orders sanctions to be imposed against Plaintiffs' counsel in an amount to be determined. The Court ORDERS Defendant's counsel to submit their billing records from September 9, 2015 to the present by March 21, 2016, and Plaintiffs' counsel may respond as to the amount of sanctions by March 30, 2016. The matter will then stand submitted. All sanctions are to be paid by Plaintiffs' counsel, and not by the Plaintiffs themselves.

VII. CONCLUSION

For the reasons stated above, the Court GRANTS the Motion for Summary Judgment, and GRANTS the Motion for Sanctions.

IT IS SO ORDERED.

Dated: 3/9/16 /s

Virginia A. Phillips
United States District Judge

APPENDIX D — TRANSCRIPT OF THE UNITED STATES DISTRICT, COURT CENTRAL DISTRICT OF CALIFORNIA, EASTERN DIVISION-RIVERSIDE, DATED SEPTEMBER 14, 2015

[1]UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION-RIVERSIDE

No. EDCV 15-1066 VAP

THE ESTATE OF JEFFREY RANDALL, *et al*.,

Plaintiffs,

vs.

FIRST SOLAR, INC.

Defendant.

HONORABLE VIRGINIA A. PHILLIPS,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Riverside, California
Monday, September 14, 2015
1:48 p.m.

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[3]MONDAY, SEPTEMBER 14, 2015;
RIVERSIDE, CALIFORNIA

THE CLERK: Item No. 8, EDCV 15-01066 VAP, The Estate of Jeffrey Randall v. First Solar, Inc. Counsel, please state your appearance.

MR. CAMPBELL: Good afternoon, Your Honor. Chris Campbell on behalf of all plaintiffs.

THE COURT: Good afternoon.

MR. JANICKI: Good afternoon. Bill Janicki on behalf of First Solar.

THE COURT: Thank you. Good afternoon.

The issue -- the primary issue in this case is the exclusivity of the workers' comp remedy.

MR. CAMPBELL: Absolutely.

THE COURT: So the defense has suggested, again, sort of an early summary judgment motion addressed to that issue.

MR. JANICKI: That's correct.

THE COURT: What is the plaintiffs' theory to get around the exclusive remedy of the workers' comp theory?

MR. CAMPBELL: The theory is that going up to take an aerial survey of the solar array after a storm is so far outside the scope of any contemplated job requirements for these particular individuals that it takes it out of workers' comp. In that regard, in terms of our fact discovery, I believe we're in agreement that there are a couple of key [4]individuals who need to be deposed.

THE COURT: Well, let me stop you there before we get to discovery, because if that's your theory that -- I guess in a nutshell your theory is that this activity was outside the scope of employment?

MR. CAMPBELL: Far outside the scope.

THE COURT: Well, I don't mean to quibble with you, but it just has to be outside the scope, right?

MR. CAMPBELL: Yes, Your Honor.

THE COURT: It's like, you know, you're either pregnant or you're not. A little bit, a lot, it doesn't really matter.

MR. CAMPBELL: Right.

THE COURT: So what's the status of the workers' comp application on behalf of your clients? Have they accepted benefits?

MR. CAMPBELL: The insurer has been making payments. Benefits have been accepted. First Solar is asserting a set-off based on any payments that have been made.

THE COURT: Well, I guess my question, and I don't know the answer to it, but my question is, is there an issue with the inconsistency of accepting the benefit -- applying for and accepting the benefits which your clients would only be entitled to if the accident was within the scope?

MR. CAMPBELL: My understanding is that the short [5]answer to that is, no, but I'm sure that's going to be heavily briefed by the parties in their motion.

THE COURT: Right. And then the other -- the flip side of that coin or question is, is there a waiver? Whether you look at it as a waiver or just there's an inconsistency between applying for and accepting benefits which are only payable if the accident occurs in the course and scope and then also suing. I don't know the answer to that question, but it seems to me that that's part of the same question that the defense wants to bring a summary judgment motion on.

MR. JANICKI: I think that's correct. It's obviously inconsistent. I can't tell you they're barred from bringing another action right now under the law, but the two are inconsistent. And this has to be a threshold issue before any further discovery goes on, we think.

THE COURT: Well, that's a -- that's a problem I think, because while it's tempting to think of it as a threshold issue, if the plaintiffs' theory is that the accident was the result of something that was beyond the scope of employment, to establish -- well, I guess there's two questions. First would be, is that an exception, and that is more of a legal question than a factual question. If it is an exception, then there's going to be almost the same extent and scope of discovery as in the case as a whole, wouldn't there be?

[6]MR. JANICKI: I completely disagree with that. There's plenty of case law on what is the course of employment. It has nothing to do with the negligence of the employer. Time of accident, place of accident, duties, circumstances of accident have nothing to do with negligence or gross negligence or heaped on negligence. That's a completely separate issue under the case law as to whether an activity is within the course of employment. And that could be briefed apart from any evidence and negligence on the employer.

THE COURT: It's been a long -- I don't come across this issue very much here. When I was on the state court I did quite a bit, but it's been at least a couple of years since I've run across it now. So when you say that the case law that says that those are two separate things -- two separate lines of inquiry --

MR. JANICKI: That's correct. The test for whether you're in the course of employment, there's several cases that list out some tests. Some of the factors are, the time of the accident, was he injured during the normal business day or was he on vacation. The place of the accident, was he injured at work or at home. The context of the injury, was he doing something for the benefit of his employer, or again, was he on vacation jet skiing. Those are all things that have nothing to do with whether or not the employer was negligent. So it can --

[7]THE COURT: You mean --

MR. JANICKI: Which means he can be limited to the course of employment.

THE COURT: So your position is that some of the things that the -- or factors that the plaintiff has argued in the joint report, such as the conditions that day, I mean, there's a factual dispute between the parties, as best I can tell, about what the conditions were, whether they were near monsoonal or, according to the defense side, quite calm. But your position, if I understand it correctly, is that that doesn't matter?

MR. JANICKI: That's completely right. It does not matter whether or not the employer was negligent --

THE COURT: In having that flight take place.

MR. JANICKI: In having him take place, because employers are negligent all the time and the activity is still within course and scope of employment, and the workers' compensation then provides a remedy that's a complete bar to any tort action. That's the whole process of workers' comp.

THE COURT: All right. So is there an issue then, first of all, about the scope of discovery that's going to take place before this motion is heard or do you agree with Mr. -- is it Janicki?

MR. JANICKI: Janicki.

THE COURT: Janicki. His description of what the [8]case law holds in terms of just -- not as it applies to the facts of this case necessarily, but in terms of what the scope of discovery should be before the summary judgment motion is heard?

MR. CAMPBELL: Not knowing the answer to the Court's query off the top of my head either about the scope of employment issue, it's tough for me to say, but I think that there's going to need to be at least some discovery in connection with this particular case. Among other factors are, it's our understanding that in similar circumstances First Solar went out and hired professional surveyors to survey the aerial array. And then they tell two guys who were essentially maintenance/construction, go up in a plane, take an aerial survey and some pictures of this solar array, and there's no -- I don't believe there's going to be any evidence that our guys were even qualified to take meaningful pictures of a potentially damaged solar array.

THE COURT: But the --

MR. CAMPBELL: But without knowing the exact status of the law, it's difficult to determine that.

THE COURT: Well, I think what I'm going to do now is I'm going to order that -- I'm going to set a deadline for the summary judgment motion on this issue; that is, whether or not the action is barred under the premise of the exclusive remedy of workers' compensation. So that's the summary judgment [9]motion.

And the discovery, I think three months to do discovery limited to the issues raised by that would be sufficient. If the parties -- and I hope you could work out any discovery issues, but if not, those motions would be heard by Judge Bristow. So that would mean your discovery – this first discovery cutoff would be December -- let's make it the end of December.

MR. JANICKI: And if I understand it, limited to the workers' comp issue.

THE COURT: Right.

MR. JANICKI: And within the course and scope of employment.

THE COURT: Yes.

MR. CAMPBELL: December the 31st?

THE COURT: Right. And I'm not going to set other dates at this time except that the motion has to be filed by January 5th. So let's make the discovery cutoff December 15th. Let me make your lives a little better. Otherwise, we all work to deadlines, so you'll be trying to take some deposition on like the 28th. But it's December 15th. So that's your discovery cutoff and then file the motion by January 25th.

MR. JANICKI: We're most agreeable to that.

THE COURT: All right. And then it would be heard -- it'll be heard on the regular briefing schedule and be heard on [10]February 29th. And then depending on the outcome of that motion, at the hearing on it I will either give further dates, including a discovery cutoff throughout the case and a trial date or not, depending on the outcome.

All right. Thank you very much.

MR. CAMPBELL: Thank you.

MR. JANICKI: Your Honor, may I? I apologize. But for the summary judgment hearing, the parties may want to have experts come in and testify, depending on various issues, and is that --

THE COURT: It should all be done in declarations. There shouldn't be testimony at a summary judgment motion hearing.

MR. JANICKI: Okay. We like to do it anyway.

THE COURT: Well, your request is noted. Thank you.

And on this case -- on this issue on this case, I really don't see -- I mean, I've allowed it sometimes in a patent case or a case where there's something -- or a products liability case where there's -- where it would be helpful, so I shouldn't say never, because I have allowed it, but I just don't see, at least on the preliminary issue in this case.

MR. JANICKI: Let me just tell you, and I don't really think this issue matters, but there's an issue of the weather and there's a dispute over that and that's easy to determine what it is. The second issue, did the weather have [11]any causal effect on this accident, and that could be another expert and -- I don't --

THE COURT: I don't think we'd be getting to that.

If the issue is, was this done in the course and scope –

MR. JANICKI: I agree, it shouldn't be an issue, but I'm just anticipating it might be.

THE COURT: I don't think weather conditions are the kind of --

MR. CAMPBELL: I agree with that.

THE COURT: I mean, not that they're not complex and not that there's not a whole science about it, but it's not the kind of thing that I think expert testimony at a summary judgment motion would be needed.

All right. Thank you very much.

MR. CAMPBELL: Thank you, Your Honor.

MR. JANICKI: Thank you.

(Proceedings concluded)

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APPENDIX E — DIVISION OF WORKERS' COMPENSATION WORKERS' COMPENSATION COURT PUBLIC INFORMATION SEARCH

Division of Workers' Compensation - Workers' compensation court public information search

EAMS Electronic Adjudication Management System

Case events

EAMS case number	***Case location***	
ADJ9917584	RIV-ADJ	
Injured worker first name	***Injured worker last name***	***Employer***
JEFF	RANDALL DECEASED	FIRST SOLAR INC

Event general description	***Detail description***	***Event date***
STIPULATIONS FILED	STIPULATIONS WITH REQUEST FOR AWARD - DEATH FILED	02/02/2016
AWARD - STIPULATIONS	CLOSING ORDER: AWARD ON STIPULATED FINDS AND AWARD (GRANTED)	02/02/2016
APPLICATION FILED	PETITION: APPLICATION FOR ADJUDICATION FILED	04/14/2015

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