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MEMORANDUM*, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT (SEPTEMBER 18, 2023)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

URS HOLDINGS, INC., AN OHIO CORPORATION,

Plaintiff-Appellee,

v.

GARY TOPOLEWSKI,

Defendant-Appellant,

and

JOHN RIPLEY; ET AL.,

Defendant.

No. 22-55546

D.C. No. 2:17-cv-05398-RSWL-AGR

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

URS HOLDINGS, INC., AN OHIO CORPORATION,

Plaintiff-Appellee,

v.

JOHN RIPLEY; ET AL.,

Defendants,

and

MORRISON KNUDSEN CORPORATION, A NEVADA CORPORATION; ET AL.,

Defendants-Appellants.

No. 22-55547

D.C. No. 2:17-cv-05398-RSWL-AGR

Appeal from the United States District Court for the Central District of California Ronald S.W. Lew, District Judge, Presiding

Submitted September 14, 2023**
Pasadena, California

Before: SCHROEDER, FRIEDLAND, and MILLER, Circuit Judges.

MEMORANDUM

Defendant Gary Topolewski and Defendants Morrison Knudsen Corporation, Morrison-Knudsen

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

Company, Inc., Morrison-Knudsen Services, Inc., and Morrison-Knudsen International Inc. (collectively the Corporate Defendants) appeal from the district court's judgment in favor of plaintiff AECOM Energy and Construction, Inc. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We review de novo whether a district court has the authority to impose sanctions. *Dreith v. Nu Image, Inc.*, 648 F.3d 779, 786 (9th Cir. 2011). We review a district court's imposition of sanctions for abuse of discretion. *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 957-58 (9th Cir. 2006). "The district court has 'broad fact-finding powers' with respect to sanctions, and its findings warrant 'great deference.'" *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 649 (9th Cir. 1997) (quoting *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1366 (9th Cir. 1990) (en banc)).

1. As a sanction against all defendants, the district court deemed it true that defendants had collected on a $36 million contract, and the court ultimately awarded damages in that amount to AECOM. The district court had the authority to impose that sanction under the "inherent power of federal courts to levy sanctions in response to abusive litigation practices." *Leon*, 464 F.3d at 958. A court may impose sanctions under its inherent power "if the court specifically finds bad faith or conduct tantamount to bad faith." *Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001). The district court did so here, finding that defendants failed to comply with an order to produce various financial records necessary to resolve the issue of damage. *Id.* at 991 (holding that the court may use its inherent power to sanction a party who willfully disobeys a court order).

Defendants argue that AECOM is at fault for the failure to obtain financial information during discovery, noting that after remand from this court, it did not pursue its outstanding discovery requests and eventually moved for sanctions. Given defendants' failure to respond to numerous discovery requests, it was reasonable for AECOM to conclude that pursuing sanctions would be a more productive course than continuing fruitless discovery.

Additionally, the Corporate Defendants argue that they did not willfully disobey the district court's order because they did not have access to any of their own financial documents that would have assisted in a damage calculation. But the district court was within its discretion to discount the credibility of that assertion, especially given that the employee whose declaration supported it failed to appear for his deposition.

Further, the district court did not abuse its discretion in applying the sanction to Topolewski along with the Corporate Defendants. It found that Topolewski, who held multiple executive roles with the Corporate Defendants, is jointly and severally liable for the infringement at issue in the case and was "extensively involved with Corporate Defendants despite his current statements to the contrary." In addition, Topolewski was involved in other willful misconduct highlighted by the district court as deserving of sanctions, including violating a preliminary injunction, failing to respond to other discovery requests, and failing to appear at his first deposition.

The district court did not abuse its discretion by relying on a press release to deem it true that defendants had collected on a $36 million contract. The

district court found that defendants willfully concealed their financial information, preventing the assessment of damage. Accordingly, it reasoned that the defendants must have made some profit in their scheme, or else "they would not have evaded discovery in the first place and could have simply turned over the records." *See Gibson v. Chrysler Corp.*, 261 F.3d 927, 948 (9th Cir. 2001) (identifying a presumption that "the party resisting discovery is doing so because the information sought is unfavorable to its interest"). In the absence of reliable financial records, it was not an abuse of discretion to rely on an undisputed, publicly available press release to determine an appropriate damage figure.

Defendants argue that the sanction and subsequent damage award conflict with our decision in an earlier appeal in this action. *See AECOM Energy & Constr., Inc. v. Morrison Knudsen Corp.*, 851 F. App'x 20 (9th Cir. 2021). But our decision expressly noted that it did "not preclude the district court on remand from considering whether a discovery sanction is appropriate should AECOM seek such relief, such as a sanction focused on the evidentiary inferences that may be drawn from the defendants' refusal to produce relevant financial records." *Id.* at 22 n.5; *see id.* at 23–24 (Friedland, J., concurring in the judgment).

Finally, defendants argue that the sanction and damage award are contrary to the Lanham Act. Because the $36 million figure was used as a sanction for litigation misconduct, it need not be proved with the level of certainty required by the Lanham Act.

2. The district court's inherent authority also permits the imposition of terminating sanctions for abusive litigation tactics, including discovery mis-

conduct. *See Anheuser-Busch, Inc. v. Natural Beverage Distribs.*, 69 F.3d 337, 348 (9th Cir. 1995). Defendants offer no support for their assertion that the district court's inherent authority is limited such that it may not impose both monetary and terminating sanctions for the same discovery misconduct.

"A terminating sanction . . . is very severe," and "[o]nly 'willfulness, bad faith, and fault' justify terminating sanctions." *Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th Cir. 2007) (quoting *Jorgensen v. Cassiday*, 320 F.3d 906, 912 (9th Cir. 2003)). As discussed above, the district court did not err in finding that defendants' conduct rose to this level of bad faith and willfulness. Before imposing a terminating sanction, the district court must also weigh several factors: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." *Leon*, 464 F.3d at 958 (quoting *Anheuser-Busch*, 69 F.3d at 348). A court need not make an express finding for each factor, but it must expressly consider less severe alternatives. *Id.* The district court did so here, rejecting lesser sanctions because it anticipated continued misconduct. *See Connecticut Gen. Life Ins.*, 482 F.3d at 1097 ("It is appropriate to reject lesser sanctions where the court anticipates continued deceptive misconduct." (quoting *Anheuser-Busch*, 69 F.3d at 352)).

The motion to substitute (Dkt. No. 28 in Appeal No. 22-55546 & Dkt. No. 22 in Appeal No. 22-55547) is GRANTED. The motion to take judicial notice (Dkt. Nos. 19 & 20 in Appeal No. 22-55546) is DENIED.

AFFIRMED.

AMENDED FINAL JUDGMENT AGAINST ALL DEFENDANTS, U.S. DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA (MAY 9, 2022)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AECOM ENERGY & CONSTRUCTION, INC., AN OHIO CORPORATION,

Plaintiff,

v.

GARY TOPOLEWSKI, ET AL.,

Defendants.

Case No. 2:17-cv-05398-RSWL(AGRx)

Complaint Filed Date: July 17, 2017

Before: Hon. Ronald S.W. LEW,
United States District Court Judge.

AMENDED FINAL JUDGMENT AGAINST ALL DEFENDANTS

On February 25, 2022, the Honorable Ronald S.W. Lew, District Judge Presiding, granted-in-part AECOM's Motion for Sanctions against Defendants Gary Topolewski, Goodbrand Corporation (formerly Morrison Knudsen Corporation), Northern Majestic International Inc. (formerly Morrison Knudsen Inter-

national Inc.), Goodbrand Company Inc. (formerly Morrison-Knudsen Company, Inc.), and Majestic Services Inc. (formerly Morrison-Knudsen Services, Inc. Dkt. 417. The order also found that defaulting Defendants John Ripley, Todd Hale, Bud Zukaloff, and Henry Blum were bound by the Order. Dkt. 417; *see also* Dkt. 258.

IT IS THEREFORE ORDERED AND ADJUDGED that this Court hereby enters judgment for AECOM as follows:

All Defendants shall be jointly and severally liable for all claims for relief in this action: false designation of origin/affiliation/passing off, false advertising, cyberpiracy, California Common Law unfair competition, California statutory unfair competition, and California statutory false advertising;

Registration No. 5,077,287 shall be cancelled;

The Court's Order dated November 8, 2018, remains in effect: Defendants, their officers, directors, employees, agents, and all persons acting on their behalf or in concert with them, are hereby permanently enjoined from any further representations—to the government, to actual and potential customers and business partners, and to the public—that they are Morrison Knudsen Corporation and/or any related entity ("MK"), that MK's accomplishments are their own, that the products and services they offer originate from MK, that the products and services they offer are affiliated with, backed, sponsored or endorsed by, or have any relationship whatsoever to MK, and from further use of the word mark MORRISON KNUDSEN (Reg. No. 1,716,505), the MK logo and the combined word and design mark MKCO MORRISON KNUDSEN

(Reg. No. 1,744,815), or any confusingly similar name or logo, including the use of "MK," "Morrison Knudsen," or any confusingly similar name;

AECOM is awarded damage in the amount of $36 million against all Defendants (jointly and severally), payable to AECOM within thirty (30) business days after entry of this Amended Final Judgment;

AECOM is awarded its reasonable attorneys' fees against all Defendants (jointly and severally) incurred during litigation following the Ninth Circuit's remand in the amount of $372,473.60. This amount is in addition to the previous award of reasonable attorneys' fees for the initial phase of litigation, in the amount of $873,628.02, which remains in effect. For the avoidance of doubt, the fee award to AECOM for its reasonable attorneys' fees totals $1,246,101.62, payable to AECOM within thirty (30) business days after entry of this Amended Final Judgment; and

AECOM is awarded its costs against all Defendants (jointly and severally) incurred during litigation following the Ninth Circuit's remand in the amount of $2,877.15. This amount is in addition to the previous award of costs for the initial phase of litigation, in the amount of $15,477.76, which remains in effect. For the avoidance of doubt, the costs award to AECOM totals $18,354.91, payable to AECOM within thirty (30) business days after entry of this Amended Final Judgment.

/s/ Ronald S. W. Lew
Judge of the United States District Court

Dated: May 9, 2022

ORDER, U.S. DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA (FEBRUARY 25, 2022)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AECOM ENERGY & CONSTRUCTION, INC., AN OHIO CORPORATION,

Plaintiff,

v.

GARY TOPOLEWSKI, ET AL.,

Defendants.

Case No. 2:17-cv-05398-RSWL-AGRx

Before: Hon. Ronald S.W. LEW, Senior U.S. District Judge.

ORDER re: PLAINTIFF'S MOTION FOR SANCTIONS [398]

DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT [395, 396]

Plaintiff AECOM Energy & Construction, Inc. ("AECOM") brought this Action for injunctive relief and damage against Defendants Morrison Knudsen Corporation; Morrison-Knudsen Company, Inc.; Morrison-Knudsen Services, Inc.; Morrison-Knudsen International, Inc. (collectively, "Corporate Defendants");

and Gary Topolewski ("Defendant Topolewski") (collectively, "Defendants"). The Action arises out of Defendants' infringing use of the identity and goodwill of Morrison Knudsen Corporation ("MK IP" or "MK brand"), which AECOM owns the rights to.

Currently before the Court is a Motion for Sanctions filed by AECOM [398], a Motion for Summary Judgment filed by Corporate Defendants [395], and a Motion for Summary Judgment filed by Defendant Topolewski [396]. Having reviewed all papers submitted pertaining to the Motions, the Court **NOW FINDS AND RULES AS FOLLOWS:** the Court **GRANTS in part and DENIES in part** AECOM's Motion for Sanctions and **DENIES as moot** Defendants' Motions for Summary Judgment.

I. Background

A. Factual Background

The facts underlying this Action are stated at length in this Court's previous Order granting AECOM's Motion for Summary Judgment and Permanent Injunction. *See generally* Order re: Pl.'s Mot. for Summ. J., ECF Nos. 242, 243. The facts alleged by AECOM pursuant to its Motion for Sanctions are as follows[1]:

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[1] The Court does not cite to the parties' uncontroverted facts given that the Court **DENIES as moot** Defendants' Motions for Summary Judgment. The Court finds it more appropriate to rely on the facts as stated in AECOM's Motion for Sanctions, as it relies on various orders and court records that have been filed throughout this case. Accordingly, the Court cites only to the facts contained in the moving papers pursuant to AECOM's Motion for Sanctions in summarizing the facts here.

Throughout the underlying discovery period, Defendants showed no respect for this Court or for the judicial process. Pl.'s Mot. for Sanctions 2:26-27, ECF No. 398-1. Defendants have violated this Court's preliminary injunction order, ignored multiple discovery deadlines, failed to respond to discovery requests, served false discovery responses, failed to comply with Court orders compelling discovery, and failed to appear at depositions. *Id.* at 2:27-3:2.

1. Defendants Violated the Court's Preliminary and Permanent Injunction Orders

On September 28, 2017, this Court granted AECOM's request for a preliminary injunction and enjoined Defendants from using the MK name, including as a domain name. *Id.* at 3:4-6. However, Defendants failed to abide by the preliminary injunction, necessitating multiple motions to compel. *Id.* at 3:9-10. Defendants finally complied with the preliminary injunction after over six months had passed and two motions for contempt were filed. *Id.* at 3:18-19.

On November 8, 2018, this Court granted AECOM's motion for permanent injunction. *Id.* at 8:18-19. However, Defendants resurrected two infringing websites in direct violation of the permanent injunction. *Id.* at 4:11-15. As of March 2021 and May 2021, *www.morrisonknudsen.com* and *www.morrison-knudsen.com* were live and the domain registrations had been updated. *Id.* at 4:18-20. AECOM notified Defendants twice before the infringing websites were finally taken offline. *Id.* at 4:15-22.

2. Defendants Ignored Their Discovery Obligations

On December 4, 2017, during the initial discovery period for this action, AECOM asked Defendants to identify "revenue received by any Defendant or affiliate" for every contract entered "under or using the Morrison Knudsen name"; and "[f]or each Corporate Defendant, . . . all revenue earned" since their respective dates of inception. *Id.* at 5:2-7. Four years, significant motion practice, and many court orders later, Defendants have refused to produce anything. *Id.* at 5:7-9. Defendants failed to respond to discovery and to appear for depositions, served false discovery responses, and have failed to produce financial information. *See id.* at 5:12-7:11.

Defendants, to this day, still refuse to provide any information about any contracts they entered or revenue they received. *Id.* at 7:12-13. When the Magistrate Judge compelled discovery of "all revenue" for each Corporate Defendant for four years before the filing of the Complaint, Defendants produced only a two-page "income statement" that the Court found "plainly inadequate." *Id.* at 7:13-16. The Court stated Defendants' decision to produce only two pages of financial information "created specially for this litigation" merited compelling Corporate Defendants' corporate tax returns and bank statements. *Id.* at 7:1619. However, Corporate Defendants were suddenly unable to find their bank statements, with Defendants claiming that the bank statements either did not exist or were not in their possession. *Id.* at 8:1-4. AECOM then filed a subsequent motion for contempt, which the Court granted. *Id.* at 8:4-6. Afterwards, Corporate Defendants, through their representative

Mike Johnson (who has never appeared for a deposition), averred that it was his understanding that Corporate Defendants "have no legal authority to obtain bank records without Henry Blum's[2] authorization," and that he had been "unable to locate Henry Blum for over a year." *Id.* at 8:7-10.

3. The Court Reopened Discovery on Damages

Following remand from the Ninth Circuit, the Court reopened discovery on damage. *Id.* at 9:16-24. AECOM served eleven third-party subpoenas, seeking: account information for the infringing websites; account information for telephone numbers published by Defendants; and bank statements from financial institutions believed to be used by Defendants, as well as identification of the bank from which Defendants' previous counsel paid fee awards in this case. *Id.* at 9:25-10:7. Defendants objected to every subpoena, effectively blocking AECOM from gaining information about the sources of Defendants' revenues. *Id.* at 10:35. On December 17, 2021, the Magistrate Judge denied Defendants' motion to quash with respect to Corporate Defendants' bank statements and service provider information. *Id.* at 10:13-15. The Court noted "the subpoena seeks information that the court already ordered Defendants to produce," *i.e.*, bank statements for Corporate Defendants. *Id.* at 10:14-17. At the close of fact discovery, Defendants had not supplemented any discovery responses, nor supplemented their document productions. *Id.* at 10:18-19.

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[2] Henry Blum is one of four defaulting defendants in this action. *See generally* Default by Clerk, ECF No. 77; Order re: Mot. for Default J., ECF No. 258.

B. Procedural Background

On November 8, 2018, this Court granted [242, 243] AECOM's Motion for Summary Judgment against Defendants,[3] finding willful infringement of the MK brand and awarding AECOM $1,802,834,672 ("$1.8 billion") in damages.[4] On February 21, 2019, Defendants filed a Motion for Alteration, Amendment, or Reconsideration [268] of the Court's Order granting AECOM's Motion for Summary Judgment, which the Court denied [305] on April 24, 2019.

Defendants appealed the damage award, which the Ninth Circuit reversed and remanded [339] on March 24, 2021.[5] Following remand, this Court reopened discovery on damage. On December 16, 2021,[6]

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[3] AECOM also named four additional individual defendants in its Complaint: Bud Zulakoff, John Ripley, Todd Hale, and Henry Blum (collectively, "Defaulting Defendants"). *See generally* Compl., ECF No. 1. On December 4, 2017, the court clerk entered default as to these four individuals. *See generally* Default by Clerk. On November 9, 2018, AECOM filed a Motion for Default Judgment against Defaulting Defendants. *See generally* Mot. for Default J., ECF No. 244. On January 24, 2019, the Court granted AECOM's motion, finding Defaulting Defendants jointly and severally liable for AECOM's damage. *See generally* Order re: Mot. for Default J.

[4] The Court also granted AECOM's request for a permanent injunction ordering Defendants to cease their use of the MK IP and awarded AECOM its attorneys' fees. *See* Order re: Pl.'s Mot. for Summ. J. at 45:5-55:8.

[5] Defendants also argued on appeal that AECOM lacked Article III standing, which the Ninth Circuit rejected. *See* Ninth Cir. Mem. at 2-3, ECF No. 339.

[6] Also on December 16, 2021, Magistrate Judge Rosenberg granted in part and denied in part Defendants' motions to quash

Defendants filed the present Motions for Summary Judgment [395, 396]. On December 17, 2021, AECOM filed the present Motion for Sanctions [398]. On December 28, 2021, AECOM opposed [403] Defendants' Motions for Summary Judgment and Defendants opposed [402, 405] AECOM's Motion for Sanctions. On January 4, 2022, Defendants filed their replies in support of their Motions for Summary Judgment [408, 409] and AECOM filed its Reply [411] in support of its Motion for Sanctions.

II. Discussion

A. Legal Standard

1. Evidentiary and Terminating Sanctions

Federal Rule of Civil Procedure ("Rule") 37 "authorizes the district court, in its discretion, to impose a wide range of sanctions when a party fails to comply with the rules of discovery or with court orders enforcing those rules." *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 589 (9th Cir. 1983) (citation omitted). Under Rule 37(b)(2)(A), "[i]f a party . . . fails to obey an order to provide or permit discovery . . . , the court where the action is pending may issue further just orders," which can include "directing that the matters embraced in the order or other designated facts be taken as established for the purposes of the action, as the prevailing party claims" and "rendering a default judgment against the disobedient party." Fed. R. Civ. P. 37(b)(2)(A)(i)-(vi).

AECOM's third-party subpoenas, granted in part Defendants' alternative motions for a protective order, and denied AECOM's motion to compel [397].

Courts also have "the inherent authority to issue sanctions in response to abusive litigation practices." *Garrison v. Ringgold,* 2020 WL 6537389, at *4 (S.D. Cal. Nov. 6, 2020) (citing *Leon v. IDX Sys. Corp.,* 464 F.3d 951, 958 (9th Cir. 2006) ("There are two sources of authority under which a district court can sanction a party who has despoiled evidence: the inherent power of federal courts to levy sanctions in response to abusive litigation practices, and the availability of sanctions under Rule 37. . . . ")); *Neighborhood Assistance Corp. of* Am. *v. First One Lending Corp.,* 2013 WL 12142562, at *2 (C.D. Cal. Mar. 26, 2013) ("A district court may impose terminating sanctions pursuant to its inherent power and pursuant to . . . Rule . . . 37."). "It is firmly established that the courts have inherent power to dismiss an action or enter a default judgment to ensure the orderly administration of justice and the integrity of their orders." *Phoceene Sous-Marine, S.A. v. U.S. Phosmarine, Inc.,* 682 F.2d 802, 806 (9th Cir. 1982) (citations omitted).

B. Discussion

1. AECOM's Motion for Sanctions

As a preliminary matter, the Court first addresses: (1) Defendant Topolewski's requests for judicial notice made in connection with his Opposition to AECOM's Motion for Sanctions; (2) Defendants' evidentiary objections to the Declaration of Yungmoon Chang ("Chang Declaration") submitted by AECOM in support of its Motion for Sanctions; and (3) AECOM's evidentiary objections to the Declarations of Gary Topolewski ("Topolewski Declaration") and John Jahrmarkt ("Jahrmarkt Declaration") submitted in support of

Defendant Topolewski's Opposition to AECOM's Motion for Sanctions.

a. Defendant Topolewski's Requests for Judicial Notice

A court may take judicial notice of an adjudicative fact that is "not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Matters of public record may be judicially noticed, but disputed facts contained therein may not. *Khoja v. Orexigen Therapeutics, Inc.,* 899 F.3d 988, 999 (9th Cir. 2018). "[A]ccuracy is only part of the inquiry under Rule 201(b)." *Id.* "A court must also consider—and identify—which fact or facts it is noticing from" the documents. *Id.*

Defendant Topolewski seeks judicial notice of the following four documents on file with the Nevada Secretary of State: (1) filings for Majestic Services, Inc. (formerly known as Morrison-Knudsen Services, Inc.) from May 29, 2017 to present ("Exhibit A"); (2) filings for Goodbrand Corporation (formerly known as Morrison Knudsen Corporation) from October 22, 2014 to present ("Exhibit B"); (3) filings for Northern Majestic International Inc. (formerly known as Morrison Knudsen International Inc.) from January 23, 2012 to present ("Exhibit C"); and (4) filings for Goodbrand Company Inc. (formerly known as Morrison-Knudsen Company, Inc.) from August 4, 1998 to present ("Exhibit D"). *See generally* Topolewski's Req. for Judicial Notice, ECF No. 406. Although Exhibits A-D may be judicially noticeable as matters of public

records, Defendant Topolewski does not specify which facts he seeks to judicially notice from the four filings. Further, the documents are not pertinent or necessary to the Court's resolution of the present motion, and the Court does not rely upon them. The Court therefore **DENIES** Defendant Topolewski's requests for judicial notice in their entirety.

b. Defendants' Evidentiary Objections

Defendants lodged sixteen evidentiary objections to the Chang Declaration submitted by AECOM in support of its Motion for Sanctions. *See generally* Defs.' Evid. Objs., ECF No. 405-1. Many of Defendants' objections read as a continuation or reiteration of their arguments in their briefs. *See id.* Nos. 8-16. Further, the Court does not rely on the majority of the Chang Declaration or its attached exhibits in ruling on AECOM's Motion for Sanctions. Regarding the portions of the Chang Declaration to which Defendants' object but the Court does not rely, the Court **DENIES as moot** Defendants' evidentiary objections. *See Muhammad v. Reese L. Grp., APC,* 2017 WL 2578915, at *2 (S.D. Cal. June 14, 2017) (denying evidentiary objections as moot where the court "did not rely on the . . . declarations and exhibits in ruling on the . . . motion [for sanctions]."). Accordingly, the Court **DENIES as moot** Defendants' evidentiary objections 1-7 and 15-16 because the Court does not rely on the objected-to information contained within them in reaching its determination on the Motion for Sanctions.

The Court does, however, rely on the press release titled "Morrison Knudsen Awarded $36 Million Mine Engineering Contract" in making its ruling on

AECOM's Motion for Sanctions. *See* Chang Decl. % 24; *see also* Ex. 26 to Chang Decl. The Court also relies on the Chang Declaration for the proposition that Defendants "published at least two other press releases." *See* Chang Decl. % 25; *see also* Exs. 27-28 to Chang Decl. The Court reaffirms its previous order overruling Defendants' same objections to these press releases. *See* Order re: Pl.'s Mot. for Summ. J. 49:21-25. Further, the press releases are relevant to AECOM's Motion for Sanctions because they are relevant for establishing evidentiary and terminating sanctions. In sum, the Court **OVERRULES** Defendants' evidentiary objections 8-14, and **DENIES as moot** Defendants' evidentiary objections 1-7 and 15-16.

c. AECOM's Evidentiary Objections

AECOM objects to the Topolewski Declaration and Jahrmarkt Declaration in their entirety. *See* Pl.'s Evid. Objs., ECF No. 414. Given that the Court does not rely on either declaration in reaching its ruling on AECOM's Motion for Sanctions, the Court **DENIES as moot** AECOM's evidentiary objections. *See Muhammad,* 2017 WL 2578915 at *2 (denying evidentiary objections as moot where the court "did not rely on the . . . declarations and exhibits in ruling on the . . . motion [for sanctions].").

d. Motion for Sanctions

AECOM moves this Court to impose evidentiary, terminating, and monetary sanctions on Defendants. *See generally* Pl.'s Mot. for Sanctions. The Court **GRANTS in part and DENIES in part** AECOM's

Motion for Sanctions. Each sanction request is examined in turn below.

i. Evidentiary Sanctions

AECOM requests, pursuant to Rule 37(b)(2)(A)(i), that the Court take as established that Defendants "performed the work referenced in, and collected the amount listed in, the press release titled 'Morrison Knudsen Awarded $36 Million Mine Engineering Contract.'"[7] *Id.* at 12:9-12. AECOM argues that such an evidentiary sanction is justified because Defendants "have refused to produce any reliable information regarding their financial records. . . . " *Id.* at 12:22-23. In light of Defendants' flagrant discovery abuse, the Court **GRANTS** AECOM's request and takes as true that Defendants performed and collected on a contract for $36 million.

Under Rule 37(b)(2)(A), "[i]f a party . . . fails to obey an order to provide or permit discovery . . . , the court may "direct[] that the matters embraced in the order or other designated facts be taken as established for the purposes of the action, as the prevailing party claims. . . . " Fed. R. Civ. P. 37(b)(2)(A)(i). "Rule 37 sanctions must be applied diligently both 'to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent.'"

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[7] In the alternative, AECOM asks that the Court "designate as established that Defendants have earned as much as they claim to have spent in costs and expenses, trebled." *Id.* at 14:9-11. Given that the Court GRANTS AECOM's primary evidentiary sanctions request and takes as true that Defendants collected on a $36 million contract, the Court need not address AECOM's alternative evidentiary sanctions request.

Guifu Li v. A Perfect Day Franchise, Inc., 281 F.R.D. 373, 390 (N.D. Cal. 2012) (quoting *Nat'l Hockey League v. Metro. Hockey Club,* 427 U.S. 639, 643 (1976)). A "district court has great latitude in imposing sanctions for discovery abuse." *Dahl v. City of Huntington Beach,* 84 F.3d 363, 367 (9th Cir. 1996).

As a condition precedent to imposing evidentiary sanctions pursuant to Rule 37, Defendants must have violated a Court Order. *See* Fed. R. Civ. P. 37(b)(2)(A); *Wanderer v. Johnston,* 910 F.2d 652, 657 (9th Cir. 1990) (affirming sanctions where a party repeatedly obstructed discovery and disobeyed court orders). This condition precedent has been met here. To date, Defendants still have not complied with this Court's June 27, 2018 Order compelling Defendants to produce "all monthly, quarterly, and annual income statements, balance sheets, and other financial statements of any Corporate Defendants" and their corporate tax returns and bank statements "for the period beginning four years before the filing of the complaint. . . . " Order re: Defs.' Mot. to Quash Subpoenas and/or for Protective Order at 2 ("Order re: Mot. to Quash"), ECF No. 397. Thus, evidentiary sanctions pursuant to Rule 37 may be appropriately imposed.

"There are two limitations to the application of a Rule 37(b)(2) sanction." *Guifu,* 281 F.R.D. at 393. "First, 'any sanction must be just; second, the sanction must be specifically related to the particular claim which was at issue in the order to provide discovery.'" *Id.* (quoting *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 707 (1982)). Here, taking as true that Defendants performed and collected on a contract for $36 million is both just and

"specifically related" to this Court's previous order compelling Defendants to provide financial discovery. The evidentiary sanction is appropriate for the reasons below.

a. The Evidentiary Sanction Is Just in Light of the Circumstances of this Case

AECOM cannot calculate its damage due to Defendants' repetitive discovery evasion. As this Court has stated—and as the Ninth Circuit agreed on appeal— "[t]he history of this litigation demonstrates a pattern in which Defendants continuously refused to comply with Plaintiff's discovery requests, Court orders, and evaded providing financial information." Order re: Pl.'s Mot. for Summ. J. 49:21-25; *see also* Ninth Cir. Mem. n.5 ("We note that Defendants-Appellants failed to provide in discovery any reliable evidence of their sales, profits, or costs, despite court orders compelling them to do so."); Ninth Cir. Mem. (Friedland, J., concurring) ("[T]he defining feature of this dispute has been what the district court aptly described as Defendants-Appellants' 'lengthy history of bad faith litigation practices.' Defendants-Appellants ignored multiple discovery orders, refused to appear for depositions, and ultimately failed to produce a single reliable business record from which AECOM could calculate damage."). To decline to impose an evidentiary sanction of some sort here would be manifestly unjust to AECOM and effectively reward Defendants for their discovery abuse. Given Defendants' discovery evasion and violations of this Court's orders, designating that Defendants performed and collected on a $36 million contract is just. *See Compagnie des Bauxites,* 456 U.S. at 708 (affirming a sanction as

"just" in light of a party's refusal to provide discovery and where the court was "[c]onfronted with continued delay and an obvious disregard of its orders").

b. The Evidentiary Sanction Is Specifically Related to the Order Compelling Defendants to Provide Financial Discovery

Establishing that Defendants collected $36 million on a construction contract directly remedies the prejudice AECOM has faced due to Defendants' refusal to produce their financial and tax statements. Because AECOM has no sources of information from which to calculate its damages, directing it as true that Defendants collected $36 million based on the lowest of the three publicly available press releases is a narrowly tailored sanction. *Cf. Guifu,* 281 F.R.D. at 394 (finding that an evidentiary sanction deeming facts alleged in a complaint as established for trial "flow[ed] directly" from defendants' refusal to produce financial discovery and was "narrowly tailored to directly address the prejudice from Defendants' conduct"). AECOM's reliance on the press release is justifiable given that Defendants have not produced any reliable financial discovery. Thus, because the evidentiary sanction sought here meets both requirements under Rule 37(b)(2), the Court **GRANTS** AECOM's request to designate as established that Defendants performed and collected on a $36 million contract.

To be clear, the Court notes the somewhat unconventional nature of this evidentiary sanction. In analogous cases where a party has evaded discovery,

courts have instructed the jury that it may draw an adverse inference against the party responsible for withholding evidence. *See Glover v. BIC Corp.,* 6 F.3d 1318, 1329 (9th Cir. 1993); *Neighborhood Assistance Corp.,* 2013 WL 12142562, at *3 (instructing the jury to infer that financial evidence destroyed by defendants "would have been favorable to the [p]laintiff and unfavorable to the [d]efendants"). Other times, courts have entered evidentiary sanctions "deem[ing] facts alleged in the complaint established for trial, subject to rebuttal by the non-moving party, where the moving party was prejudiced because of the other party's discovery abuses." *Guifu,* 281 F.R.D. at 393 (citing *General Atomic Co.* v. *Exxon Nuclear Co.,* 90 F.R.D. 290 S.D. Cal. 1981). To take either approach here would be wholly insufficient to penalize and deter Defendants' discovery misconduct, however. *See Nat'l Hockey League,* 427 U.S. at 643 (noting that the rationale of Rule 37 sanctions is to both penalize and deter future misconduct). Directing the jury to infer that Defendants' financial statements would have been favorable to AECOM and unfavorable to Defendants would not bring AECOM closer to the truth behind Defendants' profits. A vague adverse inference of this kind would be inadequate here, as the jury would still be left with the conundrum of fashioning a damage award based on little to no information.

Nor would deeming facts in AECOM's Complaint as established for trial be sufficient. Unsurprisingly, AECOM's Complaint does not state a specific damage amount. *See generally* Compl. At the time the Complaint was filed, AECOM could not have known how much Defendants profited from their infringement

scheme, and AECOM was justifiably relying on the judicial process to uncover the true facts of this case. But Defendants have so frustrated AECOM's discovery efforts that now, nearly five years after the filing of its Complaint, AECOM is in no better position than where it started. Perhaps AECOM puts it best:

> "Without imposition of such sanctions, AECOM will be forced to proceed to a damage trial on a record that is incomplete solely due to Defendants' recalcitrance. And Defendants (despite being adjudicated willful infringers) may escape paying any damage at all. Such an outcome would reward Defendants for their flagrant disregard, and incentivize every other wrongdoer, in every type of case, to avoid paying damage simply by withholding financial information. This could hardly be more unjust. As the Ninth Circuit has noted, '[i]t seems scarcely equitable . . . for an infringer to reap the benefits of a trade-mark he has stolen, force the registrant to the expense and delay of litigation, and then escape payment of damage on the theory that the registrant suffered no loss. To impose on the infringer nothing more serious than an injunction when he is caught is a tacit invitation to other infringement.'"

Pl.'s Mot. for Sanctions 2:10-20 (quoting *Maier Brewing Co. v. Fleischmann Distilling Corp.,* 390 F.2d 117, 123 (9th Cir. 1968)). Accordingly, deeming that Defendants performed and collected on a $36 million contract is necessary and appropriate here, especially in light of the Court's "great latitude in imposing

sanctions for discovery abuse." *See Dahl,* 84 F.3d at 367.

c. The Evidentiary Sanction Is Not Speculative and Does Not Run Afoul of the Law of the Case

Defendants argue that the evidentiary sanction sought here is speculative and runs afoul of the law of the case. *See* MK Defs.' Opp'n to Mot. for Sanctions ("MK Defs.' MFS Opp'n") 12:18-14:28, ECF No. 402; Topolewski's Opp'n to Mot. for Sanctions ("Topolewski's MFS Opp'n") 18:7-21:4, ECF No. 405.[8] Both arguments are unavailing and are examined in turn below.

Defendants assert that the $36 million inference requested by AECOM must be "supported by a chain of logic, rather than [by] mere speculation dressed up in the guise of evidence." *Id.* at 13:1-3 (citation omitted). They argue AECOM has not shown a "chain of logic" but rather, "merely speculates that because Defendants failed to produce bank records, they have spoliated evidence or committed fraud." *Id.* at 13:14-16. But AECOM has, indeed, shown a "chain of logic" here to support the $36 million inference it is requesting. What other "chain of logic" could there be? Why else would Defendants go to the great lengths of ignoring multiple discovery requests and

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[8] Corporate Defendants' and Defendant Topolewski's Oppositions to AECOM's Motion for Sanctions are virtually identical both in substance and in form. *See generally* MK Defs.' MFS Opp'n; Topolewski's MFS Opp'n. Accordingly, the Court treats them as the same and cites to Corporate Defendants' Motion for arguments made in both. For arguments only made by Defendant Topolewski, the Court cites to his Opposition only.

violating court orders compelling discovery if their infringement scheme was not highly profitable to begin with? Had Defendants truly operated at a loss and made no profits—which they assert in their Motions for Summary Judgment—they would not have evaded discovery in the first place and could have simply turned over the records reflecting as much. AECOM's $36 million evidentiary sanction request is more than well-supported here. The "chain of logic" underlying Defendants' shady litigation tactics points to only one conclusion: that Defendants' widespread infringement scheme was highly profitable and Defendants are withholding evidence of their true finances. Any speculation concerning the $36 million amount here is due to Defendants' own wrongdoing, and AECOM's use of the publicly available press release is justified given that Defendants have not produced any reliable financial statements to date.

Moreover, establishing that Defendants performed and collected on a $36 million contract does not run afoul of the law of this case. Defendants argue that because the Ninth Circuit held AECOM could not use the publicly available press releases to support a damage award, AECOM cannot now use the press release regarding a $36 million contract to request sanctions in the same amount. MK Defs.' MFS Opp'n 13:21-14:28. Defendants are mistaken, however. Unlike in its previous motion for summary judgment, here, AECOM does not seek to use the press release to establish Defendants' sales as a matter of law under Section 1117(a) of the Lanham Act. Pl.'s Reply to Mot. for Sanctions ("Pl.'s MFS Reply") 14:13-15, ECF No. 411. Rather, AECOM seeks to use the press release to sanction Defendants under Rule 37. *Id.* at

14:17-19. Moreover, the Ninth Circuit contemplated such an evidentiary sanction, stating that "[o]ur decision does not preclude the district court on remand from considering whether a discovery sanction is appropriate should AECOM seek such relief, such as a sanction focused on the evidentiary inferences that may be drawn from the [D]efendants' refusal to produce relevant financial records." Ninth Cir. Mem. n.5; *see also* Ninth Cir. Mem. (Friedland, J., concurring) at 3 ("I share the majority's opinion that the district court could consider entering discovery sanctions."). The Court finds that the evidentiary sanction sought here is indeed appropriate and infers no more than is necessary to remedy Defendants' discovery abuses. Using the press release regarding a $36 million contract to support an evidentiary sanction here is proper and does not run afoul of the law of this case.

d. The Evidentiary Sanction Is Additionally Authorized Under the Court's Inherent Authority

Even if this evidentiary sanction was somehow improper under Rule 37, the Court's decision is authorized under its inherent powers. Courts have "inherent authority to issue sanctions in response to abusive litigation practices." *Garrison,* 2020 WL 6537389 at *4 (citing *Leon,* 464 F.3d at 958 ("There are two sources of authority under which a district court can sanction a party who has despoiled evidence: the inherent power of federal courts to levy sanctions in response to abusive litigation practices, and the availability of sanctions under Rule 37. . . . ")). This includes the "inherent power to sanction parties and their attorneys, a power born of the practical

necessity that courts be able 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Van Osten v. Home Depot,* U.S.A., Inc., 2021 WL 3471581, at *14 (S.D. Cal. May 4, 2021) (quoting *Chambers v. NASCO, Inc.,* 501 U.S. 32, 43 (1991)). Given Defendants' "history of bad faith litigation tactics" and the reasons stated above, an evidentiary sanction based on the Court's inherent powers establishing that Defendants collected on a $36 million contract is justified and necessary for the "expeditious disposition" of this case. *See id.* (noting that courts may impose sanctions pursuant to their inherent powers where a party has "willfully disobeyed a court order, or where the party has acted in bad faith, vexatiously, or for oppressive reasons"). This litigation began in 2017 and Defendants, through their evasive behavior, have dragged this case on for far too long. Thus, on this separate and additional basis of authority, taking as established that Defendants collected $36 million from a construction contract is proper.

In sum, the Court **GRANTS** AECOM's request for an evidentiary sanction and deems that Defendants performed and collected on a $36 million contract.

ii. Terminating Sanctions

There may be no better case to grant terminating sanctions than in this one. "A terminating sanction, whether default judgment against a defendant or dismissal of a plaintiff's action, is very severe." *Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills,* 482 F.3d 1091, 1096 (9th Cir. 2007) (citing *Jorgensen v. Cassiday,* 320 F.3d 906, 912 (9th Cir. 2003)). "Only willfulness, bad faith, and fault justify

terminating sanctions." *Id.* (internal quotation marks and citation omitted). The Ninth Circuit also uses a five-part test, with three subparts to the fifth part, to determine whether a case-dispositive sanction is just: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." *Malone v.* U.S. *Postal Serv.,* 833 F.2d 128, 130 (9th Cir. 1987). Because courts may grant terminating sanctions under either Rule 37 or their inherent powers, this Court need not engage in a Rule 37 analysis and **GRANTS** terminating sanctions pursuant to its inherent powers. *See Anheuser-Busch, Inc. v. Natural Beverage Distributors,* 69 F.3d 337, 348 (9th Cir. 1995) (affirming terminating sanctions under the district court's inherent powers and thus declining to address whether sanctions were appropriate under Rule 37).

a. Defendants' Discovery Misconduct Was Willful

Disobedient conduct is willful if it is within the offending party's control. *Stars' Desert Inn Hotel & Country Club, Inc. v. Hwang,* 105 F.3d 521, 525 (9th Cir. 1997); *Fair Hous. of Marin v. Combs,* 285 F.3d 899, 905 (9th Cir. 2002). As AECOM aptly states, "the record is replete with examples of Defendants' willful disregard for the judicial process." Pl.'s Mot. for Sanctions 18:22-23. Willfulness, fault, and bad faith on the part of Defendants have been repeatedly demonstrated throughout this litigation. Defendants have failed to respond to AECOM's discovery requests; failed to appear at depositions; failed to comply with

Court orders compelling them to provide discovery; violated the preliminary and permanent injunction orders; and ignored multiple deadlines to name a few. In doing so, Defendants have effectively precluded AECOM from uncovering the truth behind their profits. *Cf.* Ninth Cir. Mem. (Friedland, J., concurring) at 3 ("Defendants-Appellants had stonewalled AECOM's every effort to ascertain information about their finances. . . . "). Defendants' flagrant discovery abuse was clearly within their control, a point which Corporate Defendants do not dispute, and intended to keep their profits from being discovered. Accordingly, the Court concludes that Defendants' discovery misconduct was willful for the purposes of imposing terminating sanctions. *See Garrison,* 2020 WL 6537389 at *5 (finding willfulness where a defendant's failures to file discovery responses, comply with orders compelling discovery, and attend his deposition were in his control).

Defendant Topolewski's attempt to distance himself from Corporate Defendants is unavailing. As this Court has found, he was extensively involved with Corporate Defendants despite his current statements to the contrary. *See* Order re: Defs.' Mot. for Reconsideration 25:16-20, ECF No. 305 ("Holding Topolewski personally liable is not manifestly unjust because he is liable jointly and severally for his direct involvement in the extensive fraud committed in forming the Corporate Defendants."). Defendant Topolewski himself has also failed to comply with his discovery obligations which were in his control. He failed to appear for his first deposition, arrived late to his second deposition and left early, and failed to respond to discovery requests propounded on him.

See Pl.'s MFS Reply 8:9-10. Accordingly, it is proper for the Court to refer to Defendants as a collective and find that Defendant Topolewski's conduct, too, was willful and bind him to this Order. *See Garrison,* 2020 WL 6537389 at *5.

b. The *Malone* Factors Support Terminating Sanctions

In determining whether to impose terminating sanctions, "the key *[Malone]* factors are prejudice and the availability of lesser sanctions." *See Davidson v. Barnhardt,* 2013 WL 6388354, at *6 (C.D. Cal. Dec. 6, 2013) (citing *Wanderer v. Johnston,* 910 F.2d 652, 656 (9th Cir. 1990)); *Valley Eng'rs Inc. v Elec. Eng'g Co.,* 158 F.3d 1051, 1057 (9th Cir. 1998) (noting that when considering evidentiary, issue, or terminating sanctions, factors three and five "are decisive"). Put another way, "[w]hat is most critical for case-dispositive sanctions, regarding risk of prejudice and of less drastic sanctions, is whether the discovery violations 'threaten to interfere with the rightful decision of the case.'" *Valley Eng'rs,* 158 F.3d at 1057 (quoting *Adriana Int'l. Corp. v. Lewis & Co.,* 913 F.2d 1406, 1412 (9th Cir. 1990)). Thus, a district court need not make explicit findings regarding each of the five factors. *Connecticut Gen. Life Ins.,* 482 F.3d at 1096; *see also Wanderer,* 910 F.2d at 656 (noting that in most cases, courts have found that the first two *Malone* factors weigh in favor of terminating sanctions and the fourth factor weighs against terminating sanctions). Given that *Malone* factors three and five are "key" and "decisive" in assessing terminating sanctions, and given that explicit findings regarding each of the five factors are not required, the Court

focuses only on factors three and five in making its determination.

i. Factor 3: Prejudice

"When assessing prejudice, courts consider whether the other party's actions 'impair' the ability of the party seeking sanctions 'to go to trial or threaten to interfere with the rightful decision of the case.'" *Sec. & Exch. Comm'n v. Blockvest, LLC,* 2020 WL 1910355, at *15 (S.D. Cal. Apr. 20, 2020) (quoting *In re Phenylpropanolamine (PPA) Prod. Liab. Litig.,* 460 F.3d 1217, 1227 (9th Cir. 2006) (internal quotations and citations omitted)). There is undoubtedly a high risk of prejudice to AECOM here due to Defendants' discovery misconduct. Defendants' obstructionist, recalcitrant, and contumacious behavior over the course of this litigation has made it impossible for AECOM to ever discover the truth behind Defendants' profits. *See Anheuser-Busch,* 69 F.3d at 352 ("Dismissal is appropriate where a 'pattern of deception and discovery abuse ma[k]e[s] it impossible' for the district court to conduct a trial 'with any reasonable assurance that the truth would be available.'"); *see also Valley Eng'rs,* 158 F.3d at 1058 ("Where a party so damage the integrity of the discovery process that there can never be assurance of proceeding on the true facts, a case dispositive sanction may be appropriate."); *Connecticut Gen. Life Ins.,* 482 F.3d at 1097 (affirming terminating sanctions and finding prejudice where defendants had engaged in a "pattern of deception and discovery abuse that made it impossible for the district court to conduct another trial with any reasonable assurance that the truth would be available."). The only financial discovery that Defendants have produced consists of "two pages of Income State-

ments" that the Magistrate Judge deemed "patently insufficient," "plainly inadequate," and "created specially for this litigation." Order re: Pl.'s Mot. for Contempt 13:3-4, 6-8; 16:4-7, ECF No. 154. Otherwise, Defendants have yet to produce any reliable discovery of their finances in direct violation of this Court's orders. AECOM has clearly been prejudiced as a result of Defendants' bad faith discovery tactics. *See Garrison,* 2020 WL 6537389 at *5 (noting that a failure to produce documents as ordered establishes sufficient prejudice) (citing *Adriana Int'l Corp.,* 913 F.2d at 1412).

Defendants' assertion that AECOM's inability to find the "true facts" on damage is "its own fault" flies in the face of this Court. *See* MK Defs.' MFS Opp'n 11:7-8. Contrary to what Defendants argue, AECOM was not required to re-serve discovery requests on Defendants post-remand. Rather, Defendants had—and still have—an ongoing duty to supplement their prior discovery responses. *See Woods v. Google,* 2014 WL 1321007, at *4 (N.D. Cal. Mar. 28, 2014) ("The Court can definitively state that the Rule 26(e) duty to supplement or correct incomplete or incorrect responses does, in fact, extend beyond the discovery cutoff date."); *Hernandez v. Polanco Enters.,* Inc., 19 F. Supp. 3d 918, 933 (N.D. Cal. 2013) ("Federal Rule of Civil Procedure 26(e) places litigants under an affirmative duty to supplement non-deposition discovery responses, even after the discovery cut-off date.").

Additionally, it is not AECOM's "fault" that it cannot calculate its damage; Defendants still have not complied with this Court's June 27, 2018 Order compelling Defendants to produce "all monthly, quarterly, and annual income statements, balance

sheets, and other financial statements of any Corporate Defendants" and their corporate tax returns and bank statements "for the period beginning four years before the filing of the complaint. . . . " Order re: Defs.' Mot. to Quash Subpoenas and/or for Protective Order at 2 ("Order re: Mot. to Quash"), ECF No. 397. Defendants' argument that AECOM has prejudiced itself by not reserving discovery after remand is plainly nonsensical given that it is Defendants who have continued to skirt their discovery obligations. It is due to Defendants' fault that AECOM may never learn the true facts on damage in this case.

Similarly ludicrous is Defendants' argument that AECOM "repeatedly blames its inability and refusal to conduct discovery on Defendants' objections to its subpoenas, thus asking the Court to sanction them for exercising that procedural right." *See* MK Defs.' Opp'n 11:15-17. This argument is distracting and beside the point. As stated, AECOM's inability to conduct discovery is a direct result of Defendants' discovery abuse. While Defendants indeed have a procedural right to object to third-party subpoenas pursuant to Rule 45, this does not forgive or explain their refusal to produce discovery that the Court had already ordered them to produce. AECOM likely would not have had to subpoena third-party banks after remand had Defendants provided financial discovery in the first place. Indeed, in granting in part and denying in part Defendants' Motions to Quash Subpoenas and/or for a Protective Order, Magistrate Judge Rosenberg stated that "[t]o the extent the subpoena seeks [third-party] bank statements for a [Corporate Defendant], the subpoena seeks information that the court *already ordered*

Defendants to produce." Order re: Mot. to Quash at 2-3 (emphasis added). Defendants face terminating sanctions not because they filed motions to quash third-party subpoenas, but because they—as of current—still have not produced any financial statements in direct violation of court orders. *See id.* at 2 (noting on December 16, 2021 that the financial documents that Defendants were ordered to produce "were not in fact produced.").

As a final attempt to escape the inevitability of terminating sanctions, Defendants argue that their discovery misconduct from 2018 is too remote in time. *See* MK Defs.' Opp'n 7:21-24 ("Very simply, the landscape of the case has changed too excessively to justify the extreme sanctions requested without any effort to conduct discovery more recently than three and a half years ago."). Defendants cite no authority limiting the scope of sanctions to only the discovery period after remand, and the Court finds none. What is clear, however, is that AECOM has been prejudiced by Defendants' shady discovery tactics and Defendants can no longer hide from their day of reckoning. The Court finds that the prejudice factor weighs in favor of terminating sanctions.

ii. Factor 5: Availability of Lesser Sanctions

The fifth factor asks the Court to consider: (1) the feasibility of less drastic sanctions and why such alternative sanctions would be inappropriate; (2) whether alternative sanctions were implemented before ordering dismissal; and (3) whether the spoliating party was warned of the possibility of dismissal before dismissal was ordered. *Leon,* 464 F.3d at 960.

"It is appropriate to reject lesser sanctions where the court anticipates continued deceptive misconduct." *Connecticut Gen. Life Ins.,* 482 F.3d at 1097; *see also Jerry Beeman & Pharmacy Servs.,* Inc. *v. Caremark Inc.,* 322 F. Supp. 3d 1027, 1039 (C.D. Cal. 2018) ("The Court finds that lesser sanctions would have no effect on the sustained, deceptive behavior by Plaintiffs' counsel during this litigation."); *Computer Task Group,* Inc. *v. Brotby,* 364 F.3d 1112, 1116-17 (9th Cir. 2004) (noting that terminating sanctions may be appropriate if lesser sanctions would not deter future wrongdoing).

Lesser sanctions are not available here. Defendants have shown a complete and total disregard for the judicial process over the lifetime of this case, and the Court anticipates that Defendants will only continue their obstructive behaviors. This is especially true given that Defendants, as noted above, have yet to produce any financial discovery despite court orders compelling them to do so. As AECOM states, "Defendants have made clear in every way possible that they do not intend to permit discovery of financial information. Nor have multiple findings for contempt, multiple orders to compel, or the imposition of daily sanctions for noncompliance, dissuaded Defendants from doing otherwise." Pl.'s Mot. for Sanctions 22:17-20. Indeed, Magistrate Judge Rosenberg expressed her skepticism regarding Defendants' failure to produce their bank records, stating "I honestly don't know why a corporation would not be able to get access to its own bank statements. I mean, that's, I must say, peculiar." Transcript of Telephonic Hearing Re: Defs.' Mot. to Quash 16:24-17:1, ECF No. 389. Thus, the Court finds that "lesser sanctions would have no effect

on the sustained, deceptive behavior" by Defendants and rejects lesser sanctions.[9] *Jerry Beeman,* 322 F. Supp. 3d at 1039; *see also Nevijel v. N. Coast Life Ins. Co.,* 651 F.2d 671, 674 (9th Cir. 1981) ("[T]he district court need not exhaust [all sanctions short of dismissal] before finally dismissing a case . . . [dismissal] requires only that possible and meaningful alternatives be reasonably explored, bearing in mind the drastic foreclosure of rights that dismissal effects.").

The conclusion would be the same even if the Court were to engage in a more exacting inquiry of all three sub-parts of the fifth factor. First, less drastic sanctions are not feasible and would be inappropriate for the reasons stated above. Defendants have continued their deceptive behavior after remand by refusing to provide their financial records and less drastic sanctions would likely be ineffective to coerce them into compliance. Second, alternative sanctions have already been implemented in this case to no avail. *See generally* Order re: Pl.'s Mot. for Contempt, ECF No. 210 (ordering Defendants to supplement discovery and awarding AECOM attorney's fees and costs incurred in filing the motion). Third, and finally, Defendants have been explicitly warned of the possibility of case-dispositive sanctions. To quote Judge Friedland's concurrence from the Ninth Circuit's Memorandum:

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[9] Moreover, the Court is already granting AECOM's evidentiary sanction request and taking as true that Defendants' collected on a contract for $36 million. In light of this inference and considering that only damage are at issue for trial, terminating the case at this stage is even more appropriate. There is no need to impose lesser sanctions and proceed to trial.

> "I share the majority's opinion that the district court could consider entering discovery sanctions. In my view, appropriate sanctions could even include a *default judgment* against Defendant-Appellants, if the district court deems it justified."

Ninth Cir. Mem. (Friedland, J., concurring) at 3 (emphasis added).

In sum, Defendants' discovery misconduct "threaten[s] to interfere with the rightful decision of th[is] case" and terminating sanctions are more than justified. *See Valley Eng'rs,* 158 F.3d at 1057 ("What is most critical for case-dispositive sanctions, regarding risk of prejudice and of less drastic sanctions, is whether the discovery violations 'threaten to interfere with the rightful decision of the case.'") (quoting *Adriana Int'l. Corp.,* 913 F.2d at 1412). Due to Defendants' recalcitrant behavior, AECOM may never have access to the true facts of Defendants' profits. *See Connecticut Gen. Life Ins.,* 482 F.3d at 1097 ("The most critical factor to be considered in case-dispositive sanctions is whether 'a party's discovery violations make it impossible for a court to be confident that the parties will ever have access to the true facts.'") (quoting *Valley Eng'rs,* 158 F.3d at 1058). Considering that Defendants' discovery misconduct is willful and the *Malone* factors favor case-dispositive sanctions, terminating sanctions are even more appropriate here. Accordingly, the Court **GRANTS** Plaintiff's request for terminating sanctions and enters default judgment against Defendants[10] in the amount

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[10] Defaulting Defendants (Bud Zulakoff, John Ripley, Todd Hale, and Henry Blum) are also bound to this ruling, having been

of $36 million. *See id.* (affirming terminating sanctions in the form of default judgment where defendants had so frustrated the discovery process that plaintiffs could not determine their damage).

iii. Monetary Sanctions

AECOM also requests two forms of monetary sanctions. *See generally* Pl.'s Mot. for Sanctions. First, AECOM requests a compensatory sanction of $9 million "based on a fine of $10,000 per day that this case has been pending in this Court," coupled with a $10,000 per day fine going forward for any future violations of the permanent injunction. *Id.* at 16:1113, 25:24. Second, AECOM asks this Court to award attorneys' fees and costs incurred following remand from the Ninth Circuit. *Id.* at 24:11-22.

a. $9 Million Compensatory Sanction and $10,000 Per Day Coercive Sanction

"A court may wield its civil contempt powers for two separate and independent purposes: (1) to coerce the defendant into compliance with the court's order; and (2) to compensate the complainant for the losses sustained." *Shell Offshore Inc. v. Greenpeace, Inc.*, 815 F.3d 623, 629 (9th Cir. 2016) (internal quotations omitted) (quoting *United States v. United Mine Workers of America,* 330 U.S. 258, 303-04 (1947)). In asking for a $9 million sanction award "based on a fine of $10,000 per day that this case has been pending," AECOM essentially requests that the Court hold

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previously held jointly and severally liable for AECOM's damage. *See generally* Order re: Mot. for Default J.

Defendants in civil contempt and: (1) enter a coercive sanction in the amount of $10,000 per day for future violations of the permanent injunction; and (2) enter a compensatory sanction of $9 million by retroactively applying the $10,000 per day coercive sanction over the lifetime of this case, which is approximately 900 days according to AECOM. *See id.* at 16:11-14. The Court **DENIES** both requests.

Turning first to the $10,000 per diem coercive sanction request, case authority does not support an entry of coercive sanctions for prospective violations of an injunction without a corresponding concurrent violation. *See*, *e.g.*, *Shell,* 815 F.3d at 629-630. Put another way, a violation of an injunction is a condition precedent to holding a party in civil contempt and imposing coercive sanctions. *Id.* Here, it does not appear that Defendants are violating the permanent injunction order. In fact, it seems Defendants have complied with the permanent injunction since June 2021, after AECOM notified Defendants that two infringing websites were live. *See* Mot. for Sanctions 4:17-22. Indeed, all of the cases AECOM relies on involved concurrent violations of an injunction which justified coercive sanctions to ensure future compliance with the injunction. *See Hook v. Arizona Dep't of Corr.,* 107 F.3d 1397, 1400 (9th Cir. 1997) (holding disobedient party in civil contempt for violating injunction and consent decree and imposing coercive $10,000 per day fine for future noncompliance); *CBS Broad.* Inc. *v. FilmOn.com, Inc.,* 814 F.3d 91, 96 (2d Cir. 2016) (holding defendants in contempt for violating injunction and issuing $10,000 per day fine for "any further failure" to comply with the injunction); *Matter of Search of Content Stored at Premises Controlled by*

Google Inc., 2017 WL 4700056, at *1 (N.D. Cal. Oct. 19, 2017) (holding a company in civil contempt for noncompliance with a court order and imposing a $10,000 per day sanction to ensure compliance); *JPMorgan Chase Bank, N.A. v. PT Indah Kiat Pulp & Paper Corp. Tbk,* 854 F. Supp. 2d 528, 537 (N.D. Ill. 2012) (ordering defendants to comply with a court order by April 20, 2012 and imposing daily sanctions for noncompliance each day thereafter); *U.S. Philips Corp. v. KXD Tech., Inc.,* 2007 WL 4984153, at *2 (C.D. Cal. July 27, 2007) (noting that in a parallel case, the court had ordered defendants to pay civil contempt damage for violation of a preliminary injunction and imposed per diem sanctions at $10,000 per day). Given that Defendants are complying with the permanent injunction, the Court declines to hold Defendants in civil contempt at this time and **DENIES** AECOM's coercive sanction request for future violations of the permanent injunction.

The Court similarly **DENIES** AECOM's request that it be awarded $9 million in compensatory sanctions by retroactively applying the $10,000 per diem coercive sanction over the course of this litigation. Even if the Court were to grant the above coercive sanction request, AECOM has not provided any authority in support of retroactively applying the $10,000 per day sanction. Rather, and as Defendants point out, AECOM's cited cases and other cases that the Court has found support only the future application of coercive sanctions. *See e.g.,* Hook, 107 F.3d at 1404; *see also JPMorgan Chase,* 854 F. Supp. at 532 ("The court declines to impose sanctions for the *past conduct* of the defendants, but will impose a sanction of $5,000 per day for each day after April 20, 2012, and

$10,000 for each day after May 20, 2012, that the defendants have not complied with the citations.") (emphasis added). While "[c]ompensatory sanctions are backward looking and are designed to compensate the complainant for damage caused by past acts of disobedience," *Aug. Tech. Corp. v. Camtek, Ltd.,* 542 F. App'x 985, 991 (Fed. Cir. 2013) (citation and internal quotation marks omitted), they must still be limited to the "actual losses sustained as a result of the contumacy." *Shuffler,* 720 F.2d at 1148; *see also United Mine Workers,* 330 U.S. at 304 (noting that compensatory fines must "be based upon evidence of complainant's actual loss"). AECOM has not provided justification for the $10,000 figure, nor has it shown any proof of actual losses sustained from Defendants' discovery evasion. AECOM's $9 million compensatory sanction request, based on the retroactive application of the $10,000 per diem coercive sanction, is therefore DENIED.

In sum, the Court **DENIES** AECOM's requests for a $10,000 per diem coercive sanction for future violations of the permanent injunction and a $9 million compensatory sanction.

b. Attorneys' Fees Following Remand

AECOM additionally requests its costs and fees incurred following remand from the Ninth Circuit pursuant to two bases of authority: (1) the Lanham Act; and (2) Rule 37. Pl.'s Mot. for Sanctions 24:11-21. In opposition, Defendants argue that attorneys' fees and costs are improper under the Lanham Act. *See* MK Defs.' MFS Opp'n 18:26-19:14. Defendants also assert that an award of attorneys' fees against

Defendant Topolewski is improper under the Lanham Act. *Id.* at 19:8-14; *see also* Topolewski's MFS Opp'n 24:1-6. Defendants do not address the recovery of such fees under Rule 37. *See* MK Defs.' MFS Opp'n 18:26-19:14.

The Court has inherent authority to award attorneys' fees here and need not turn to the Lanham Act or Rule 37. *See Chambers,* 501 U.S. at 45 ("[A]n assessment of attorneys' fees is undoubtedly within a court's inherent power. . . . ") (citation omitted); *Roadway Exp., Inc. v. Piper,* 447 U.S. 752, 765 (1980) ("There are ample grounds for recognizing . . . that in narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel."). A court may assess attorneys' fees when a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 258-59 (1975) (quoting *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.,* 417 U.S. 116, 129 (1974)).

To make AECOM whole for "expenses caused by [Defendants'] obstinancy," the Court finds that awarding AECOM all of its attorneys' fees and costs following remand is appropriate here. *See Hutto v. Finney,* 437 U.S. 678, n.14 (1978). As outlined above, Defendants have engaged in a years-long effort to prohibit AECOM from ever discovering their financial posture. To reiterate, the Ninth Circuit agreed on appeal that "the defining feature of this dispute has been . . . [Defendants'] 'lengthy history of bad faith litigation practices.'" Ninth Cir. Mem. at 2 (Friedland, J., concurring). Since remand, Defendants have not changed their behavior given that they still have not produced their financial statements in direct violation

of court orders. Order re: Mot. to Quash at 2 (noting that Defendants had not produced financial discovery after remand despite being compelled to do so in 2018). Further, Defendant Topolewski cannot escape the attorneys' fees and costs award given his own extensive involvement in the infringing activity and willful evasion of his discovery obligations. Awarding AECOM its attorneys' fees and costs is plainly appropriate here in light of Defendants' bad faith, flagrant, and egregious discovery misconduct. *See Universal Oil Prod. Co. v. Root Ref. Co.,* 328 U.S. 575, 580 (1946) ("No doubt, if the court finds . . . that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire cost of the proceedings could justly be assessed against the guilty parties. Such is precisely a situation where 'for dominating reasons of justice' a court may assess counsel fees as part of the taxable costs." (citation omitted)). The Court **GRANTS** AECOM's request for attorneys' fees and costs incurred after remand and orders AECOM to provide supplemental briefing to establish the amount of reasonable attorneys' fees and costs.

2. Defendants' Motions for Summary Judgment

On March 24, 2021, the Ninth Circuit reversed this Court's $1.8 billion damage award to AECOM. *See generally* Ninth Cir. Mem. The only issue on remand is that of damage, and Defendants seek summary judgment on the sole ground that evidence in the record does not show that Defendants profited from their infringing use of the MK IP.[11] *See generally*

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[11] Corporate Defendants' and Defendant Topolewski's Motions for Summary Judgment (collectively, "Motions for Summary Judg-

MK Defs.' Mot. for Summ. J. ("MK Defs.' MSJ"), ECF No. 395; Def. Topolewski's Mot. for Summ. J ("Topolewski's MSJ"), ECF No. 396. AECOM argues in opposition that circumstantial evidence in the record, namely Defendants' behavior over the course of this litigation, leads to the conclusion that Defendants did profit from their use of the MK IP. Pl.'s Opp'n to Mot. for Summ. J. ("Pl.'s Opp'n to MSJ") 6:17-7:24, ECF No. 403. In light of the above disposition on AECOM's Motion for Sanctions, the Court **DENIES** as moot Defendants' Motions for Summary Judgment.

Still, engaging briefly on the merits, the Court notes that basic logic would have that there is a triable issue as to Defendants' profits precluding an entry of summary judgment. Defendants' argument that they are entitled to summary judgment because AECOM cannot prove profits is preposterous. Defendants' bad faith litigation tactics alone belie their nonsensical statement. Defendants would not have violated—and be in current violation of—this Court's orders compelling them to produce financial discovery if their infringement scheme was not highly profitable. To grant summary judgment in favor of Defendants here would reward Defendants for their discovery abuse and encourage future parties to do the same to escape judgment. Frivolous as Defendants' Motions for Summary Judgment are, the Court—perhaps too charitably—does not require Defendants

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ment") are virtually identical both in substance and in form. *See generally* MK Defs.' Mot. for Summ. J. ("MK Defs.' MSJ"), ECF No. 395; Def. Topolewski's Mot. for Summ. J ("Topolewski's MSJ"), ECF No. 396. Accordingly, the Court treats them as the same and cites to Corporate Defendants' Motion for arguments made in both.

to show cause why their Motions for Summary Judgment are not in violation of Rule 11(b) at this time. Fed. R. Civ. P. ("On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b)."). Defendants' Motions for Summary Judgment are DENIED as moot.

III. Conclusion

Based on the foregoing, the Court **GRANTS** in part and **DENIES** in part AECOM's Motion for Sanctions. Specifically, the Court: (1) **GRANTS** AECOM's request for an evidentiary sanction and deems as true that Defendants performed and collected on a contract for $36 million; (2) **GRANTS** AECOM's request for terminating sanctions and enters default judgment against Defendants in the amount of $36 million; (3) **DENIES** AECOM's request for a $10,000 per diem coercive sanction for future violations of the permanent injunction; (4) **DENIES** AECOM's $9 million compensatory sanction request based on the retroactive application of the $10,000 per diem coercive sanction; and (5) **GRANTS** AECOM's requests for attorneys' fees and costs incurred following remand from the Ninth Circuit. The Court orders AECOM to provide supplemental briefing to establish the amount of reasonable attorneys' fees and costs. AECOM shall prepare and file a proposed judgment thereafter.

Defendants' Motions for Summary Judgment are DENIED as moot in light of the disposition on AECOM's Motion for Sanctions.

Having been previously found jointly and severally liable for AECOM's damage, Defaulting Defendants are also bound to this Order.

Defendants are still ordered to comply with this Court's previous permanent injunction issued on January 24, 2019.

IT IS SO ORDERED.

/s/ Ronald S.W. Lew
Senior U.S. District Judge

Dated: February 25, 2022

ORDER, U.S. DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA, GRANTING DEFENDANTS NOTICE OF MOTION AND MOTION TO QUASH (DECEMBER 16, 2021)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

AECOM ENERGY AND CONSTRUCTION, INC.

v.

JOHN RIPLEY, ET AL.

Case No. CV 17-05398-RSWL (AGRx)

Before: Ronald S.W. LEW, District Judge.

PROCEEDINGS:

ORDER RE: (1) GARY G. TOPOLEWSKI'S NOTICE OF MOTION AND MOTION TO QUASH SUBPOENAS AND/OR FOR A PROTECTIVE ORDER BARRING ENFORCEMENT OF SUBPOENAS (DKT. NO. 373), (2) THE MORRISON KNUDSEN DEFENDANTS' NOTICE OF MOTION TO QUASH SUBPOENAS AND/OR FOR A PROTECTIVE ORDER BARRING ENFORCEMENT OF SUBPOENAS (DKT. NO. 374), (3) PLAINTIFF AECOM ENERGY & CONSTRUCTION, INC.'S NOTICE OF MOTION AND MOTION BY PLAINTIFF TO

COMPEL RESPONSE TO REQUEST FOR PRODUCTION NO. 21 AND JOINT STIPULATION (DKT. NOS. 380)

Defendant Gary Topolewski filed a motion to quash nine subpoenas and/or for a protective order barring enforcement of subpoenas to Adli Law Group, P.C.; AT&T; Cellco, Inc.; Century Communications, Inc.; Pacific Bell Telephone Company; Sprint PCS; Sprint Spectrum LP; Verizon Wireless Telecom, Inc.; and US Bancorp. The parties briefed the issues. (Dkt. Nos. 373, 375.)

The Morrison Knudsen Defendants filed a motion to quash subpoenas and/or for a protective order barring enforcement of the same subpoenas. The parties briefed the issues. (Dkt. Nos. 374, 377.)

Plaintiff filed a motion to compel responses to Document Request No. 21. The parties briefed the issues. (Dkt. Nos. 380, 381, 383.)

These motions came on for hearing and were taken under submission. (Dkt. No. 387.)

Before the motions were reassigned to this court, the previous magistrate judge had issued an order dated June 27, 2018. (Order, Dkt. No. 154.) That order followed a previous order dated April 18, 2018 and incorporated its prior description of the claims. (*Id.* at 1, 3; Order, Dkt. No. 118.) As relevant here, the June 27, 2018 Order granted Plaintiff's motion to compel further responses to Interrogatory No. 15 and Document Request Nos. 19-20, and denied Plaintiff's motion to compel as to Interrogatory No. 5 and Document Request No. 21. (Dkt. No. 154 at 23.) Specifically, the order required Defendants to produce all monthly, quarterly, and annual income statements,

balance sheets, and other financial statements of any Corporate Defendant, including any underlying documents used to prepare the summary income statement produced, for the period beginning four years before the filing of the complaint on July 21, 2017. (*Id.* at 12-13.) The order also required Defendants to produce their corporate tax returns and bank statements for the period beginning four years before the filing of the complaint on July 21, 2017. Such documents would be designated Attorneys Eyes Only under the protective order. (*Id.* at 14-16.)

This court likewise incorporates the prior description of the claims as well as the legal standards and reasoning regarding the rulings on Document Request Nos. 19-20. (*Id.* at 11-17; Dkt. No. 118.)

At oral argument, counsel confirmed that the documents ordered to be produced by Defendants in the June 27, 2018 Order were not in fact produced.

The scope of discovery under Rule 45 "is the same as that applicable to Rule 34 and the other discovery rules." Advisory Comm. Notes to 1970 Amendment.

"Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). "District courts have broad discretion in determining relevancy for discovery purposes." *Surfvivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625,

635 (9th Cir. 2005). "[I]nformation that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable." Advisory Committee Notes, 2000 Amendments, to Fed. R. Civ. P. 26(b)(1).

Subpoena to US Bancorp

The subpoena to US Bancorp seeks applications and bank statements for bank accounts opened, held, owned, or operated at any time by a specified Morrison-Knudsen entity or named individual. (Dkt. No. 373-11.) To the extent the subpoena seeks bank statements for a Morrison-Knudsen entity, the subpoena seeks information that the court already ordered Defendants to produce. To the extent the subpoena seeks applications to open or maintain such accounts, the subpoena seeks information that will disclose witnesses with knowledge of the bank accounts. Such discovery is proportional to the needs of this case. Fed. R. Civ. P. 26(b)(1).

The court, however, grants without prejudice the motions for a protective order and excludes from production applications and bank statements for personal bank accounts owned by the individuals listed in the subpoena. At the discovery conference, the court explored whether the Mr. Topolewski's bank statements could be redacted to disclose only fund transfers between him and a Morrison-Knudsen entity. Such fund transfers would, however, also show up in the entity's bank statements, which would not require the same type of redaction of personal transactions in an individual's bank statement. There is no indication in the record before the court that a customer of the Morrison Knudsen Defendants were

directed to pay an account other than an account belonging to a Morrison-Knudsen entity.

Subpoenas to Service Providers

Plaintiff served subpoenas upon seven service providers that each sought information regarding the identity, contact information, and payment method of the account holder of seven listed phone numbers. (Dkt. Nos. 373-4 through 373-10.) There appears to be no dispute that the first five phone numbers were listed on the "contact us" subpage of a website at issue, http://morrisonknudsen.com. As explained by the court on the record during the discovery conference, the subpoenas seek information that is directly relevant and proportional to the needs of this case as to the first five phone numbers.

Defendant Topolewski seeks a protective order as to the last two phone numbers listed in each subpoena. He argues that one of those phone numbers is for Metal Jeans, Inc., a clothing company owned by him. The other phone number is for Topolewski America, a company formerly owned by him. He contends neither company is a defendant in this case or otherwise has anything to do with the allegations in this case. Plaintiff argues that there is evidence Metal Jeans paid the attorneys fees owed to AECOM. Even assuming Metal Jeans is paying Defendants' financial obligations in this litigation, that fact alone does not render discovery about Metal Jeans phone number proportional to the needs of this case. Similarly, Plaintiff makes no showing that a phone number at Topolewski America has any relevance to this case. (Exhs. E-F to Chang Decl.)

Accordingly, Defendants' motion for protective order is granted in part and the subpoenas to the seven service providers are modified to delete the last two phone numbers.

Subpoena to Adli Law Group

Plaintiff was previously awarded attorneys fees. Defendants' prior counsel, the Adli Law Group, apparently paid the attorneys fees award by wire transfer. Plaintiff served a subpoena upon the Adli Law Group to determine the identity of the bank that transferred funds to the Adli Law Group from which the firm then paid the attorneys fee award. The court cannot discern any way in which the information sought would be directly relevant and proportional to the needs of this case. Defendants' motion to quash is granted.

Plaintiff's Motion to Compel Re: Document Request No. 21

The April 18 and June 27, 2021 Orders denied without prejudice Plaintiff's motion to compel production of Document Request No. 21. (Dkt. No. 154 at 16-17.) The reasoning in those Orders remain valid. It is still not clear how tax returns of an individual would be relevant and proportional to the issues remaining in this case. Plaintiff's motion to compel is denied without prejudice.

Accordingly, IT IS ORDERED that:[1]

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[1] The court does not address a deadline for production because the third party recipients of the subpoenas are not before the court.

1. Defendants' motions to quash the subpoena to the Adli Law Group is granted. Defendants' motions to quash are otherwise denied.

2. Defendants' alternative motions for protective order are granted in part as to the subpoena to US Bancorp without prejudice. The court excludes from production the applications and bank statements for personal bank accounts owned by the individuals listed in the subpoena.

3. Defendants' alternative motions for protective order are granted in part as to the subpoenas to the service providers. The court deletes the last two phone numbers in those subpoenas.

4. Plaintiff's motion to compel production of documents responsive to Document Request No. 21 is denied without prejudice.

cc: District Judge Ronald S.W. Lew

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MEMORANDUM DECISION AND ORDER, U.S. DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA (JUNE 27, 2018)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AECOM ENERGY & CONSTRUCTION, INC.,

Plaintiff,

v.

JOHN RIPLEY, ET AL.,

Defendants.

Case No. CV 17-5398 RSWL (SSx)

Before: Suzanne H. SEGAL,
United States Magistrate Judge.

MEMORANDUM DECISION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR CONTEMPT, OR IN THE ALTERNATIVE, TO COMPEL DEFENDANTS TO SUPPLEMENT DISCOVERY

I. Introduction

On April 26, 2018, the Court granted in part and denied in part Plaintiff's Amended Motion to Compel Responses to Interrogatories and Requests for Pro-

duction. ("Order," Dkt. No. 118). Pursuant to the Order, Defendants were required to provide supplemental discovery responses and documents, if any, by May 15, 2018.

On May 29, 2018, Plaintiff filed the instant "Motion for Contempt, or in the Alternative, Motion to Compel Defendants to Supplement Discovery." ("Motion," Dkt. No. 132). In the Motion, Plaintiff contends that Defendants' supplemental responses were either deficient or non-existent. On June 6, 2018, the Court granted Plaintiff's Application to file under seal the Joint Stipulation required by Local Rule 37-2. (Dkt. No. 142). That same day, Plaintiff separately filed a public, redacted version of the Joint Stipulation, (Dkt. No. 143), which included unredacted copies of the declaration of Yungmoon Chang and Exhibits A-F and H; and a sealed, unredacted version of the Joint Stipulation, along with a sealed, unredacted copy of Exhibit G. (Dkt. No. 144; collectively, "Jt. Stip."). Although the moving papers are captioned as a Joint Stipulation, Defendants did not provide their portion. Accordingly, the Joint Stipulation does not include Defendants' opposition to Plaintiff's contentions.

The Court held a telephonic hearing on the Motion on June 22, 2018. During the hearing, Plaintiff informed the Court that five discovery requests– Interrogatories Nos. 5 and 15, and Requests for Production Nos. 19, 20 and 21–were "critical" to its claims and remained in dispute. For the reasons stated below and at the hearing, the Motion is GRANTED IN PART and DENIED IN PART. The request for a contempt finding is DENIED. The requests for supplemental responses and documents with respect to

Interrogatory No. 15 and Requests for Production of Documents Nos. 19 and 20 are GRANTED, as modified by this Order. The requests for supplemental responses and documents to Interrogatory No. 5 and Request for Production No. 21 are DENIED. The remaining requests for further responses are DENIED AS MOOT. Defendants shall produce supplemental responses and documents as required by this Order within ten days of the date of this Order. **Where information is unobtainable or no documents responsive to the requests exist, Defendants' supplemental written responses shall include a declaration by a person with knowledge describing the steps taken to discover information and to locate documents responsive to the requests.**

II. Background Information

The Court incorporates by reference the prior Order's summary of the claims in the Complaint and the discovery proceedings preceding the Order. (*See* Order at 2-3).

Defendants served their Second Supplemental Responses on May 15, 2018. According to Plaintiff, among other deficiencies, the only financial information Defendants disclosed consisted of two pages of "Income Statements" that were incomplete and appeared to have been created for this litigation, without any supporting materials. (Jt. Stip. at 3). Plaintiff emailed Defendants on May 17, 2018 identifying several deficiencies in the responses and requesting a conference of counsel. The parties held a telephonic

meet and confer on May 21, 2018.[1] That same day, Plaintiff emailed its portion of the Joint Stipulation to Defendants and stated that it intended to file the document on May 29, 2018. On May 29, 2018, Defendants responded that they were aware of the Joint Stipulation, but did not provide an opposing portion. (Chang Decl. ¶¶ 4-9, Exhs. B-F).

III. Standard

As the Ninth Circuit has recently explained, "[t]he discovery process in theory should be cooperative and largely unsupervised by the district court. But when required disclosures aren't made or cooperation breaks down, Federal Rule of Civil Procedure 37 allows a party to move for an order compelling disclosures or discovery. If the order is disobeyed, the court can impose contempt and other sanctions." *Sali v. Corona Reg'l Med. Ctr.*, 884 F.3d 1218, 1219–20 (9th Cir. 2018).

"Rule 37(a) provides generally that 'a party may move for an order compelling disclosure or discovery.' Fed. R. Civ. P. 37(a)(1). In particular, Rule 37(a) permits a party to seek to compel 'an answer, designation, production, or inspection' under certain circumstances. . . ." *Sali*, 884 F.3d at 1222 (quoting Fed. R. Civ. P. 37(a)(3)(B)). Rule 37(b) "empowers the court to take remedial action if a party 'fails to obey an order to provide or permit discovery, including an

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[1] Local Rule 37-1 requires that counsel meet and confer in person when, as here, they are located in the same county. Plaintiff's May 17, 2018 email appropriately proposed that the conference of counsel take place at Plaintiff's counsel's office. (Chang Decl., Exh. C).

order under Rule . . . 37(a).'" *Id.* (quoting Fed. R. Civ. P. 37(b)(2)(A)). The sanctions available when a party fails to comply with a discovery order include:

> (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
>
> (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
>
> (iii) striking pleadings in whole or in part;
>
> (iv) staying further proceedings until the order is obeyed;
>
> (v) dismissing the action or proceeding in whole or in part;
>
> (vi) rendering a default judgment against the disobedient party; or
>
> (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Fed. R. Civ. P. 37(b)(2)(A).

"The standard for finding a party in civil contempt is well settled: The moving party has the burden of showing by clear and convincing evidence that the [non-moving party] violated a specific and definite order of the court." *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999). However, while a Rule 37 order "compels the party to use its best efforts" to provide the required discovery, "it doesn't demand the impossible." *Sali*, 884 F.3d at 1224.

"[T]he use of Rule 37 sanctions must be tempered by due process. . . . [I]t is improper to dismiss a claim or to exclude evidence if the failure to comply with a discovery order is due to circumstances beyond the disobedient party's control." *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 784 n.8 (9th Cir. 1983); *see also Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 212 (1958) ("Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner."); *Sali*, 884 F.3d at 1224 (quoting *Rogers*). Similarly, "a person should not be held in contempt if his action appears to be based on a good faith and reasonable interpretation of the court's order." *In re Dual–Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993). (internal formatting and quotation marks omitted). "'Substantial compliance' with the court order is a defense to civil contempt, and is not vitiated by 'a few technical violations' where every reasonable effort has been made to comply." *Id.*

IV. Discussion

Although Plaintiff repeatedly prefaces its discussions of the purported inadequacies of Defendants' Second Supplemental Responses with the heading "AECOM's Reasons Why Defendants Should Be Held In Contempt For Failing to Supplement" each challenged request, Plaintiff does not further attempt explain exactly why the standard for civil contempt is satisfied apart from the bare fact that Plaintiff finds Defendants' responses insufficient. Nor

does Plaintiff appear to seek any relief other than a satisfactory supplemental response. As opposed to meeting the high standard for a contempt finding, Plaintiffs' motion appears more akin to a routine discovery dispute. Moreover, the dispute involves a somewhat routine discovery disagreement, *i.e.*, where it is not entirely clear if a party has purposefully withheld responsive documents or if no responsive documents actually exist. Accordingly, the Court DENIES Plaintiff's Motion to the extent that it seeks a contempt finding and ORDERS supplemental responses as follows.

A. Interrogatories

- Interrogatory No. 5: Describe the facts and circumstances surrounding the reinstatement or renaming of each of the Corporate Defen dants at their Dates of Inception, including but not limited to, the actions taken by the decision-makers and all other persons involved, all reasons for choosing to reinstate Morrison Knudsen entities or to rename entities using the Morrison Knudsen name, identification of all submissions to governmental agencies, and any authority granted to Defendants by the Original MK to take such actions.

Subject to certain objections, Defendants originally responded that unknown MK employees approached Tom Porter in 2006 about reviving the "discarded company," which Porter passed on to current management. Plaintiff argued in the prior motion that Defendants' response did not identify either "Tom Porter" or the individual "current management" members he

approached. The Court's Order granted the MTC in part with respect to Interrogatory No. 5. The Court ordered Defendants to "serve a supplemental response clarifying who 'Tom Porter' is and his connection, if any, to any Defendant in this case, and supplying Porter's contact information, including last known address and telephone number where available." (Order at 14).

Defendants' Second Supplemental Response to Interrogatory No. 5 states: "Tom Porter was an independent third party involved in the construction industry in some manner unknown to Responding Parties. Responding Parties have no contact information for Tom Porter." (Jt. Stip. at 6). Plaintiff argues that this response still "fails to identify what the connection between Tom Porter and any Defendant is." (*Id*. at 7). The Court disagrees.

Federal Rule of Civil Procedure 33(b) provides that parties must respond to interrogatories under oath to the fullest extent possible. However, parties are not required to produce information that they do not possess. If Plaintiffs contend that this response is false or inaccurate, then they need to provide some evidence to the Court demonstrating that Defendants are purposefully withholding relevant information or have intentionally submitted a false response. Plaintiffs have not made this showing. Accordingly, the Motion is DENIED with respect to Interrogatory No. 5.

- Interrogatory No. 15: Identify all revenues and profits earned by Topolewski America, Inc. since its date of incorporation and how those revenues and profits, in whole or in part, are shared with or received by any of the Defendants.

According to Plaintiff, Topolewski America, Inc., is owned by Defendant Gary Topolewski and does the same kind of work that Defendants do under the MK brand. Plaintiff argued in the prior motion that the information sought by Interrogatory No. 15 is relevant to its damage requests, shows the value of the MK brand, and is accessible to Topolewski. Defendants' First Supplemental Response to Interrogatory No. 15 stated: "After a diligent search and inquiry, Responding Parties are without knowledge to respond to this interrogatory. Topolewski America is not a party hereto and Responding Parties do not have access to the information requested." (Jt. Stip. at 10). The Court's Order denied the MTC without prejudice with respect to Interrogatory No. 15. The Court found that "Defendants' answer is sufficiently responsive to the request based on the record presented to the Court. However, denial is without prejudice to Plaintiff renewing the request on a showing of good cause upon further discovery concerning Topolewski America's connection to this case." (Order at 12).

Plaintiff argues that Defendants' purported Income Statements show that Defendants' direct labor costs and operating expenses were nearly 130 times the amount Defendants claim they received in total revenue from 2013 to 2016. Plaintiff contends that this gross disparity between alleged income and expenses confirms its belief that "Defendants are utilizing the MK name and reputation to bring in business, but collect money through some other entity," and renews the request for Topolewski America's financial information accordingly. (Jt. Stip. at 11).

Plaintiff has shown that Topolewski America could have a role in collecting revenue solicited by

other entities, but the connection remains speculative. The only new evidence presented as a basis for renewing the discovery request is a disparity between Defendants' income and expenses, which may or may not implicate Topolewski America specifically. While the Court is dubious of Defendants' claim that they do not have access to Topolewski America's financials, even if the information were in Defendants' possession, custody or control, Plaintiff has not explained why it needs information about "all revenues and profits" that Topolewski America, Inc. has ever earned. However, Defendants in this action presumably do know whether, to what extent, and in what amounts funds, if any, from Topolewski America have been shared with them, and whether those funds had any connection to the use of the MK brand. Accordingly, the Motion is GRANTED IN PART with respect to Interrogatory No. 15. The request for an accounting of "all revenues and profits" earned by Topolewski America is DENIED. The request for information about Topolewski America's revenue and profits relating to the use of the MK brand that has been shared with or received by any Defendant is GRANTED. However, consistent with the relevant time period set by the Court's prior Order, the response shall be limited "to the four years before the filing of the Complaint on July 21, 2017." (*See*, *e.g.*, Order at 10-11, 23, 27-28, 30).

C. Requests for Production of Documents

RFP Nos. 19, 20, 21 seek revenue and tax documents related to both the corporate and individual Defendants. Defendants originally objected to all of these requests in their entirety on the grounds that the requests would require production of trade secrets,

invade Defendants' and third-party privacy rights, and are irrelevant and overbroad. Plaintiff contended in their prior motion that the documents are relevant to show Defendants' use of the MK name and to its prayer for damage, particularly as the information they may contain relates to the disgorgement of profits. Plaintiff further maintained that Defendants' privacy objections are baseless because the protective order will sufficiently protect any privacy interests. In response, Defendants emphasized that there is no compelling need for tax returns, especially the individual Defendants' tax returns, as individual income that the tax returns might reflect are irrelevant to the determination of corporate profits.

- RFP No. 19: All documents relating to or reflecting any revenue received by any Defendant arising in any way relating to the use of the Morrison Knudsen name or logo, including all monthly, quarterly and annual income statements, balance sheets and other financial statements of any Corporate Defendant since such Corporate Defendant's Date of Inception.

The Court's Order granted the MTC in part with respect to RFP No. 19. The Court found that the materials requested were "plainly relevant to the claims and defenses in this action" and proportional to the needs of this case. (Order at 29-30). The Court further noted that "Defendants have not shown why the Protective Order would be insufficient to protect their privacy and trade secret concerns." However, the Court limited the scope of the request "to the four

years before the filing of the Complaint on July 21, 2017."[2] (*Id*. at 30).

Plaintiff argues that Defendants' production of "two pages of purported 'Income Statements' covering all four Defendants jointly" was insufficient for several reasons. First, the statements do not cover the full period required by the Court because they provide no information from January 2017 forward. (Jt. Stip. at 16). Second, the statements are summary documents with no division of assets among any of the entities and appear to have been created solely for this litigation. (Id.). According to Plaintiff, Defendants' counsel conceded that Plaintiff was entitled to the documents used to compile the purported Income Statements, "but indicated he had no ability to produce what his clients would not provide." (*Id*.). As such, Plaintiff maintains that the production was patently insufficient. The Court agrees.

Defendants' production of two pages of financial summaries only partially addressing the period identified by the Court is plainly inadequate. Plaintiff is entitled, at a minimum, to all of the documents Defendants consulted to create the Income Statements, as well as any additional documents that might contradict or otherwise call into question the accuracy of the information in those Statements. Accordingly, the Motion is GRANTED with respect to Request for Production No. 19. Defendants shall serve supplemental

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[2] The Court further permitted Defendants to "redact third party names and job site locations from the production," but "without prejudice to Plaintiff renewing the request for actual third party names and locations on a showing of good cause." (Order at 30).

written responses and produce "all monthly, quarterly and annual income statements, balance sheets and other financial statements of any Corporate Defendant," including any underlying documents used to prepare the income statements, to the extent any such documents exist, limited "to the four years before the filing of the Complaint on July 21, 2017."

- RFP No. 20: All tax returns and bank statements of any Corporate Defendant since such Corporate Defendant's Date of Inception.

The Court's Order denied the MTC without prejudice with respect to RFP No. 20. The Court concluded that Plaintiff had not shown that the information it was seeking "from Defendants' tax returns and bank statements is not available from other sources." (Order at 30). However, denial was without prejudice "to renewing the request following a showing that the documents produced by Defendants in their supplemental productions are insufficient." (*Id*.). Plaintiff maintains that "Defendants' two pages of 'income statements,' purporting to summarize all revenue and expenses for four separate corporate entities over a span of four years," are patently insufficient. (Jt. Stip. at 17). According to Plaintiff, Defendants' substantial expenses over the period at issue with "virtually no income for four straight years of operation" raise the "strong suspicion that "Defendants are operating Corporate Defendants' business in conjunction with another business entity." (*Id*. at 18). Because the financial summaries that Defendants produced do not provide the level of verifiable detail Plaintiff seeks, Plaintiff maintains that the information does not appear to be available

from sources other than the corporate Defendants' tax returns and bank statements. The Court agrees.

As the Court previously explained, "Federal Courts ordinarily recognize a constitutionally-based right of privacy that can be raised in response to discovery requests." *Soto v. City of Concord*, 162 F.R.D. 603, 616 (N.D. Cal. 1995) "[T]he right to privacy is not a recognized privilege or absolute bar to discovery, but instead is subject to the balancing of needs." *E.E.O.C. v. California Psychiatric Transitions*, 258 F.R.D. 391, 395 (E.D. Cal. 2009); *Soto*, 162 F.R.D. at 616 ("Resolution of a privacy objection or request for a protective order requires a balancing of the need for the information sought against the privacy right asserted."). The right to privacy has been held to cover information about personal finances. *See DeMasi v. Weiss*, 669 F.2d 114, 119 (3d Cir. 1982).

Under federal law, tax returns in particular "do not enjoy an absolute privilege from discovery." *Premium Services Corp. v. Sperry & Hutchinson Co.*, 511 F.2d 225, 229 (9th Cir. 1975); *Heathman v. United States District Court*, 503 F.2d 1032, 1035 (9th Cir. 1974) (Title 26 U.S.C. § 6103(a)(2) restricts the dissemination of tax returns only by the government and does not otherwise make copies of tax returns privileged). "Nevertheless, a public policy against unnecessary public disclosure [of tax returns] arises from the need, if the tax laws are to function properly, to encourage taxpayers to file complete and accurate returns." *Premium Services Corp.*, 511 F.2d at 229.

Courts generally apply a two-pronged test to balance the liberal scope of discovery and the policy favoring the confidentiality of tax returns. *See A. Farber & Partners, Inc. v. Garber*, 234 F.R.D. 186, 191

(C.D. Cal. 2006); *Hilt v. SFC Inc.*, 170 F.R.D 182, 189 (D. Kan. 1997). First, the court must find that the returns are relevant to the subject matter of the action. Second, the court must find that there is a compelling need for the returns because the information contained therein is not otherwise readily obtainable. *Farber*, 234 F.R.D. at 191.

Plaintiff has shown a need for the Corporate Defendants' financial information, which it intends to use in part to track funds flowing from Defendants' alleged use of the MK brand. The Corporate Defendants' tax returns and bank statements may also affirm or contradict the information in Defendants' Income Statements. Defendants' decision to limit their production of financial information to two pages of Income Statements created specially for this litigation suggests that that the information Plaintiff is entitled to pursue is not otherwise readily available. Accordingly, the Motion is GRANTED with respect to Request for Production No. 20. The corporate Defendants shall serve supplemental written responses and produce their corporate tax returns and bank statements for "the four years before the filing of the Complaint on July 21, 2017." Pursuant to the Protective Order, these documents shall be designated "For Attorneys' Eyes Only."

- RFP No. 21: All tax returns and bank statements of any Individual Defendant since 2008.

The Court's Order denied the MTC without prejudice with respect to RFP No. 21. As with RFP No. 20, the Court determined that Plaintiff had not shown that the information it was seeking from Defendants' tax returns and bank statements was not available

from other sources. However, once again, denial was without prejudice to "renewing the request following a showing that the documents produced by Defendants in their supplemental productions are insufficient." (Order at 31). Plaintiff argues that the reasons supporting the renewal of Request for Production No. 20 also warrant renewal of Request for Production No. 21. (Jt. Stip. at 17-18). The Court disagrees.

It is not entirely clear to the Court how the individual Defendants' personal tax returns are relevant to the claims and defenses in this action. While the individual Defendants' personal tax returns should reflect any income derived from the corporate Defendants, the corporate Defendants' financial information, which the Court has ordered Defendants to produce with respect to Request for Production No. 20, is a much more direct source of such information. Accordingly, Plaintiff's need for the information does not outweigh the individual Defendants' interest in maintaining the privacy of their tax returns.

Similarly, the individual Defendants' bank statements are likely to include much information that is plainly irrelevant to this action, such as purchases of personal consumer goods and services, including, potentially, protected health care information. The individual Defendants' right to keep such information private outweighs Plaintiff's alleged need for the information. Accordingly, the Motion is DENIED with respect to Request for Production No. 21.

V. Conclusion

For the reasons stated above and at the hearing, Plaintiff's Motion is GRANTED IN PART and DENIED IN PART. The request for a contempt finding is

DENIED. The requests for supplemental responses and documents with respect to Interrogatory No. 15 and Requests for Production of Documents Nos. 19 and 20 are GRANTED, as modified by this Order. The requests for supplemental responses and documents to Interrogatory No. 5 and Request for Production No. 21 are DENIED. The remaining requests for further responses are DENIED AS MOOT. Defendants shall produce supplemental responses and documents as required by this Order within ten days of the date of this Order. Where information is unobtainable or no documents responsive to the requests exist, Defendants' supplemental written responses shall include a declaration by a person with knowledge describing the steps taken to discover information and to locate documents responsive to the requests.

/s/ Suzanne H. Segal
United States Magistrate Judge

Dated: June 27, 2018

MEMORANDUM DECISION AND ORDER, U.S. DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA (APRIL 26, 2018)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AECOM ENERGY & CONSTRUCTION, INC.,

Plaintiff,

v.

JOHN RIPLEY, ET AL.,

Defendants.

Case No. CV 17-5398 RSWL (SSx)

Before: Suzanne H. SEGAL,
United States Magistrate Judge.

MEMORANDUM DECISION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S AMENDED MOTION TO COMPEL RESPONSES TO INTERROGATORIES AND REQUESTS FOR PRODUCTION

I. Introduction

On April 12, 2018, Plaintiff filed an Amended Motion to Compel Responses to Interrogatories and

Requests for Production against Defendants. (Dkt. No. 109). The Parties filed a Joint Stipulation pursuant to Local Rule 37-2. ("Jt. Stip.," Dkt. No. 110).[1] On April 24, 2018, the Court held a hearing. For the reasons stated below and at the hearing, Plaintiff's Motion is GRANTED IN PART and DENIED IN PART.

II. Background Information

The Complaint alleges that Plaintiff is an engineering firm, formerly known as Morrison Knudsen Corporation ("MK"), that is still the registered owner of MK's trademark rights in the United States. (Complaint, Dkt. No. 1, 1 3). Plaintiff states that it continues to use the MK name and trademarks in brochures and client presentations. (*Id.* 1 22).

Plaintiff further alleges that in 2008, Defendants fraudulently took over two dissolved MK affiliates and acquired two other unrelated entities that they renamed as MK affiliates. (*Id.* 11 27-36). The Complaint sues those four entities along with Gary Topolewski, who Plaintiff alleges "controls the Defendant entities." (*Id.* 1 9). The Complaint raises Lanham Act claims for false designation of origin, false advertising, and cyberpiracy, 15 U.S.C. § 1125, and state law claims for unfair competition and false advertising. (*Id.* 11 52-73). The Complaint also petitions the Court for cancellation of Defendants' fraudulent registration of the MK trademark. *(Id.* 11 74-78).

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[1] In the Joint Stipulation, Plaintiff appears to have incorporated by reference the declaration of Yungmoon Chang ("Chang Decl.," Dkt. No. 100), which was filed on March 16, 2018 in support of Plaintiff's original motion to compel. (*See*, *e.g.*, Jt. Stip. at 6 & n.1).

On December 4, 2017, Plaintiff served Interrogatory Nos. 1–2 and Request for Production No. 1. (Chang Decl. 1 4). On January 3, 2018, Defendants served responses. (*Id.*). On January 12, 2018, Plaintiff served Request for Production Nos. 2–21 and Interrogatory Nos. 3–15. (*Id.* ¶ 5). On February 14, 2018, Defendants served responses. (*Id.*). On April 2, 2018, Defendants served supplemental responses. (Jt. Stip. at 5).

Plaintiff originally moved to compel further responses to its discovery requests on March 16, 2018. (Dkt. No. 98). On March 20, 2018, the Court denied that motion without prejudice to refiling if any disputes remained after the Parties met and conferred in person pursuant to Local Rule 37-2. (Dkt. No. 102). The instant Amended Motion followed on April 12, 2018.

III. Standards

A. Scope Of Permissible Discovery

Federal Rule of Civil Procedure 26(b)(1), as amended on December 1, 2015, provides:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information

> within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1).

Accordingly, the right to discovery, even plainly relevant discovery, is not limitless. Discovery may be denied where: "(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1)." Fed. R. Civ. P. 26(b)(2)(C); *Tedrow v. Boeing Employees Credit Union,* 315 F.R.D. 358, 359 (W.D. Wash. 2016) (quoting same). "Federal district courts are vested with broad discretion in resolving discovery disputes and deciding whether to grant or deny a motion to compel." *Sherrill v. DIO Transp.,* Inc., 317 F.R.D. 609, 612 (D. S.C. 2016).

B. Privacy

"Federal Courts ordinarily recognize a constitutionally-based right of privacy that can be raised in response to discovery requests." *Soto v. City of Concord,* 162 F.R.D. 603, 616 (N.D. Cal. 1995) "[T]he right to privacy is not a recognized privilege or absolute bar to discovery, but instead is subject to the balancing of needs." E.E.O.C. *v. California Psychiatric Transitions,* 258 F.R.D. 391, 395 (E.D. Cal. 2009); *Soto,* 162 F.R.D. at 616 ("Resolution of a privacy objection or request for a protective order requires a balancing of the need for the information sought against the privacy right asserted."). The right to privacy has been held to cover information about

personal finances. *See DeMasi v. Weiss,* 669 F.2d 114, 119 (3d Cir. 1982).

Under federal law, tax returns in particular "do not enjoy an absolute privilege from discovery." *Premium Services Corp. v. Sperry & Hutchinson Co.,* 511 F.2d 225, 229 (9th Cir. 1975); *Heathman v. United States District Court,* 503 F.2d 1032, 1035 (9th Cir. 1974) (Title 26 U.S.C. § 6103(a)(2) restricts the dissemination of tax returns only by the government and does not otherwise make copies of tax returns privileged). "Nevertheless, a public policy against unnecessary public disclosure [of tax returns] arises from the need, if the tax laws are to function properly, to encourage taxpayers to file complete and accurate returns." *Premium Services Corp.,* 511 F.2d at 229.

Courts generally apply a two-pronged test to balance the liberal scope of discovery and the policy favoring the confidentiality of tax returns. *See A. Farber & Partners, Inc. v. Garber,* 234 F.R.D. 186, 191 (C.D. Cal. 2006); *Hilt v. SFC Inc.,* 170 F.R.D 182, 189 (D. Kan. 1997). First, the court must find that the returns are relevant to the subject matter of the action. Second, the court must find that there is a compelling need for the returns because the information contained therein is not otherwise readily obtainable. *Farber,* 234 F.R.D. at 191.

C. Trade Secrets

There is no absolute privilege for trade secrets and similar confidential information. *DIRECTV, Inc. v. Trone*, 209 F.R.D. 455, 458 (C.D. Cal. 2002) (citing *Federal Open Mkt.* Comm. *v. Merrill,* 443 U.S. 340, 362 (1979); *see also Hartley Pen* Co. *v. United States Dist. Court,* 287 F.2d 324, 325 (9th Cir. 1961)).

Nevertheless, as the Advisory Committee Notes to the 1970 Amendment to Rule 26(c) state: "[Although] courts have not given trade secrets automatic and complete immunity against disclosure, [they] have in each case weighed their claim to privacy against the need for disclosure." As one court has explained:

> First, the party opposing discovery must show that the information is a "trade secret or other confidential research, development, or commercial information" . . . and that its disclosure would be harmful to the party's interest in the property. The burden then shifts to the party seeking discovery to show that the information is relevant to the subject matter of the lawsuit and is necessary to prepare the case for trial.
>
> [¶] If the party seeking discovery shows both relevance and need, the court must weigh the injury that disclosure might cause to the property against the moving party's need for the information. If the party seeking discovery fails to show both the relevance of the requested information and the need for the material in developing its case, there is no reason for the discovery request to be granted, and the trade secrets are not to be revealed.

In re Remington Arms Company, Inc., 952 F.2d 1029, 1032 (8th Cir. 1991); *see also DIRECTV,* 209 F.R.D. at 459 (quoting same).

IV. Discussion

A. Interrogatories

1. Standard

"The purpose of interrogatories is to allow the parties to prepare for trial and inform the parties what evidence they must meet." *Citibank, N.A. v. Savage (In re Savage),* 303 B.R. 766, 773 (Bankr. D. Md. 2003); *see also Soria v. Oxnard School Dist. Bd. Of Trustees,* 488 F.2d 579, 587 (9th Cir. 1973). To that end, interrogatories may be properly used to "'obtain information necessary to use other discovery devices effectively, including identifying witnesses whose depositions should be taken. . . .'" *Essex Ins.* Co. *v. Interstate Fire & Safety Equip. Co./Interstate Fire & Safety Cleaning Co.,* 263 F.R.D. 72, 75 (D. Conn. 2009) (quoting 7 James Wm. Moore et al., Moore's Federal Practice ¶ 33.03 (3d ed. 2004)). Overly broad and unduly burdensome interrogatories "are an abuse of the discovery process" and are routinely denied. *See, e.g.*, Lucero *v. Valdez,* 240 F.R.D. 591, 594 (D. N.M. 2007) (interrogatories requiring responding party to state "each and every fact" supporting the party's contentions impermissibly overbroad); *Rivera v. Nibco, Inc.,* 364 F.3d 1057, 1072 (9th Cir. 2004) (noting generally that district courts "need not condone the use of discovery to engage in 'fishing expedition[s]'").

A responding party must respond to interrogatories under oath to the fullest extent possible, Fed. R. Civ. P. 33(b)(3), and any objections must be stated with specificity. Fed. R. Civ. P. 33(b)(4); *Davis v. Fendler,* 650 F.2d 1154, 1160 (9th Cir. 1981). "The answers to interrogatories must be responsive, full, complete

and unevasive." *Continental Ill. Nat'l Bank & Trust* Co. *v. Caton,* 136 F.R.D. 682, 684 (D. Kan. 1991) (internal citation and quotation marks omitted); *see also Chubb Integrated Systems Ltd. v. National Bank of Washington,* 103 F.R.D. 52, 61 (D. D.C. 1984) (parties have "a duty to provide true, explicit, responsive, complete and candid answers to interrogatories"). A party answering interrogatories cannot limit his answers to matters within his own knowledge and ignore information reasonably available to him or under his control. *Essex Builders Group, Inc. v. Amerisure Insurance Co.,* 230 F.R.D. 682, 685 (M.D. Fla. 2005). While a responding party is not generally required to conduct extensive research to answer an interrogatory, a reasonable effort to respond must be made. *Gorrell v. Sneath,* 292 F.R.D. 629, 632 (E.D. Cal. 2013). "If a party is unable to supply the requested information, the party may not simply refuse to answer, but must state under oath that he is unable to provide the information and set forth the efforts he used to obtain the information." *Hansel v. Shell Oil Corp.,* 169 F.R.D. 303, 305 (E.D. Pa. 1996) (internal quotation marks and citation omitted).

2. Disputed Interrogatories[2]

a. Interrogatory Nos. 1, 2

Plaintiff asserts that the contract and corporate revenue information sought by Interrogatory Nos. 1 and 2 is relevant to its prayer for damage. (Jt. Stip. 9-11). Defendants object to each of these interrogatories in their entirety on the grounds that (1) responding

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[2] The Court will address Plaintiff's discovery requests in the order in which they are presented in the Joint Stipulation.

would require disclosure of trade secrets and invade Defendants' and third parties' privacy rights, and (2) the information requested is irrelevant and overbroad. (*Id.* at 7).

- Interrogatory No. 1: Identify with specificity each contract into which any Defendant has entered to provide products or services under or using the Morrison Knudsen name (including as part of a longer corporate name) by Defendants from 2008 to the present. Contracts shall include, without limitation, contracts for the provision of engineering, design or construction services or for the sale of construction equipment or other goods. For each such contract, provide the parties to each contract, date entered into, dates of services provided, nature and scope of services provided, dollar value of each contract, and revenue received by any Defendant or affiliate of any Defendant to date for each contract.

The MTC is GRANTED IN PART with respect to Interrogatory No. as modified by the Court. The scope of the request shall be limited to the four years before the filing of the Complaint on July 21, 2017. Should Defendants elect to produce the contracts pursuant to Rule 33(d) in lieu of providing a written response, third party names and job site locations may be redacted. However, redactions are without prejudice to Plaintiff renewing the request for actual third party names and locations on a showing of good cause.

- Interrogatory No. 2: For each Corporate Defendant, identify all revenue earned since the Date of Inception.

The MTC is GRANTED IN PART with respect to Interrogatory No. as modified by the Court. The scope of the request shall be limited to the four years before the filing of the Complaint on July 21, 2017.

b. Interrogatory Nos. 13, 14, 15

Interrogatory Nos. 13, 14 and 15 seek information about Topolewski America, Inc., a company which Plaintiff contends is owned by Defendant Gary Topolewski and does the same kind of work that Defendants do under the MK brand. (Jt. Stip. at 8-11). Plaintiff contends that the information is relevant to its damage requests, shows the value of the MK brand, and is accessible to Topolewski. (*Id.*). Defendants argue that Topolewski America is a third party and that Topolewski's ownership of the company does not give Plaintiff a right to unlimited information about a non-party. *(Id.* at 11-13).

- Interrogatory No. 13: Describe the business and activities of Topolewski America, Inc., including by describing its relationship to any Defendant and the role of any Defendant in the business of Topolewski America, Inc.

The MTC is DENIED with respect to Interrogatory No. 13. Defendants' answer is sufficiently responsive to the request.

- Interrogatory No. 14: Identify each and every shareholder, director, officer, and employee of Topolewski America, Inc., since its date of incorporation.

The MTC is GRANTED IN PART with respect to Interrogatory No. 14, as modified by the Court. The scope of the request shall be limited to the four years before the filing of the Complaint on July 21, 2017.

- Interrogatory No. 15: Identify all revenues and profits earned by Topolewski America, Inc. since its date of incorporation and how those revenues and profits, in whole or in part, are shared with or received by any of the Defendants.

The MTC is DENIED WITHOUT PREJUDICE with respect to Interrogatory No. 15. Defendants' answer is sufficiently responsive to the request based on the record presented to the Court. However, denial is without prejudice to Plaintiff renewing the request on a showing of good cause upon further discovery concerning Topolewski America's connection to this case.

c. Interrogatory No. 3

Interrogatory No. 3 seeks information about the Corporate Defendants' shareholders, directors, officers and employees. (Jt. Stip. at 18). Plaintiff contends that the information provided by Defendants is insufficient because it does not identify dates of service, does not include information about shareholders, employees, Topolewski or Mike Johnson, and the addresses provided do not exist. (*Id.* at 13-18). Defendants contend that they have provided the names and last known addresses of their officers and directors, and that it would be unduly burdensome to provide the dates of service and the names and contact information of shareholders and employees. (*Id.* at 18).

The requested disclosures would also invade third party employee privacy rights. (*Id.*).

- Interrogatory No. 3: Identify each and every shareholder, director, officer, and employee of the Corporate Defendants, including Individual Defendants, since each Corporate Defendant's Date of Inception, by providing each individual's full name, physical address (not simply that he can be contacted via counsel), telephone number(s), title(s), and dates during which such individual served in such capacity.

The MTC is GRANTED IN PART with respect to Interrogatory No. 3. Defendants shall serve supplemental responses providing the information requested for all categories of persons listed in the request, and shall include dates served and last known telephone numbers.

d. Interrogatory No. 5

Interrogatory No. 5 seeks information about the reinstatement or renaming of each of the corporate Defendants. (*Id.* at 18). Subject to certain objections, Defendants responded that unknown MK employees approached Tom Porter in 2006 about reviving the "discarded company," which Porter passed on to current management. (*Id.* at 19). Plaintiff argues that the response does not identify either "Tom Porter" or the individual "current management" members he approached. (Jt. Stip. at 18-20). Nor does it explain why Defendants chose the MK name, identify submissions to the government, or show that Defendants obtained permission from MK to do so. (*Id.*). Defendants

contend that level of detail Plaintiff is seeking is more appropriate for a deposition. (*Id.* at 20-21).

- **Interrogatory No. 5:** Describe the facts and circumstances surrounding the reinstatement or renaming of each of the Corporate Defendants at their Dates of Inception, including but not limited to, the actions taken by the decision-makers and all other persons involved, all reasons for choosing to reinstate Morrison Knudsen entities or to rename entities using the Morrison Knudsen name, identification of all submissions to governmental agencies, and any authority granted to Defendants by the Original MK to take such actions.

The MTC is GRANTED IN PART with respect to Interrogatory No. 5. Defendants shall serve a supplemental response clarifying who "Tom Porter" is and his connection, if any, to any Defendant in this case, and supplying Porter's contact information, including last known address and telephone number where available.

e. Interrogatory No. 8

Interrogatory No. 8 seeks the full legal name and address of every person who signed a form submitted to the Nevada Secretary of State on behalf of any of the Corporate Defendants. (Jt. Stip. at 21). Defendants responded with the name and the last known address for Todd Hale. (Jt. Stip. at 21). Plaintiff contends that the address provided for Hale does not exist, and that Defendants' response does not provide information for everyone whose name appears on the relevant corporate records. (*Id.* at 21-22).

Defendants state that the information provided reflects the best available information. (*Id.* at 23).

- **Interrogatory No. 8:** Identify each person (including by providing his or her full legal name and complete physical address) who signed a form submitted to the Nevada Secretary of State on behalf of each Corporate Defendant after their respective Dates of Inception.

The MTC is GRANTED IN PART with respect to Interrogatory No. 8. Defendants shall serve a supplemental response clarifying whether Todd Hale and Bud Zukaloff are the same person and explaining how Defendants obtained the address(es) that Plaintiff contends is/are erroneous. The supplemental response shall include contact information, including the last known address and telephone number, for every person named in the response.

f. Interrogatory No. 9

Interrogatory No. 9 seeks the full legal name and address of every person who signed a form submitted to the United States Patent and Trademark Office on behalf of any of the Corporate Defendants. (Jt. Stip. at 21). Defendants responded with the names and the last known addresses for Todd Hale and Bud Zukaloff, noting that "Bud Zukaloff is the only name of which the Responding Parties are aware for Mr. Zukaloff." Plaintiff contends that "Bud Zukaloff" does not appear to be a full "legal" name and that the address provided for him is a P.O. Box at a UPS store. (*Id.* At Defendants state that the information provided reflects the best available information. (*Id.* at 25).

- **Interrogatory No. 9:** Identify each person (including by providing their full legal name and complete physical address) who signed a form submitted to the United States Patent & Trademark Office on behalf of each Corporate Defendant after their respective Dates of Inception, including the Assignment of Trademark shown on Dkt. 142 at 3.

The MTC is GRANTED IN PART with respect to Interrogatory No. 9. Defendants shall serve supplemental responses clarifying whether Todd Hale and Bud Zukaloff are the same person and explaining how Defendants obtained the address(es) that Plaintiff contends is/are erroneous. The supplemental response shall include contact information, including the last known address and telephone number, for every person named in the response.

g. Interrogatory No. 11

Interrogatory No. 11 requires Defendants to identify the person who authored the response to Diana Torres from the email address *info@morrison-knudsen.com* on June 1, 2017. (Jt. Stip. At Defendants state that after a diligent search, they are unable to determine who authored the email. (*Id.*). Plaintiff contends that Defendants' response is not credible, as Defendants know how their emails are routed and who has access to and is capable of responding to emails sent to that account. (*Id.* at 25-27). Plaintiff also states that at a minimum, Defendants must describe the steps they took to try to identify the author of the email. (*Id.*). Defendants state that they are still unable to identify the author, but assert that

discovery and the investigation are ongoing. *(Id.* at 27).

- **Interrogatory No. 11:** Identify the person who authored the response to Diana Torres from the email address *info@morrison-knudsen.com* on June 1, 2017, as shown in Dkt. 19-9, Ex. 9 at 179–80.

The MTC is GRANTED with respect to Interrogatory No. 11. Defendants shall serve a supplemental response either identifying the actual respondent, or, if the actual respondent remains unknown, the person or persons affiliated with Defendants who had access to the *info@morrison-knudsen.com* account during the relevant period. Defendants shall state whether each person so identified was primarily or regularly responsible for responding to emails sent to that account, and explain the steps taken to identify the respondent.

h. Interrogatory No. 12

Interrogatory No. 12 requires Defendants to describe all instances in which third parties believed or appeared to believe that the Corporate Defendants were endorsed by the Original MK. (Jt. Stip. at 27). Defendants responded that they are unaware of any belief formed by any third party that the Corporate Defendants were endorsed by the Original MK. (*Id.*). Plaintiff contends that Defendants' response is not credible because Defendants have access to their employees and documents, and have already admitted that several AECOM employees have contacted the Corporate Defendants "over the years" to ask "if it was OK if Aecom could claim that they built those projects performed by [MK] since the thirties" so as

to "pad their resumes." (*Id.* at 27). Defendants also did not discuss an email from Michael Gallo to Defendants regarding Northern toolboxes sold on Defendants' website. (*Id.* at 28) (citing Chang. Decl., Exh. T). Defendants respond that they have no way of knowing what third parties subjectively thought. (*Id.* at 29).

- **Interrogatory No. 12:** Describe all instances in which any third party believed, or appeared to believe, that the Corporate Defendants were affiliated or associated with, sponsored by, endorsed by, or in any way related to the Original MK, or were using the Morrison Knudsen name with the authorization of anyone associated with the Original MK.

The MTC is DENIED with respect to Interrogatory No. 12. The Court finds that Defendants' objections are well taken, *i.e.*, Plaintiffs have not demonstrated that Defendants possess information regarding the beliefs of third parties.

C. Requests For Production Of Documents

1. Standard

Pursuant to Federal Rule of Civil Procedure 34(a), a party may request documents "in the responding party's possession, custody, or control." Rule 34(b) requires the requesting party to describe the items to be produced with "reasonable particularity." Fed. R. Civ. P. 34(b)(1). "'All-encompassing demands' that do not allow a reasonable person to ascertain which documents are required do not meet the particularity standard of Rule 34(b)(1)(A)." *In re Asbestos Products*

Liability Litigation (No. VI), 256 F.R.D. 151, 157 (E.D. Pa. 2009).

Following a reasonable investigation, a responding party must serve a written response to each request either (1) stating that the materials requested will be produced, in whole or in part; (2) affirming that no responsive documents exist in the party's possession, custody or control; or (3) posing an objection and stating *"with specificity* the grounds for objecting to the request, including the reasons." Fed. R. Civ. P. 34(b)(2)(B) (emphasis added); *see also Leibovitz v. City of New York,* 2017 WL 462515, at *2 (S.D. N.Y. Feb. 3, 2017) (collecting cases for the proposition that revisions to the Federal Rules effective December 1, 2015 prohibit "general" or "boilerplate" objections). Also pursuant to 2015 amendments, if objections are made, the "objection must state *whether any responsive materials are being withheld* on the basis of that objection." Rule 34(b)(2)(C) (emphasis added). If the search does not reveal responsive materials, the responding party should provide sufficient information for the requesting party, and the court, to be satisfied that the investigation was adequate. *Atcherley v. Clark,* 2014 WL 4660842, at *1 (E.D. Cal. Sept. 14, 2014) (internal citations omitted).

However, a court cannot order a party to produce documents that do not exist. A plaintiff's mere suspicion that additional documents must exist is an insufficient basis to grant a motion to compel. *See Bethea v. Comcast,* 218 F.R.D. 328, 329 (D. D.C. 2003). Rather, the moving party must have a colorable basis for its belief that relevant, responsive documents exist and are being improperly withheld. *See Carter v. Dawson,* 2010 WL 4483814, at *5 (E.D. Cal. Nov. 1, 2010)

(defendants' representation that they are unable to locate responsive documents precludes the grant of a motion to compel "unless Plaintiff can identify a specific document that Defendants have withheld"); *Ayala v. Tapia,* 1991 WL 241873, at *2 (D. D.C. Nov. 1, 1991) (denying motion to compel where moving party could not identify withheld documents).

2. Disputed Production Requests

a. RFP Nos. 8, 9

RFP Nos. 8 and 9 seek exemplars of Defendants' use of the MK name or logo in advertising and promotion. (Jt. Stip. at 29-30). Defendants state that they will produce an exemplar of their letterhead (RFP No. 8) and refer Plaintiff to the website located at *morrion-knudsen.com* for other exemplars (RFP Nos. 8 & 9). *(Id.)* Plaintiff argues that documents responsive to RFP No. 4 would be responsive to RFP No. 8 and should be produced, and that Defendants should also produce screenshots of the website, which they concede they have, in response to RFP No. 9. (*Id.* at 32-33). Defendants state that they have produced all documents in their possession, custody and control and are not withholding any documents pursuant to an objection. (*Id.* at 33).

- RFP No. 8: Exemplars of all documents authored or forms used by any Defendant displaying the Morrison Knudsen name or logo, including letterhead, business cards, business forms, and signature blocks in letters and emails.

The MTC is DENIED with respect to RFP No. 8. Apart from the documents Defendants state they

have produced, the materials requested are equally available to the Parties.

- **RFP No. 9:** Exemplars of all advertisements, marketing and promotional materials used by any Defendant displaying the Morrison Knudsen name or logo, including brochures, pamphlets, flyers, and press releases.

The MTC is DENIED with respect to RFP No. 9. Apart from the documents Defendants state they have produced, the materials requested are equally available to the Parties.

b. RFP No. 10

RFP No. 10 seeks all documents created under the MK brand in response to requests for proposals or invitations to bid. (Jt. Stip. at 30). Defendants object to RFP No. 10 in its entirety on the grounds that the requests would require production of trade secrets, invade Defendants' and third-party privacy rights, and are irrelevant and overbroad. (*Id.*). Defendants further state that documents are being withheld pursuant to these objections. (*Id.*). Plaintiff contends that the documents (1) are relevant to showing that Defendants conducted business in the MK name, (2) would reflect third party beliefs that Defendants are affiliated with MK, and (3) are relevant to damage. (*Id.* at 32-33). Defendants state their supplemental responses indicate whether documents are being withheld and on what basis. (*Id.* at 33).

- **RFP No. 10:** All documents created in response to requests for proposals and invitations to bid sent to any Defendant utilizing the Morrison Knudsen name or logo.

The MTC is GRANTED IN PART with respect to RFP No. 10, as modified by the Court. The materials requested are plainly relevant to the claims and defenses in this action and the request is proportional to the needs of this case. Defendants have not shown why the Protective Order would be insufficient to protect their privacy and trade secret concerns.

The scope of the request shall be limited to the four years before the filing of the Complaint on July 21, 2017. Defendants may redact third party names and job site locations from the production. However, redactions are without prejudice to Plaintiff renewing the request for actual third party names and locations on a showing of good cause.

c. RFP Nos. 12, 13

RFP Nos. 12 and 13 seek documents relating to Defendants' communications with government and other third party entities regarding the MK name and logo. (Jt. Stip. at 30-31). Defendants state that they will produce documents filed with the Nevada Secretary of State (RFP No. 12) and other documents "filed with regard to the trademarks (RFP No. 13). (*Id.* at 31). Defendants further state that they have no other documents in their possession, custody or control and are not withholding any documents pursuant to an objection. (*Id.*). Plaintiff states with respect to RFP No. 12 that Defendants should be required to identify who Walter Yee is, who filed a California registration that Defendants produced. (*Id.* at 33). With respect to RFP No. 13, Plaintiff argues that Defendants should confirm they do not have a change of owner's address for Reg. No. 1716505 or a certificate for Reg. No. 5,077,287. (*Id.*). Defendants

state their supplemental responses indicate whether documents are being withheld and on what basis. (*Id.*).

- **RFP No. 12:** All communications between or among any Defendant and the Nevada Secretary of State, California Secretary of State, United States Patent & Trademark Office or any other governmental or third party entity regarding your use of the Morrison Knudsen name or logo.

The MTC is DENIED with respect to RFP No. 12. Responses to production requests address the existence or non-existence of responsive documents and whether or not such documents are being withheld. The Federal Rules do not require a responding party to provide a narrative explaining the documents or identifying persons named in them. The information Plaintiff seeks about Mr. Yee is more appropriately sought through other discovery devices, such as interrogatories or depositions.

- **RFP No. 13:** All documents relating to the registration of any trademark consisting of or including the term "Morrison Knudsen" or MKCO, including but not limited to all documents concerning applications, change of address forms, assignments, responses to office actions, notes of calls with examiners, and internal or external correspondence regarding the same.

The MTC is DENIED WITHOUT PREJUDICE with respect to RFP No. 13. Defendants have stated that they have no further documents apart from the documents that they have produced with their sup-

plemental responses. If Plaintiff wishes to challenge that representation, it must conduct additional discovery to test Defendants' assertions. Accordingly, RFP No. 13 is DENIED WITHOUT PREJUDICE to renewing the request on a showing that Defendants' representations are not accurate.

d. RFP No. 15

RFP No. 15 seeks documents sufficient to show all of the addresses for the Corporate Defendants since their inception. Defendants object to RFP No. 15 on the grounds that it is overbroad, vague and ambiguous. (*Id.* at 32). Because Defendants claim that RFP No. 15 "fails to identify what documents are requested," they state that documents are potentially being withheld pursuant to the objections. (*Id.*). Plaintiff argues that Defendants have not identified what they believe is vague and ambiguous about the request. (*Id.* at 33). Defendants state their supplemental responses indicate whether documents are being withheld and on what basis. (*Id.*).

- **RFP No. 15:** Documents sufficient to identify all places of business (including all physical addresses) of any Defendant since the Date of Inception for each Corporate Defendant.

The MTC is DENIED with respect to RFP No. 15. Plaintiff has not shown why the information requested is relevant and proportional to the needs of this case, and why it is not duplicative. Furthermore, the type of information Plaintiff seeks is more appropriately sought through other discovery devices, such as interrogatories or depositions.

e. RFP Nos. 1, 4, 11, 14, 19, 20, 21

RFP Nos. 1, 4, 11, 14, 19, 20, 21 seek contracts, documents reflecting compensation and revenue, communications with potential customers under the MK name, and tax documents. (Jt. Stip. at 3336). Defendants object to all of these requests in their entirety on the grounds that the requests would require production of trade secrets, invade Defendants' and third-party privacy rights, and are irrelevant and overbroad. (*Id.* 33-36). Defendants further state that documents are being withheld pursuant to these objections. (*Id.*). Plaintiff contends that the documents are relevant to show Defendants' use of the MK name and to its prayer for damage, particularly as they relate to the disgorgement of profits. (*Id.* at 35-38). Plaintiff further maintains that Defendants' privacy objections are baseless because the protective order will sufficiently protect any privacy interests. (*Id.*). Defendants emphasize that there is no compelling need for tax returns, especially the individual Defendants' tax returns, as individual income that the tax returns might reflect are irrelevant to the determination of corporate profits. (*Id.* at 38-41).

- **RFP No. 1:** All contracts into which any Defendant has entered to provide products or services under or using the Morrison Knudsen name (including as part of a longer corporate name) by Defendants from 2008 to the present, including but not limited to contracts for engineering, design or construction services, or for the sale of construction equipment or other goods.

The MTC is GRANTED IN PART with respect to RFP No. 1, as modified by the Court. The materials

requested are plainly relevant to the claims and defenses in this action and the request is proportional to the needs of this case. Defendants have not shown why the Protective Order would be insufficient to protect their privacy and trade secret concerns.

The scope of the request shall be limited to the four years before the filing of the Complaint on July 21, 2017. Defendants may redact third party names and job site locations from the production. However, redactions are without prejudice to Plaintiff renewing the request for actual third party names and locations on a showing of good cause.

- **RFP No. 4:** Documents reflecting compensation to any Defendant arising from any business activities conducted using the Morrison Knudsen name, including any share of profits in any business conducted by the Corporate Defendants.

The MTC is GRANTED IN PART with respect to RFP No. 10, as modified by the Court. The materials requested are plainly relevant to the claims and defenses in this action and the request is proportional to the needs of this case. Defendants have not shown why the Protective Order would be insufficient to protect their privacy and trade secret concerns.

The scope of the request shall be limited to the four years before the filing of the Complaint on July 21, 2017. Defendants may redact third party names and job site locations from the production. However, redactions are without prejudice to Plaintiff renewing the request for actual third party names and locations on a showing of good cause.

- **RFP No. 11:** All communications between or among any Defendant and potential customers or media in which any Defendant used the Morrison Knudsen name or logo.

The MTC is GRANTED IN PART with respect to RFP No. 11, as modified by the Court. Defendants have not shown why the Protective Order would be insufficient to protect their privacy and trade secret concerns. However, without further limitations, it would be difficult for Defendants to know when and if they have fully responded to the production request.

The scope of the request shall be limited to the four years before the filing of the Complaint on July 21, 2017. Defendants may redact names of third party potential customers and job site locations from the production, but not media names. However, redactions are without prejudice to Plaintiff renewing the request for actual third party names and locations on a showing of good cause. The Parties shall meet and confer *within ten days of the date of this Order* to identify the custodians whose records are to be searched and the key word search terms to be applied to the search. The number of custodians and search terms shall be reasonable and proportionate to the needs of this case.

- **RFP No. 14:** All documents relating to financial applications, including bank account applications, applications for credit, and applications for loans, using the Morrison Knudsen name or logo.

The MTC is GRANTED with respect to RFP No. 14. The financial documents requested may contain relevant admissions showing Defendants' use of the

Morrison-Knudsen name and representations to third parties, among other pertinent information. Defendants have not shown why the Protective Order would be insufficient to protect their privacy and trade secret concerns. However, Defendants may redact social security numbers.

- **RFP No. 19:** All documents relating to or reflecting any revenue received by any Defendant arising in any way relating to the use of the Morrison Knudsen name or logo, including all monthly, quarterly and annual income statements, balance sheets and other financial statements of any Corporate Defendant since such Corporate Defendant's Date of Inception.

The MTC is GRANTED IN PART with respect to RFP No. 19, as modified by the Court. The materials requested are plainly relevant to the claims and defenses in this action and the request is proportional to the needs of this case. Defendants have not shown why the Protective Order would be insufficient to protect their privacy and trade secret concerns.

The scope of the request shall be limited to the four years before the filing of the Complaint on July 21, 2017. Defendants may redact third party names and job site locations from the production. However, redactions are without prejudice to Plaintiff renewing the request for actual third party names and locations on a showing of good cause.

- **RFP No. 20:** All tax returns and bank statements of any Corporate Defendant since such Corporate Defendant's Date of Inception.

The MTC is DENIED WITHOUT PREJUDICE with respect to RFP No. 20. Plaintiff has not shown that the information it seeks from Defendants' tax returns and bank statements is not available from other sources. Accordingly, DENIAL is WITHOUT PREJUDICE to renewing the request following a showing that the documents produced by Defendants in their supplemental productions are insufficient.

- **RFP No. 21:** All tax returns and bank statements of any Individual Defendant since 2008.

The MTC is DENIED WITHOUT PREJUDICE with respect to RFP No. 21. As with RFP No. 20, Plaintiff has not shown that the information it seeks from Defendants' tax returns and bank statements is not available from other sources. Accordingly, the DENIAL is WITHOUT PREJUDICE to renewing the request following a showing that the documents produced by Defendants in their supplemental productions are insufficient.

f. RFP Nos. 2 and 3

RFP Nos. 2 and 3 seek documents relating to the sale of construction equipment on the "Infringing Website" and at *www.topcor.us/for-sale.html,* which is apparently the website for Topolewski America, of which Defendant Topolewski is purportedly the president. (Jt. Stip. at 41-42). Defendants state that they are unable to locate any responsive materials and affirm that no documents are being withheld on the basis of any objection. (Jt. Stip. at 41-42). Plaintiff states that it is "not credible" that Defendants have no documents relating to construction equipment that was available on their website until its deactivation

or on the Topolewski America website as recently as March 2, 2018. (*Id.* at 42-44). If no documents survive, Plaintiff contends that Defendants must identify when the equipment was destroyed or disposed of, and list all steps taken to preserve the relevant documents." (*Id.*). Defendants state that are unable to locate any responsive documents, but assert that discovery and the investigation are ongoing. (*Id.* at 44).

- **RFP No. 2:** The following documents relating to construction equipment that has been shown for sale on the Infringing Website, since the date of creation of the Infringing Website: purchase agreements, sale agreements, maintenance records, and documents showing the current location for each piece of equipment.

The MTC is GRANTED IN PART AND DENIED IN PART with respect to RFP No. 2. Defendants state that they have no responsive documents and that no responsive documents are being withheld. If Plaintiff wishes to challenge that representation, it must conduct additional discovery to test Defendants' assertions. However, Defendants shall provide a declaration describing the steps taken to locate and preserve materials responsive to this request. *See Atcherley,* 2014 WL 4660842, at *1 ("In responding to discovery requests, a reasonable inquiry must be made, and if no responsive documents or tangible things exist, the responding party should so state with sufficient specificity to allow the Court to determine whether the party made a reasonable inquiry and exercised due diligence.") (internal citations omitted). Furthermore, denial of RFP No. 2 is WITHOUT

PREJUDICE to Plaintiff renewing the request on a showing that Defendants' representations about the lack of responsive materials are not accurate, or to seeking other relief if materials that should have been preserved were destroyed.

- **RFP No. 3:** The following documents relating to construction equipment that has been shown for sale at the domain *www.topcor.us/for-sale.html,* since the date of creation of the Infringing Website: purchase agreements, sale agreements, maintenance records, and documents showing the current location for each piece of equipment.

The MTC is GRANTED IN PART AND DENIED IN PART with respect to RFP No. 3. Defendants state that they have no responsive documents and that no responsive documents are being withheld. If Plaintiff wishes to challenge that representation, it must conduct additional discovery to test Defendants' assertions. However, Defendants shall provide a declaration describing the steps taken to locate and preserve materials responsive to this request. *See Atcherley,* 2014 WL 4660842, at *1. Furthermore, denial of RFP No. 3 is WITHOUT PREJUDICE to Plaintiff renewing the request on a showing that Defendants' representations about the lack of responsive materials are not accurate, or to seeking other relief if materials that should have been preserved were destroyed.

g. RFP No. 7

RFP No. 7 seeks documents relating to third party beliefs that Defendants are associated with the Original MK. (Jt. Stip. at 44). Defendants state that

they will produce documents filed with the Nevada Secretary of State. (*Id.*). Defendants further state that they have no other documents in their possession, custody or control and are not withholding any documents pursuant to an objection. (*Id.*). Plaintiff argues that documents responsive to RFP No. 4 would be responsive to RFP No. 7 and should be produced. (*Id.* at 45). Plaintiff further contends that Defendants' response is not credible because Defendants have access to their employees and documents, and have already admitted that several AECOM employees have contacted the Corporate Defendants "over the years" to ask "if it was OK if Aecom could claim that they built those projects performed by [MK] since the thirties" so as to "pad their resumes." (*Id.*). Defendants state that are unable to locate any responsive documents, but assert that discovery and the investigation are ongoing. (*Id.*).

- **RFP No. 7:** All documents concerning the belief by third parties that any Defendant is associated or affiliated with, sponsored or endorsed by, or in any way related to the Original MK.

The MTC is DENIED WITHOUT PREJUDICE with respect to RFP No. 7. Defendants state that they have no responsive documents apart from those filed with the Nevada Secretary of State, which were produced, and that no responsive documents are being withheld. If Plaintiff wishes to challenge that representation, it must conduct additional discovery to test Defendants' assertions. Accordingly, RFP No. 7 is DENIED WITHOUT PREJUDICE to renewing the request on a showing that Defendants' representations are not accurate.

V. Conclusion

For the reasons stated above and at the hearing, Plaintiff's Motion is GRANTED IN PART and DENIED IN PART. **Where required by this Order, Defendants shall provide supplemental responses and documents, if any, by May 15, 2018. The supplemental responses shall be accompanied by a declaration by a person with knowledge describing the steps taken to discover information and to preserve and locate documents responsive to the requests.**

/s/ Suzanne H. Segal
United States Magistrate Judge

Dated: April 26, 2018

ORDER, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING (DECEMBER 15, 2023)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

URS HOLDINGS, INC., AN OHIO CORPORATION,

Plaintiff-Appellee,

v.

GARY TOPOLEWSKI,

Defendant-Appellant,

and

JOHN RIPLEY; ET AL.,

Defendants.

No. 22-55546

D.C. No. 2:17-cv-05398-RSWL-AGR
Central District of California, Los Angeles

Before: SCHROEDER, FRIEDLAND, and MILLER, Circuit Judges.

The panel has unanimously voted to deny appellant's petition for rehearing. Judge Friedland and Judge Miller have voted to deny the petition for

rehearing en banc, and Judge Schroeder so recommends. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and rehearing en banc is DENIED.

GARY TOPOLEWSKI'S PETITION FOR PANEL REHEARING OR REHEARING EN BANC (NOVEMBER 21, 2023)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-55546

AECOM ENERGY & CONSTRUCTION, INC.,

Plaintiff-Appellee,

v.

GARY TOPOLEWSKI, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
Central District of California
The Honorable Ronald S.W. Lew
Case No. 2:17-cv-05398-RSWL-ARG

GARY TOPOLEWSKI'S PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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Defendant and Appellant Gary Topolewski ("Gary") submits this Petition for Rehearing or Rehearing *En Banc* following this Court's Memorandum Opinion of September 18, 2023

I. Request for Rehearing *En Banc*

By its Memorandum Opinion, this Court has ratified the district court's imposition of a $36 million evidentiary sanction and terminating sanction against Gary for conduct undertaken entirely by other defendants. Worse, the Memorandum Opinion—like the district court's order before it—dedicates only a single passing paragraph to justifying this extreme outcome as to Gary. The due process implications of such disproportionate and punishing sanctions compel rehearing *en banc* for further elucidation of the facts below and to allow this Court the opportunity to detail —in a full opinion—how such an extreme outcome can possibly be justified.

II. Introduction and Summary

Respondent AECOM Energy & Construction, Inc. ("AECOM") sued several corporations (the "Corporate Defendants")—as well as allegedly related individuals (including Gary)—for infringement-related claims arising from the Corporate Defendants' use of the "Morrison Knudsen" name. After this Court reversed a speculative $2 billion summary judgment, the district court found the Corporate Defendants failed to produce certain financial documents, and it awarded $36 million in evidentiary and terminating sanctions against all the defendants.

To justify those extreme sanctions against Gary individually, the district court, in a single paragraph,

found that the sanctions were justified because Gary (again, as an individual defendant) failed to show up to a deposition, showed up late to the rescheduled deposition, supposedly left early, and "failed to respond to discovery requests propounded on him." The district court also stated, without explanation, that "it is proper for the Court to refer to Defendants as a collective." That order was then summarily affirmed in this Court's Memorandum Opinion.

Given the grave consequences and serious due process implications, this Court should grant rehearing for three interconnected reasons. First, the record is clear that Gary was no longer involved with the Corporate Defendants and had no hand in their supposed discovery abuse. Even if the district court disbelieved Gary's uncontroverted testimony, due process requires a jury to assess credibility. Second, Gary's own conduct does not warrant sanctions: he answered the discovery propounded on him, sat for a lengthy deposition, and even offered to sit for another day (which AECOM refused). Ninth Circuit precedent confirms that the issuance of terminating sanctions for that type of conduct violates due process and is therefore reversible. Third, Gary submits that this Court could only have arrived at the anomalous conclusion it did by way of a misunderstanding of the critical facts of this case. Accordingly, Gary respectfully requests rehearing.

III. Relevant Procedural Background

Because one of the grounds Gary asserts for rehearing is that this Court misunderstood the material facts of the case, Gary submits a brief summary of those facts in this section.

A. The Complaint

On July 21, 2017, AECOM filed its Complaint against the Corporate Defendants, Gary in his individual capacity, and four other individual defendants. 6-ER-1072–1092. In essence, the Complaint alleged infringement-based causes of action related to the Corporate Defendants' alleged use of the "Morrison Knudsen" name and trademark. *Id.* Notably, Gary is the only individual defendant who appeared in the case and participated in litigation; the others defaulted. 6-ER-1071.[1]

B. The Preliminary Injunction

At the outset of the case, the district court issued a preliminary injunction, ordering the Corporate Defendants to change their names and to stop using the Morrison Knudsen name on their websites. *See* 6-SEOR-2530. Although the Corporate Defendants did change their names, AECOM still moved for an order of contempt, claiming the changes were not enough to distinguish the Corporate Defendants from the Morrison Knudsen brand. *See* 6-SEOR-2531. Counsel for the defendants (before Gary obtained separate counsel) failed to file an opposition in time, and counsel's request to file a late opposition was denied. 6-SEOR-2532. The district court accordingly granted the motion for contempt against all defendants as unopposed. 6-SEOR-2534.

In its analysis and order, the district court incorrectly (though perhaps understandably, given the

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[1] Throughout the litigation, the Corporate Defendants were represented by and spoke through a common officer, Mike Johnson. *See, e.g.*, 6-SEOR-2545.

lack of opposition) treated all the defendants (including the individual Gary) as a single unit and ordered all parties to submit a supplemental declaration detailing how they have or will comply with the preliminary injunction. 6-SEOR-2541. In response, Gary submitted a declaration attesting that he spoke with Johnson—who told him the Corporate Defendants "took appropriate actions to effectuate the order"—and confirming that was the extent of Gary's ability to influence the Corporate Defendants. 6-SEOR-2544. Johnson submitted a declaration detailing the efforts of the Corporate Defendants. 6-SEOR-2545-2548. AECOM's subsequent motion for further civil contempt was denied on all grounds except for on the issue of failure to timely pay attorney's fees. 6-ER-1021-1035.

C. Discovery

On November 29, 2017, the district court entered a scheduling order that set the discovery cut-off for June 26, 2018. 6-ER-114 at Dkt. 71. AECOM served Interrogatories and Requests for Production on the defendants in December and January, respectively. *See* 6-ER-1037-1038. In response to those requests, Gary confirmed that he was "no longer affiliated with [the Corporate Defendants]" and did not have access to corporate records. 3-ER-320-328.

In ruling on successive motions to compel further responses to those requests, the magistrate judge in this case ruled that (1) Gary did not have to produce information or documents about his personal finances or the finances of his non-party businesses, (2) the Corporate Defendants did have to produce their own financial information and bank statements, and (3)

Gary did not have access to Corporate Defendants' records and therefore was not required to produce documents in response to requests for those documents. 6-ER-1003–1020, 1036–1070.

AECOM then served requests for admission in May 2018. However, due to another misstep by Gary's first counsel, those admissions were not initially answered and therefore were deemed admitted. Gary later successfully moved to have those admissions withdrawn on the basis that neither his former counsel nor AECOM's counsel communicated to him or his new counsel the existence of the requests for admission. *See* 6-ER1126 at Dkt. 165; 1127 at Dkt. 197, 1128 at Dkt. 214, 1130 at Dkt. 231. Gary then answered those requests. *See* 2-SEOR-1528-1545.

On June 18, 2018, Gary sat for deposition from 11:19 a.m. to 6:46 p.m. *See* 3-SEOR-1658. At that deposition, Gary detailed that he was contacted by (defaulting defendant) Henry Blum in around 2007 or 2008 regarding "reviving" the Morrison Knudsen trademark. 3-SEOR-1667-1668, 1696-1670, 1700, 1711. Gary's role was to file the necessary paperwork and to obtain a contractor's license. 3-SEOR-1668. Gary candidly admitted that he expected to receive monetary compensation if the company ever obtained work but, to his knowledge, it never did. 3-SEOR-1716. He also confirmed that his role with the Corporate Defendants was minimal—amounting to no more than "maybe half a dozen hours a year." 3-SEOR-1716.[2]

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[2] Although AECOM represented to the district court and this Court that "[Gary's] breaks totaled nearly two hours," AECOM neglects to mention that each of those breaks were requested by AECOM's counsel—not Gary. 2-ER-90; 3-SEOR-1746. In fact,

D. Summary judgment and first appeal

AECOM moved for summary judgment. 6-ER-1122 at Dkt. 157. Gary's counsel again failed to timely oppose AECOM's motion for summary judgment and had to request leave to file a late opposition. 6-ER-1126 at Dkt. 186. Ultimately, the District Court considered the late-filed opposition, granted AECOM's motion, and entered a damage award totaling over $1.8 billion, based solely on three hearsay "press releases" AECOM found online. 6-ER-1131 at Dkt. 243.

Appellants timely appealed, and this Court reversed, finding the unauthenticated press releases had essentially no evidentiary value:

> Even if we were to view the press releases in the light most favorable to AECOM, we doubt they would support an inference that there were "sales"—i.e., monies actually received—by Defendants-Appellants, in any amount, much less in the amount of $1.8 billion. And this is without even considering that there was no evidence in the record that Defendants-Appellants had started any of the claimed massive construction contracts or were remotely able to undertake any of the construction

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Gary declined to take a break to answer his phone when given the opportunity by counsel. *See* 3-SEOR-1725. AECOM also neglects to mention that Gary agreed to sit again in a few weeks when his schedule permitted—which admittedly would have been beyond the discovery deadline—but AECOM refused to stipulate to extend the discovery deadline, despite Gary previously extending the same courtesy to accommodate the schedule of AECOM's witnesses. *See* 2-ER-91–92.

AECOM Energy & Constr., Inc. v. Morrison Knudsen Corp., 851 F. App'x 20, 22, n. 4 (9th Cir. 2021)

The Court mused in dicta, however, that evidentiary sanctions might be appropriate, if the Corporate Defendants failed to produce evidence of sales or profits on remand. *Id.*, n. 5 ("We express no opinion on whether any such sanction would be appropriate.").

E. Remand

On remand, the district court reprimanded both sides, with particular emphasis on the failures of Gary's counsel and on the lack of diligence on the part of AECOM:

> To a large extent, the defendants did nothing and left me in a very terrible position. The plaintiff likewise did nothing because they could have done other forms of discovery without utilizing the Court's procedures because, for crying out loud, if [Bureau of Land Management] had such a big contract with the defendants, I'm sure that there would be other areas where they could find the information instead of just giving me the announcement.
>
> . . . . .
>
> But I was stuck with the position that I had. And the argument as made by [then-counsel for Appellants] in the defense against the plaintiff summary judgment motion was one where they did nothing, they had not—did not deny anything, and I was stuck with the position of what I had to do. And I ended up saying, if they didn't do anything,

> if they didn't deny it, I will have to give summary judgment.
>
> I was not happy with the $1.8 billion because of the lack of materials presented by the plaintiffs.
>
> You guys, plaintiff, could have done more period. I was very upset at you guys.

4-ER-713–714.

Thereafter, AECOM did not propound new discovery on any of the defendants, did not ask Gary or Mike Johnson to sit for another deposition, and did not subpoena the organizations in the press releases (e.g., the Bureau of Land Management) as the district court suggested they do. 3-ER-302. Instead, AECOM served third-party subpoenas on banks, telephone providers, and other entities, seeking information about the Corporate Defendants and Gary individually. 4-ER-613; 5-ER-791-896. Since the magistrate had already ruled that AECOM was not entitled to Gary's personal information, Gary (now represented independently) successfully moved to quash those subpoenas. *See* 4-ER-617-621.

The upshot of AECOM's overbroad subpoenas and Gary's successful motion to quash them was that the subpoenaed entities refused to produce any documents until the resolution of Gary's motion. Therefore, the production of the Corporate Defendants' information would not occur until likely after the discovery cut-off. 2-ER-101-102. Gary's counsel proposed a stipulation to continue the discovery cut-off and trial date to allow that information to produced, but AECOM refused to agree to the stipulation. *Id*. Instead, they

moved for sanctions that same day. Compare id. with 6-ER-1146 at Dkt. 398.

F. Sanctions and the Memorandum Opinion

On February 25, 2022, the district court entered its sanctions order, granting $36 million in evidentiary sanctions and terminating sanctions against all defendants. 1-ER-5-52. The majority of the order discusses and pertains to the Corporate Defendants' failures to produce adequate financial information and their violation of the preliminary injunction. *Id*.

The order addressed Gary in only a single paragraph:

> [Gary's] attempt to distance himself from Corporate Defendants is unavailing. As this Court has found, he was extensively involved with Corporate Defendants despite his current statements to the contrary. [Gary] himself has also failed to comply with his discovery obligations which were in his control. He failed to appear for his first deposition, arrived late to his second deposition and left early, and failed to respond to discovery requests propounded on him. Accordingly, it is proper for the Court to refer to Defendants as a collective and find that [Gary's] conduct, too, was willful and bind him to this Order.

1-ER-32–33.

Gary (and the Corporate Defendants) appealed, and this Court affirmed the sanctions in its Memorandum Opinion, which similarly addressed Gary in a nearly-identical, single paragraph:

> [T]he district court did not abuse its discretion in applying the sanction to [Gary] along with the Corporate Defendants. It found that [Gary], who held multiple executive roles with the Corporate Defendants, is jointly and severally liable for the infringement at issues in the case and was "extensively involved with Corporate Defendants despite his current statements to the contrary." In addition, [Gary] was involved in other willful misconduct highlighted by the district court as deserving of sanctions, including violating a preliminary injunction, failing to respond to other discovery requests, and failing to appear at his first deposition.

(Opn. 4.)

This Court granted Gary two extensions to bring a petition for rehearing, and Gary now timely does so.

IV. Standard for Rehearing

Rehearing may be granted where the opinion of the court was based on an error or mistake of law. *See California River Watch v. City of Vacaville*, 39 F.4th 624, 633 (9th Cir. 2022) (issuing new opinion: "Because it is 'never too late to surrender former views to a better considered position,' we reverse our prior holding in favor of the better reading of RCRA."); *id.* ("there is 'no reason why [we] should be consciously wrong today, because [we were] unconsciously wrong yesterday") (citing *Massachusetts v. United States*, 333 U.S. 611, 639–40 (1948) (Jackson, J., dissenting)).

Rehearing may also be granted where the original opinion is based on a misunderstanding of the critical facts or issues of the case. See *Silva-Calderon v. Ashcroft*, 371 F.3d 1135, 1136 (9th Cir. 2004) (granting rehearing because the prior opinion misunderstood the critical facts of the case); *see also* Goelz, Batalden & Querio, Rutter Group Prac. Guide: Federal Ninth Circuit Civil Appellate Practice (The Rutter Group 2023) § 11-B ("A petition for rehearing is appropriate if the court's decision was based on a misunderstanding of the material facts or issues in the case.") (citing *Kassas v. State Bar of Calif.*, 49 F4th 1158, 1160 (9th Cir. 2022)).

Here, the Memorandum Opinion appears to satisfy both those criteria for rehearing.

V. Discussion

A. The sanctions against Gary violate due process

This Court's approval of the district court's sanctions against Gary constitutes a serious violation of due process that warrants rehearing. *California River Watch*, 39 F.4th at 633.[3]

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[3] In effect, the district court's sanctions order is no more than a re-do of the reversed summary judgment—without even the benefit of a "trial"—that replaces the completely ludicrous $2 billion in damage with a smaller but equally outrageous $36 million figure. Of course, the end result is the same: an unfounded award, whether $2 billion or $36 million, is absolutely crippling and insurmountable to an individual defendant like Gary. Such a weighty sanction without a trial should be given the highest scrutiny.

With respect to terminating sanctions, "[d]ismissal is a permissible sanction only when the deception relates to the matters in controversy, and because dismissal is so harsh a penalty, it should be imposed only in extreme circumstances." *Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d 585, 589 (9th Cir. 1983). Thus, "[s]anctions interfering with a litigant's claim or defenses violate due process when imposed merely for punishment of an infraction that did not threaten to interfere with the rightful decision of the case." *Id.* at 591.

1. Gary cannot be sanctioned for the Corporate Defendants' Conduct

As a general rule, a defendant cannot be sanctioned for the conduct of a codefendant. *See e.g. Loops, LLC v. Phoenix Trading, Inc.*, 594 F. App'x 614, 619 (Fed. Cir. 2014); *Apple Inc. v. Samsung Elecs. Co.*, 888 F. Supp. 2d 976, 995 (N.D. Cal. 2012)

Here, the district court's grant of sanctions was based almost entirely on the Corporate Defendants' failings in this case. The district court cites the Corporate Defendants' failures to respond to discovery, to produce documents ordered by the court, and to abide the preliminary injunction. *See generally* 1-ER-5-51 (sanctions order). As Gary testified—and as the magistrate judge in the case agreed—Gary had no hand in that conduct, had no access to corporate records, and could not control or speak for the Corporate Defendants. *See* 6-ER-998.

The district court's contrary finding that Gary was "extensively involved with Corporate Defendants despite his current statements to the contrary" is made without explanation or factual support. As Gary tes-

tified under oath, the plan to "revive" the Morrison Knudsen trademark was developed by Henry Blum—the real "mastermind"—who approached Gary in around 2007 or 2008. *See supra*, p. 9. Gary filed the paperwork naming himself "president," expected compensation (which never came), and put a grand total of about six hours of work into the Corporate Defendants in any given year. *See id.* His involvement was, in fact, very little. To the extent the district court disbelieved that testimony, that is a jury function and, indeed, precisely what due process protections are meant to ensure. *Cf. United States v. Zuno-Arce*, 44 F.3d 1420, 1423 (9th Cir. 1995), as amended (Feb. 13, 1995) ("The district court was not obligated to decide the credibility question and strike their testimony, because the determination of credibility is for the jury.")

2. Gary's conduct does not warrant the sanctions levied by the district court

The mere failure to sit for a deposition or answer discovery responses—if eventually remedied, as occurred here—is not grounds for sanctions.

For example, in *U.S. for Use and Ben. of Wiltec Guam, Inc. v. Kahaluu Const. Co., Inc.*, 857 F.2d 600, 603 (9th Cir. 1988) ("*Kahaluu*"), a defendant (Kahaluu) missed a first noticed deposition but later sat for a deposition. *Id.* at 601. The district court granted terminating sanctions for the failure to appear at the noticed time and entered judgment against Kahaluu. *Id.* at 602. In reversing the sanctions on due process grounds, the Ninth Circuit explained that there was "no indication that the defendants' violations in any way threatened to distort the resolution" of the

plaintiff's claims because "Kahaluu's deposition, while delayed, was in fact taken before the motion for sanctions was heard." *Id.* at 604.

The only actual conduct of Gary's that the district court cites to justify the extreme sanctions in this case is that Gary "failed to appear for his first deposition, arrived late to his second deposition and left early, and failed to respond to discovery requests propounded on him" 1-ER-32. However, as *Kahaluu* demonstrates, that conduct cannot justify the extreme sanctions here because Gary (1) sat for his deposition, (2) offered another day (which AECOM's counsel refused), and (3) eventually answered the discovery. The district court's decision thus raises the question: What more could Gary even have done to avoid these sanctions?[4]

3. Conclusion as to due process

In sum, it is axiomatic that a party cannot be sanctioned for another party's conduct. That is precisely what the district court's order and the Memorandum Opinion do, and in dramatic fashion. Gary's only attributable transgressions (if one could call them that) were his failure to show up to a deposition and his late arrival to the rescheduled deposition. That simply cannot justify $36 million in evidentiary and terminating sanctions, and this Court should grant

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[4] It is worth noting that AECOM submitted no evidence in the district court in support of its claim that Gary missed his first deposition. AECOM submitted the certificates of nonappearance for Mike Johnson and for the other Corporate Defendants but not for Gary. 6-SEOR-2292-2314. The record shows he did sit for a deposition, regardless of whether it was the first or second noticed. *See* 3-SEOR-1658

rehearing to remedy that deprivation of Gary's right to a trial.

B. The Memorandum Opinion was likely based on a misapprehension of the facts

The due process analysis is so straightforward, Gary submits, that this Court could only have reached the conclusion it did by way of a misunderstanding of the material facts. That is, this Court likely incorrectly surmised that Gary was personally involved in the Corporate Defendants' discovery failures or in their violation of the preliminary injunction. As noted, however, the record does not support that finding; Gary testified to the exact opposite. Thus, this Court should grant rehearing to remedy any misunderstanding of the facts to resolve a disposition that comports to those facts. *See Silva-Calderon*, 371 F.3d at 1136.

VI. Conclusion

This Court's Memorandum Opinion affirms a district court order that upon scrutiny constitutes a violation of Gary's due process rights and an abuse of the district court's discretion. Not only is that an error of law, but Gary submits that this Court could only have reached that anomalous conclusion by way of a misunderstanding of the facts of this case. For those reasons, and the reasons stated here, Gary requests either a panel rehearing or a rehearing *en banc*.[5]

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[5] While Gary has described in summary fashion the critical facts to this petition, he would welcome the opportunity to submit supplemental briefing on rehearing regarding the factual

Higgs Fletcher & Mack LLP

By: /s/ John Morris, Esq.
Steven Brunolli, Esq.
Attorney for Appellants

Dated: November 21, 2023

background, if the Court believes that is necessary or helpful to resolve this matter.

**TRANSCRIPT OF PROCEEDINGS,
RELEVANT EXCERPTS
(JUNE 22, 2021)**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA –
WESTERN DIVISION

AECOM ENERGY & CONSTRUCTION, INC.,
AN OHIO CORPORATION,

Plaintiff,

v.

JOHN RIPLEY, ET AL.,

Defendants.

Case No. CV 17-5398 RSWL

Before: Hon. Ronald S.W. LEW, District Judge.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
TUESDAY, JUNE 22, 2021
10:10 A.M.
LOS ANGELES, CALIFORNIA

[June 22, 2021, Transcript, p. 709]

THE CLERK: Calling CV 17-5398-RSWL, AECOM Energy and Construction, Inc., versus John Ripley, et al.

Counsel, please state your appearances.

MS. CHANG (for the Plaintiff): Good morning, Your Honor. On behalf of plaintiff, Yungmoon Chang; and with me today is my co-counsel, Ms. Diana Torres.

MR. JAHRMARKT (for the Corporate Defendants): Good morning, Your Honor. John Jahrmarkt for the corporate defendants.

MR. GIBSON (for Mr. Topolewski) : Good morning, Your Honor. Stan Gibson on behalf of Gary Topolewski.

THE COURT: Mr. Jahrmarkt?

MR. JAHRMARKT: Yes, Your Honor.

THE COURT: You represent all the corporations in this case?

MR. JAHRMARKT: Yes. I think there is four corporations.

THE COURT: Okay. We're here for status conference on this case being returned from the Circuit. I have read the positions of the individual and the plaintiff.

For the corporation, do you have anything to add?

MR. JAHRMARKT: No. We would be on the same page as the individual defendant—

THE COURT: You have to use the microphone if you speak even if you sit. You could stay where you are. Have a microphone in front of you so we can have it heard by everybody.

MR. JAHRMARKT: Okay. Your Honor, we don't have any difference in position between the corporate defendants and the individual.

THE COURT: Great.

Do you have anything to add, plaintiff?

MS. CHANG: Nothing further from plaintiff, Your Honor.

THE COURT: You may all be seated. Speak into the microphone. I would rather hear you than seeing you stand up at this point in time.

Since you know one another, it would assist the Court to hear you. If you want to—I'm not asking you to. If you want to and when you are speaking, take the mask off. But if you don't want to, leave your mask on but speak directly into the microphone. I just want to be heard. I want it to be reported.

You are not objecting to my taking my mask off because I am behind plexiglass, and I want you to actually hear me. Okay.

You have each taken your positions with regard to four topical areas. I will take the first topical point as stated by you with regard to the opening of discovery.

Plaintiff asked that discovery open. Defendants have objected. Obviously, the ruling on this matter may obviate everything else, or it may have further discussions for the other topics.

But with regard to discovery, what do you expect to find?

MS. CHANG: Your Honor, we're not certain what we expect to find, and that's because we have not been afforded the opportunity for discovery on these specific topics with respect to the bank accounts of the corporate defendants and Mr. Topolewski.

The reason we were unable to take that discovery prior, Your Honor, is because we had been pursuing responses to our request for production and there was, in fact, a pending motion to compel and a motion for contempt at the time that our summary judgment briefing was—had concluded, and there was a bank that was first identified to us in September of 2018 after the summary judgment briefing had concluded three months after the close of discovery—

THE COURT: What did you expect to obtain by having a motion for contempt?

MS. CHANG: For the motion to compel and for contempt for failure to respond, what we sought was responses regarding information regarding the defendants' bank account in order to prove up the profits for our damage calculation, Your Honor—

THE COURT: Neither of you were the attorneys of record for each of the defendants prior to the summary judgment ruling.

MR. JAHRMARKT: You—I'm sorry. I didn't mean to interrupt, Your Honor.

But, yes, I previously represented all the defendants in this case.

THE COURT: The corporate defendants?

MR. JAHRMARKT: Including the corporate defendants and Gary Topolewski, not the other individuals.

I don't know—at some point, I was subbed out and a new lawyer came in, the Adli firm. And the Adli firm subsequently was substituted out. So I don't know which series of events counsel is talking about and whether I was counsel at the time or not.

THE COURT: Then a lot of this is your fault.

MR. JAHRMARKT: It—I will take the blame for it if I—

THE COURT: Not your fault per se, but I wish you had been the lawyer then because there were too many issues during the course of the discovery—during the course of the summary judgment filing that had been the subject of the Circuit Court ruling. A lot of this—I want to vent a little bit to all of you.

To a large extent, the defendants did nothing and left me in a very terrible position. The plaintiff likewise did nothing because they could have done other forms of discovery without utilizing the Court's procedures because, for crying out loud, if BLM had such a big contract with the defendants, I'm sure that there would be other areas where they could find the information instead of just giving me the announcement.

I was put in a very—I was presented with a big problem in a summary judgment ruling. Everything that was discussed at the Circuit in your argument with regard to the summary judgment ruling were all discussed in my chambers, and I

was so frustrated. I covered every one of these points, and I went around in circles because I ended up having to confront the issue with what to do.

One of the options that I did not choose but had considered was to grant liability judgment but not the damage portion because I saw that there was too wide a spread between not giving the plaintiffs any money and the amount that's alleged with regard to the amounts contract without supportable evidence beyond the announcement. It was just too wide a spread.

But I was stuck with the position that I had. And the argument as made by the Adli firm in the defense against the plaintiff summary judgment motion was one where they did nothing, they had not—did not deny anything, and I was stuck with the position of what I had to do. And I ended up saying, if they didn't do anything, if they didn't deny it, I will have to give summary judgment.

I was not happy with $1.8 billion because of the lack of materials presented by the plaintiffs.

You guys, plaintiff, could have done more, period. I was very upset at you guys.

But in any event, it makes no difference who I was upset against. I don't know if I was mad against the plaintiff or madder against the defendants' attorney, Adli firm, for not even denying those contracts were actually in existence. They just ignored it altogether.

And that created a big problem because not denying it under—pursuant to our Local Rules, they accepted it. In any event, it was a big, big problem that was posed.

I am venting a little bit because I think I have come to the position that where we are at at this time, I think I should exercise my discretion to allow this case to complete its discovery so that we can have something more viable upon which I could make a ruling with regard to damage.

And if you can't settle it after this discovery, then at least we should have a good trial in that regard.

So as I am venting it out to you, my thoughts are with the Court's discretion, I would like to open up discovery. You have to tell me how long a discovery. Then we will have a pretrial date and a trial date.

Before that, the last two dates, I am sure that there will be pretrial motions, perhaps another summary judgment motion, and maybe it resolves everything. Or you might see the light and resolve this case because it's not—well, I won't comment on that. That's where I am at.

Comments? Criticisms? Your positions?

Plaintiff.

MS. TORRES: Your Honor, this is Diana Torres. First off, I will apologize to the Court for placing you in the position in which you felt uncomfortable. I take responsibility for that. It was my decision, and I—

THE COURT: I knew it was. I didn't use your name. I gave you the evil eye though.

MS. TORRES: Well, fortunately, my vision isn't all that great. So I couldn't quite see the evil eye, but we shared your frustration. It was never our intent going into this case, even when we were preparing our summary judgment papers, to use the press releases until we had nothing else left, and that was the decision we made.

THE COURT: I knew that was going to be your answer. And I wasn't going to chew you out for that. I realize the Adli firm made this situation intolerable for you. I know that for a fact because the Adli firm created a big problem for me too, not just on this motion but on other motions before this Court.

They just don't do—well, let me not comment in that. They're not here to defend themselves.

I have what I have before me at any given time. I had to do what I had to do for the summary judgment ruling. I did what I had to do, but I was not happy.

I did the best job I could, and I concur with the dissent in the Circuit Court opinion, but I still wouldn't like the amount.

You had to justify it. There is so much you could do. So I am sure in third-party discovery you could find out a lot more or even forget about third-party. Just discovery itself in your search I am sure you could find things out.

But in any event, is that your only comment?

MS. TORRES: No, Your Honor.

The one other comment is we would like and would have preferred at the time to get the financial discovery from all of the defendants because, honestly, that would show much more concrete information and enable us to collect, which I'd rather collect a small amount than chase a large amount any day.

THE COURT: I am glad you said that because that had occurred in my discussions during the summary judgment consideration.

And for the defense position, you should recognize that, when I considered that, that should be the decision on the part of plaintiff. The problem was I did not have a basis upon which I can reduce that amount of 1.8 billion to a more reasonable amount.

And, quite frankly, I'll just say it like it is because the circuit used it so often. Circuit said I did not consider sanctions, discovery sanctions. I did. I did. But the problem is what is there to review for me at that juncture?

And I said to myself—this is for your edification now. I said to myself what sanction can I impose against the defendants that would be adequate in any way given the nature of this case? A thousand dollars a day? $500,000 a day? A million dollars a day?

It's just all over the ballpark. And at the end of the day, any amount of sanction may be worthwhile for the defendants to accept and do nothing to comply with discovery because it's

cheaper to pay the sanction than it is to pay any judgment.

That's the quandary I was in. And I did not want you people to make that decision. So I had to give nothing or everything to the plaintiff.

So—I forgot where I was.

Did you want to respond?

MR. GIBSON: Your Honor, this is Stan Gibson on behalf of Gary Topolewski. I am the one who is new to the party here.

And I share the Court's frustration when I picked up this file and had to deal with the appeal. So I understand the Court's frustration with the record because the record was a difficult one.

And I think going forward I just would like to make sure that there is a difference between Mr. Topolewski and the corporation, and the discovery is different with respect to that.

I don't think that the plaintiffs can turn this into a collection case. That's not what this is about. Discovery shouldn't be determining collection issues. It should be determining damage issues, and that's the only comment I would like to make.

I don't know what discovery they intend to serve, but we would like to make sure it's focused on damage issues and not collection issues.

MR. JAHRMARKT: I would agree with that especially in light of Ms. Torres's comment that she would rather collect a small amount than chase after a large amount.

It sounds like we are on a collection discovery, which is not really what we should be here for.

And a lot has transpired in this case between the time I left it and came back but—so I can't really comment upon what Ms. Chang said about—

THE COURT: Ms. Torres.

MR. JAHRMARKT: No. Yungmoon Chang. I think I got the last name right.

Right?

MS. TORRES: Correct.

MR. JAHRMARKT: Okay. Good. It's been about two years, I think.

If that's all that the defense has—the plaintiff has to say about why they didn't get this discovery before, what did they do in order to try to get the discovery that they need going forward and, specifically other than bank account information, what other discovery are they looking for.

I really—and, again, there is a big chunk of this case that I am not familiar with, but I would suggest that maybe there is a briefing schedule to explain what it is that they are looking for and decide if it's really something that they didn't have the opportunity to find previously and whether there is good cause for that.

THE COURT: Point 1, I am not looking at damage as a collection issue. It may end up being a collection issue for them with whatever amount that is ended up with by judgment or by agreement. Okay? That's not within my purview at this juncture.

When we're talking about discovery with regard to damage, I am talking about with regard to damage on the claims before the Court by the individual defendants and the corporate defendants.

Now, I know that neither the defense—two defense attorneys in court are the attorneys of record with respect to the individual defendants that the plaintiff has already obtained default and default judgment on.

But since the default and default judgment is with regard to whole amount as to those individuals, at some juncture, when we resolve this case, I am going to have-you should or I will do it on my own—modify the judgment with regard to those individuals that will comport to the facts that we end up with. Okay?

That being said, I move on. So it's not a collection issue. It's a damage issue. And you have to look at the claims that are involved. And there is a lot of frustration with regard to discovery because I did not directly get involved with discovery.

Magistrate Judge Segal did the discovery. I got on her case about the discovery—or not on her case. I had full discussions with her about discovery in this case, and she was more frustrated than I was in the ruling that I had here.

In other words, this is a very awkward situation where we had the discovery that was the—developed by the magistrate judge, and I had what I had at the time for discovery based upon the discovery, which is nothing for consideration than summary judgment ruling.

It's not ideal in any way. But the discovery for damage are typically the discovery that one would have if the case proceeded by way of discovery, ultimately to be presented to trial, not just the bank accounts, but the bank accounts are circumstantial with regard to—it leads to what was done.

I'm sure that there is going to be other discovery with regard to what kind of contracts. We're only talking about the three contracts at issue—or four contracts at issue that was announced by BLM.

But in discovery, you might end up with discovering other kinds of work, all of which is for your consideration to sit down and talk about and avoid all the problems and just settling this case.

Plaintiff made an overture to the defense. They would—they know they're not going to get $1.8 billion. It's up to you to sit down and see what is acceptable and let's close the case. Do not—well, I won't comment.

I don't know the status of what's going on with individual action or corporate action. I just don't know, and I am not going to speak to that.

But I will speak to the damage. I am going to open it up.

How long do you want the discovery to be?

MS. TORRES: We would ask for four to five months. I think we should be able to do it quicker than that, but in the past we faced obstacles. So—

THE COURT: You won't have the obstacles. It will be before me. I think we're just going to—a typical order assigning it to a magistrate judge is not within the purview of this case. I am going to keep everything here. Let's get it settled.

Magistrate Judge Segal is no longer here anyway. So it would be too much to give to another magistrate judge to review. You don't want to do that.

Okay. Four to five months?

MS. TORRES: Yes, Your Honor.

THE COURT: Your opinion?

MR. GIBSON: I think that's fine, Your Honor.

THE COURT: Give me a five-month date.

THE CLERK: November 22.

THE COURT: November 22 will be the termination of the discovery, last date for discovery, November 22.

Discovery issue, you file motions with this Court, and don't wait for the last day. Get everything done early. Try to get this case settled.

We have what I perceive to be reasonable attorney and—I'm sorry, Mr. Jahrmarkt. I didn't think you were the bad attorney for the corporation, but you weren't here. I'm sure it would not have been my dealing with Adli firm for the corporation. He was just stonewalling everything.

So let's work with each of the attorneys and get this thing resolved. If you have to, we'll go to

trial. But I don't think you need to go that far. Okay.

So that's your discovery cutoff—November 22.

Give me a January date for pretrial conference.

THE CLERK: January 25.

THE COURT: 2022, January 25 is your pretrial date.

And for your jury trial on damage?

THE CLERK: Is February 15 okay?

MS. TORRES: Yes, Your Honor.

MR. GIBSON: Your Honor, would it be possible to move that back a couple weeks? My daughter's birthday is the 17th. I usually go out to see her.

THE COURT: My daughter is 16th. I was going to defer—that's fine. Let's go first week in March.

THE CLERK: March 1 or March 8.

THE COURT: March 1, 2022, will be your trial date. If any other dates are not accommodating, I am sure you will make motions to adjust those dates.

But I think you have adequate time upon which to do what you need to do and adequate time to review where you are at, and you have a fresh outlook at the case looking at each other, talk to each other. Resolve it if you can. If you can't, I will deal with the motions pretrial. And if they aren't resolved, we'll just set it for trial.

MR. GIBSON: Your Honor, in terms of the settlement discussions, would Your Honor be willing to order us to a magistrate judge for settlement

conference? I am new to the case relatively, and I have had some discussions with Ms. Torres before the Ninth Circuit ruling, and I think that might be beneficial.

THE COURT: I will say this to you all. Usually, when you have a case, you have a preference of where you want to go—magistrate judge, private, or whatever. Options for you guys to do. We don't have a magistrate judge assigned to this case particularly but conferring with each other, if there is a magistrate judge that you all agree that you can go to and the magistrate judge agrees to take the case, do it.

And we have a panel of mediators, and there is private mediators too. You guys discuss it and see where it goes because I think reasonable minds certainly would have this case resolved.

Of course, there might need some modicum of facts to be presented. I know the situation. There might be closure to the corporation. Mr. Topolewski might be doing other things anyway.

The whole point is we're in different times, and there are certain different circumstances. You should consider it, and perhaps it should be settled with those considerations.

But as to the last part, the world is open to you. Find a person to go to. Do it by agreement. There is no good settlement unless you have an agreement to proceed that way.

So I don't want to order it to any one particular person. Find one agreeable to all of you and just

go to that person, have a meeting, and resolve it. Okay?

Anything else to discuss?

MS. TORRES: Your Honor, there is just the issue of the Website that they have put back up again, and we would be moving for further contempt on that issue as well.

THE COURT: Don't warn me. If that's the case-I think you have a new attorney, let them deal with it. If they don't take it down, make a motion. And I don't do it orally. I won't accept it orally. File your motion. They are on notice for that.

MS. TORRES: Yes. That's all I wanted to say.

THE COURT: That's no problem.

MS. TORRES: Thank you.

THE COURT: Is that the individual or the corporations?

MS. TORRES: I believe it is the individual because the Website, the Website is registered to a post office box in his name.

THE COURT: That's for you all to consider.

MR. GIBSON: I will, Your Honor. This is the first time I have heard of this post office box.

THE COURT: It's been discussed in paperwork. I just don't want to give value to that argument or lessen the value of the argument. I just don't know the facts.

But this has been discussed in the papers, and you should know the facts better than I do for your clients. All right?

MS. TORRES: Thank you, Your Honor.

MR. GIBSON: Nothing further, Your Honor.

MR. JAHRMARKT: Nothing further, Your Honor.

THE CLERK: This Court is adjourned.

THE COURT: Thank you for everything. And, hopefully—I urge you to be reasonable in your approach. Otherwise, you are going to give it to me, and I will do what I have to do again. All right? But you will do it in a better way if we did go that far.

Okay. Thank you.

THE CLERK: All rise.

This Court is adjourned.

(Proceedings concluded at 10:40 a.m.)

VIDEOTAPED DEPOSITION OF GARY TOPOLEWSKI, TRANSCRIPT EXCERPTS (JUNE 18, 2018)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AECOM ENERGY & CONSTRUCTION, INC., AN OHIO CORPORATION,

Plaintiff,

v.

GARY TOPOLEWSKI, ET AL.,

Defendants.

Case No. 2:17-CV-05398-RSWL (SSx)

VIDEOTAPED DEPOSITION
OF GARY TOPOLEWSKI

LOS ANGELES, CALIFORNIA
MONDAY, JUNE 18, 2018
VOLUME 1

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. . . are assuming a premise that is not correct. I am instructing the witness not to answer and that's it.

MS. TORRES (for the Plaintiff): On what basis? I want every basis on which you are instructing him not to answer.

MR. SHERMAN (for the Defendants): I'm just going to instruct him not to answer the question.

MS. TORRES: We will get the court on the phone.

MR. SHERMAN: If we need to, then we will.

BY MS. TORRES:

Q. Are you following your counsel's instruction?

A. Yes.

Q. Is Mike Johnson an officer of the corporate defendants?

MR. SHERMAN: Calls for a legal conclusion, assumes facts, speculation.

THE WITNESS (Mr. Topolewski): I believe he is.

BY MS. TORRES:

Q. Was he an officer of—was he an officer—I'm sorry, let me rephrase.

Do you believe he is an officer of each of the corporate defendants?

A. I don't know.

MR. SHERMAN: Same objections.

BY MS. TORRES:

Q. Did you believe in November of 2017, that he was an officer of any of the corporate defendants?

MR. SHERMAN: Same objections.

THE WITNESS: Yeah, I believe he was.

BY MS. TORRES:

Q. Do you believe at the time that he was an officer of all of the corporate defendants?

A. I don't know.

MR. SHERMAN: Same objections to the last question.

BY MS. TORRES:

Q. You don't know whether he was or you don't know whether or not you believe he was so at the time?

A. No, I don't believe if I knew he was an officer of all the corporations.

Q. What—which corporation do you believe he is an officer of?

MR. SHERMAN: His current belief?

MS. TORRES: Yes.

THE WITNESS: Right now?

BY MS. TORRES:

Q. Yeah.

A. I think Morrison Knudsen Company.

Q. Why do you believe that?

MR. SHERMAN: Narrative, vague, legal conclusion, speculation.

THE WITNESS: Just what he was working for at the time, what his job duties were?

BY MS. TORRES:

Q. What were his job duties?

MR. SHERMAN: Assumes facts, speculation.

THE WITNESS: I don't know.

BY MS. TORRES:

Q. You don't know any of his job duties?

A. No.

Q. Did you know any of his job duties in November of 2017?

MR. SHERMAN: Same objections.

THE WITNESS: He was just handling this matter.

BY MS. TORRES:

Q. Was he handling this matter at your instruction?

A. No.

Q. At whose instruction was he handling this matter?

MR. SHERMAN: Same objections and vague.

THE WITNESS: I don't know.

BY MS. TORRES:

Q. I'm going to ask the court reporter to mark as Exhibit 2, the "Declaration of Gary Topolewski in Support of Defendants' Opposition to Motion for Preliminary Injunction."

(Plaintiff's Exhibit 2 was marked for identification by the court reporter and is attached hereto.)

MR. SHERMAN: She's going to give me a copy but you're going to give them back to the court reporter when she is done with her questions. BY MS. TORRES:

Q. Is that your signature on page 2?

A. No.

Q. Do you know whose signature that is?

A. No, I don't.

Q. Do you recall ever seeing this document before?

A. No.

Q. Do you have any knowledge as to who signed that declaration?

A. No.

MR. SHERMAN: Let her finish her question.

THE WITNESS: Sorry.

BY MS. TORRES:

Q. You don't know who signed that declaration?

MR. SHERMAN: Asked and answered.

THE WITNESS: No.

BY MS. TORRES:

Q. Did the corporate defendants have a general E-mail box in approximately 2015?

MR. SHERMAN: Vague and ambiguous, compound.

THE WITNESS: What does that mean, "general"?

BY MS. TORRES:

Q. Info at.

A. Yes, it had info.

Q. And the E-mail address specifically was Info@Morrison-Knudson.com?

A. Yes.

Q. And who monitored that E-mail box in 2015?

MR. SHERMAN: Assumes facts.

THE WITNESS: Best as I can recall, I don't know.

BY MS. TORRES:

Q. Did you?

A. No.

Q. Have you ever monitored that E-mail address?

A. No.

Q. Who has?

MR. SHERMAN: Speculation, assumes facts, vague.

THE WITNESS: As best as I can recall, I think Henry Blum did once in a while.

BY MS. TORRES:

Q. And who is Henry Blum?

A. He was an officer of the one of the companies.

Q. How long have you known Mr. Blum?

MR. SHERMAN: Assumes facts.

BY MS. TORRES:

Q. You did know Mr. Blum, correct?

A. Yes.

Q. How long have you known him?

A. As best as I can recall, maybe sixteen years.

Q. How did you first meet him?

A. He was working for another construction company.

Q. What construction company was he working for?

A. I don't recall.

Q. How did you begin working with him?

A. He had contacted me about Morrison Knudsen.

Q. When?

A. As best as I can recall, 2007, maybe 2008.

Q. You testified a few minutes ago that you have known him for about sixteen years and it's 2018.

A. Yes.

Q. That would mean you have known him since approximately 2012.

A. No, I said—

Q. I'm sorry, 2002.

A. Correct.

Q. He contacted you after you had already known him for several years?

He contacted you about Morrison Knudsen after you had known him for a few years?

A. Yes.

Q. What did he say to you?

MR. SHERMAN: Vague, narrative.

THE WITNESS: In 2007 or 2008?

BY MS. TORRES:

Q. Yes.

MR. SHERMAN: Same objections.

THE WITNESS: He said that some people he knew were reviving Morrison Knudsen.

BY MS. TORRES:

Q. Did he say anything?

A. Oh, yeah, he asked me if I would be getting involved to get the contractor's license with him.

Q. Did you have a contractor's license at the time?

A. I can't recall.

Q. Did you have any experience in construction at the time?

A. Yes.

MR. SHERMAN: Vague.

BY MS. TORRES:

Q. What was your experience?

A. I owned Topolewski America.

Q. And what does Topolewski America do?

A. Well, when I was there, it was just earth moving.

Q. Did you form Topolewski America?

A. Yes.

MR. SHERMAN: Legal conclusion, last one.

BY MS. TORRES:

Q. How long were you—well, are you still involved with Topolewski America?

A. No.

Q. When did you cease being involved with Topolewski America?

A. Three or four years ago, approximately.

Q. What were the circumstances under which you stopped being involved with Topolewski America?

A. I sold it.

Q. To whom?

A. I don't know.

Q. You don't recall who you sold your company to?

A. Yeah.

Q. Did you hold any positions with Topolewski America after you sold it?

MR. SHERMAN: Vague, legal.

THE WITNESS: I don't recall.

BY MS. TORRES:

Q. You don't recall whether or not you had any involvement with Topolewski America after you sold it?

MR. SHERMAN: Misstates testimony and asked and answered.

THE WITNESS: Possibly as a consultant. BY MS. TORRES:

Q. Do you believe you were involved as a consultant after you sold your company?

MR. SHERMAN: Asked and answered, vague, legal conclusion.

Go ahead.

THE WITNESS: Yeah, I think so because if they had questions about previous projects or whatever, I would kind of answer any questions they had about it.

BY MS. TORRES:

Q. Did you have a formal consulting agreement with them?

MR. SHERMAN: Same objections.

THE WITNESS: No.

BY MS. TORRES:

Q. Did you get paid to answer questions?

A. No.

Q. So they may have called you from time to time but you didn't have any formal relationship with them after you sold it.

Is that fair?

MR. SHERMAN: Misstates testimony.

THE WITNESS: Formal in what sense?

BY MS. TORRES:

Q. Something written, something that obligated you to provide services.

MR. SHERMAN: Legal.

THE WITNESS: No, not to provide services.

BY MS. TORRES:

Q. Was there anything that obligated you to answer their questions?

A. Answer whose questions?

Q. From whoever you sold Topolewski America to.

A. Well, that was done out of courtesy.

Q. So what do you mean by you were a consultant? Anything other than just answering questions from time to time about prior projects?

MR. SHERMAN: Vague.

THE WITNESS: Well, I had to indemnify any problems they had with previous loans that came with the company.

BY MS. TORRES:

Q. So you had an indemnification agreement with them or some obligation—some formal obligation to indemnify them?

MR. SHERMAN: Legal, compound, assumes facts.

THE WITNESS: Indemnify them in the sense that I would help correct any problems they might have had.

BY MS. TORRES:

Q. Was that a written obligation?

A. I can't recall.

Q. Who did you answer questions for at Topolewski America after you sold the company?

A. There is a lawsuit that is against me, personally, for a loan that some company bought, and in the process of exchanging the loan, they tacked on like—I don't know—an additional $30,000 to it.

Q. My question is a little bit different.

You said earlier that you answered questions from time to time for the people who purchased Topolewski America from you, correct?

A. Sure.

Q. Who asked you questions?

A. Oh, you mean—

MR. SHERMAN: Vague.

Go ahead, answer.

BY MS. TORRES:

Q. At Topolewski America.

A. Probably just Reed Flemmming [sic].

Q. And who is Reed Flemmming [sic]?

A. Just the manager over there.

Q. Did you sell the company to Mr. Flemmming [sic]?

A. No.

Q. Is Reed Flemmming [sic] still the manager over there?

MR. SHERMAN: Speculation.

THE WITNESS: I believe so, yeah.

BY MS. TORRES:

Q. Was Mr. Flemmming [sic] ever involved with any of the corporate defendants?

MR. SHERMAN: Speculation, assumes facts, vague.

THE WITNESS: I guess outside of me, no.

BY MS. TORRES:

Q. What do you mean outside of you, no?

A. Well, I knew him but not Morrison Knudsen, no.

Q. He didn't have any involvement in any of the corporate defendants?

A. No.

Q. He was not an officer?

[. . .]

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. . . responsive documents confidential.

MS. TORRES: Yes.

MR. SHERMAN: That is—okay.

To just real quick, I am going to preserve my objection on these last two exhibits considering that they are not complete because they don't have all the attachments, but continue on.

MS. TORRES: Happy to get the attachments if that's going to be an objection you are going stand by.

MR. SHERMAN: I am just going to, like I said, make—just make that record. So go ahead I'm not really concerned about it just yet.

BY MS. TORRES:

Q. There are six pages of documents attached to this E-mail.

Do you see them?

A. Yes.

Q. Directing your attention to the first two pages, have you ever seen these two pages before?

A. Yes.

Q. Directing your attention to the third page, have you seen that page before?

A. Yes.

Q. Directing your attention to the fourth page, have you seen that page before?

A. Yes.

Q. Directing your attention to the fifth page, have you seen that page before?

A. Yes.

Q. And the last page, have you seen that page before?

A. Yes.

Q. I'm going on mark as Exhibit 5, a copy of a redacted E-mail that is the same as page 2.3 of Exhibit 4.

(Plaintiff's Exhibit 5 was marked for identification by the court reporter and is attached hereto.)

BY MS. TORRES:

Q. When did you first see this document?

A. Maybe a couple of months ago.

Q. In what context did you see it?

A. It was sent to me and Jahrmarkt.

Q. It was sent to you and Jahrmarkt?

A. Yes.

Q. By whom?

A. Mike Johnson.

Q. Did you discuss this document with Mr. Johnson?

A. No.

Q. Do you know when it was received by the company?

A. I don't understand.

Q. It appears to be an E-mail directed to Info@ Morrison-Knudson.com.

A. Sorry, are you on this one?

Q. Yes.

A. Oh, shoot.

Q. I will ask my questions over again.

A. Okay, yeah.

Q. When was the first time that you saw this document which is Exhibit 5?

A. Oh, no idea, no, no, no, sorry, sorry. When I first saw this?

Q. Yes.

A. Or are you referring to MKCX or whoever it is.

Q. Yes.

A. M—whoever this railroad company is, I have no idea. When I saw this was probably about two months ago when it was submitted or sent.

MR. SHERMAN: Please, just answer her questions.

THE WITNESS: Well—

MR. SHERMAN: No, no, no, no.

THE WITNESS: All right.

MR. SHERMAN: Just answer her questions.

BY MS. TORRES:

Q. You believe you first saw this document about two months ago.

A. Correct.

Q. In what context did you see it?

A. It was supposed to be evidence you guys wanted.

Q. And who provided it to you?

A. Mike Johnson.

Q. What did Mike Johnson tell you about it?

A. Nothing.

Q. Nothing at all?

A. No.

Q. Did he E-mail it to you?

A. Yeah.

Q. Did he say anything to you in his E-mail?

A. Just—

MR. SHERMAN: Just wait, wait, wait.

And if that E-mail, if you recall, had Jahrmarkt copied on it, I'm going to instruct not to answer. If it was just between you and Mike Johnson, you can answer.

THE WITNESS: No, it was to Jahrmarkt, too.

MR. SHERMAN: Then I'm going to instruct the witness not to answer.

BY MS. TORRES:

Q. Did any of the corporate defendants ever had a trademark "MKXX"?

MR. SHERMAN: Assumes facts, legal speculation, vague.

THE WITNESS: No idea.

BY MS. TORRES:

Q. Have you ever heard of the mark "MKXX"?

MR. SHERMAN: "XX"?

THE WITNESS: No.

BY MS. TORRES:

Q. Have you ever seen—have you ever seen "MKCX" being used by any of the corporate defendants?

MR. SHERMAN: Same objections.

THE WITNESS: No.

BY MS. TORRES:

Q. Do you know anything about MKCX?

A. No.

MR. SHERMAN: Same objections, vague. That wasn't included in that one.

BY MS. TORRES:

Q. Do you have any information, whatsoever, as to why the company received this E-mail?

A. No, I don't.

Q. Do you know who redacted the information on this page?

A. No, I sure don't.

Q. When it was sent to you, was it already redacted?

A. I don't recall.

MS. TORRES: We have asked for a non-redacted copy, Counsel.

MR. SHERMAN: Assuming that we have it.

MS. TORRES: I'm fairly confident you have it electronically somewhere.

MR. SHERMAN: Once again, if we do, we do. You know, we will look.

BY MS. TORRES:

Q. I'm going to ask the court reporter to mark as Exhibit 6, a document that has a number of redactions. First line says, "The engineer's estimate range for this project is"—and then it gives a range.

(Plaintiff's Exhibit 6 was marked for identification by the court reporter and is attached hereto.)

BY MS. TORRES:

Q. Do you recognize—you told me you had seen this document before.

A. Yes, I have seen it.

Q. What is it?

MR. SHERMAN: Document speaks for itself.

THE WITNESS: It's from the County of Fresno.

BY MS. TORRES:

Q. What is it, though?

MR. SHERMAN: Same objection.

THE WITNESS: Well, I believe it's an E-mail about a project that is saying something about a budget.

BY MS. TORRES:

Q. Did corporate defendants bid for a project with the County of Fresno?

A. No.

Q. Did the corporate defendants—were the corporate defendants soliciting to bid for a project with the County of Fresno?

MR. SHERMAN: Speculation, assumes facts.

Were they solicited by Fresno?

MS. TORRES: Correct.

THE WITNESS: I believe so.

BY MS. TORRES:

Q. To whom—well, what is the basis of your belief?

Do you recall being solicited?

MR. SHERMAN: Vague, assumes facts, speculation.

THE WITNESS: You mean through E-mails?

BY MS. TORRES:

Q. In any way.

A. Yeah, I think they sent out blank E-mails, yes.

Q. Did there—was a particular point of contact with the County of Fresno for this—

A. No.

Q. —potential bid?

A. No.

Q. You received it—to the best of your recollection, you received an unsolicited E-mail asking you to bid; is that correct?

MR. SHERMAN: That misstates testimony, assumes facts, vague.

THE WITNESS: Yeah, I believe they just sent it out.

BY MS. TORRES:

Q. Had corporate defendants ever done business with the County of Fresno?

A. No.

MR. SHERMAN: Same objections.

BY MS. TORRES:

Q. Do you know what the project was for?

A. No.

MR. SHERMAN: Same objections.

BY MS. TORRES:

Q. When did you first see this document?

A. This one, I guess, a couple of months ago when that was sent to us or to you guys.

Q. Do you know what information has been redacted?

A. No, I don't.

Q. Who would know?

MR. SHERMAN: Speculation, vague.

THE WITNESS: Maybe Jahrmarkt.

MR. SHERMAN: Don't guess.

BY MS. TORRES:

Q. Did you have any discussions about this document with anyone other than Mr. Jahrmarkt?

A. No.

MR. SHERMAN: Assumes facts.

BY MS. TORRES:

Q. Do you recall approximately when the corporate defendants received an unsolicited request for an RFP response from the County of Fresno?

MR. SHERMAN: Same objections.

THE WITNESS: No, I don't recall.

BY MS. TORRES:

Q. Was it 2018?

A. I don't know.

Q. Was it 2017?

A. I don't recall.

Q. Can you narrow down the time to any time in the past ten years?

A. To the best of my knowledge, I would say in the last four years.

Q. Do you know why corporate defendants did not respond to this request for proposal or request for a bid?

MR. SHERMAN: Assumes facts, vague, calls for speculation.

THE WITNESS: Probably didn't think there was any money in it.

BY MS. TORRES:

Q. Do you know what the job was for?

A. No, I don't.

Q. It says the engineer's estimate range for this project is $6,481,194 to $7,163,425.

A. Do you see that?

A. Yes.

Q. Is that below the range at which corporate defendants would typically bid for projects?

MR. SHERMAN: Assumes facts.

THE WITNESS: The range?

BY MS. TORRES:

Q. Uh-huh.

A. I have no knowledge that they had pick and set goals like financially.

Q. My question is a little different.

Is that below the range at which they would typically bid for projects?

A. I have no idea.

Q. You don't know whether this was for building a highway, building a bridge, building a dam?

You don't know anything about what they were asking you to bid for?

MR. SHERMAN: Misstates testimony, assumes facts and compound.

THE WITNESS: Yeah, I had no idea what that is for.

BY MS. TORRES:

Q. Who would know?

MR. SHERMAN: Speculation.

THE WITNESS: County of Fresno.

BY MS. TORRES:

Q. Who would know at corporate defendants?

MR. SHERMAN: Same objection.

THE WITNESS: No one.

BY MS. TORRES:

Q. No one?

A. (Witness nods head up and down.)

Q. Who would have received this?

A. I believe it went to info E-mail.

Q. And within the past four years, who has been—who has had the ability to monitor Info@Morrison-Knudsen.com?

A. Henry Blum.

Q. Is Henry Blum the only person?

MR. SHERMAN: Assumes facts, speculation.

THE WITNESS: As far as I know.

BY MS. TORRES:

Q. I'm going to ask the court reporter to mark as Exhibit 7, an E-mail to Info@Morrison-Knudson .com, subject "BART RFQ 23997."

(Plaintiff's Exhibit 7 was marked for identification by the court reporter and is attached hereto.)

BY MS. TORRES:

Q. Before woe go on to Exhibit 7, directing your attention back to Exhibit 6, did you get any other documents from the County of Fresno?

A. No.

Q. There were no—no information about the project that they were seeking to have you bid on?

MR. SHERMAN: Assumes facts, misstates testimony, speculation, vague.

THE WITNESS: No, I have never seen anything like that.

BY MS. TORRES:

Q. No attachment to this E-mail?

A. Not as far as I know.

MR. SHERMAN: Same objections.

BY MS. TORRES:

Q. Directing your attention to Exhibit 7, you testified earlier that you have seen this before.

A. Yes.

Q. When did you first see it?

A. When we sent it to you or within a few days.

Q. Are you—are you aware or were you aware at that time that the Bay Area Rapid Transit District had sent corporate defendants a request for quotation?

A. When this was sent to them?

Q. No, when you first saw this exhibit-this exhibit.

A. Yes, yes.

Q. You already knew that BART, the Bay Area Rapid Transit, had sent corporate defendants a request for quotation, "yes" or "no"?

A. No.

Q. When did you first learn that?

A. When we sent it to you or we got it to Jahrmarkt and eventually sent it to you, whenever that was.

Q. Did you see the attachments? You see how it says "attach: Image001.gif," "Image004.jpg"?

A. Yes.

Q. And "MX RFQ #239907.docx?"

A. Yes.

Q. Did you see those attachments, any of them?

A. No.

Q. Do you have any reason to believe those

[. . .]

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A. No, this would probably be the first time unless something I don't recall.

Q. So you can't say one way or the other whether this is Mr. Blum's signature?

A. No, I can't.

Q. You see the address, 2756 North Green Valley Parkway, Number 414—

A. Yes.

Q. —Nevada?

A. Yes.

Q. Do you know what that address is?

A. No.

Q. Never been there?

A. No.

Q. Never used that address, yourself?

A. No.

Q. Do you have a residence anywhere other than Winnetka, California?

A. A residence, no.

Q. Do you have any business—any business address other than in California?

A. Yeah, Nevada.

MR. SHERMAN: Vague.

BY MS. TORRES:

Q. Where in Nevada?

A. Arville Street, and then I use an address on Rainbow—on the a Rainbow Boulevard mailbox and I have another one in Canada.

Q. Where is Arville Street?

A. Sorry. Las Vegas.

Q. Is there a number?

A. I don't know it offhand, no.

Q. Is it a residence?

A. No.

Q. Or is it a business?

A. It's a business.

Q. What is the name of the business that either leases or owns that property?

A. It's for Metal Jeans.

Q. And what is the address in Canada that you use?

A. I don't know. It's in Calgary.

Q. Is that a physical address or is it a mailbox type?

A. Yeah, it's an office.

Q. Is that also for Metal Jeans?

A. Yes.

MR. SHERMAN: Near the Horse Shoe?

THE WITNESS: The Horse Shoe?

MR. SHERMAN: Yeah.

THE WITNESS: The Saddle, it's actually not too far from there.

BY MS. TORRES:

Q. Directing your attention to 42.048, do you recognize the signature at the bottom?

A. No.

Q. Have you ever seen Mr. Hale's signature?

A. No.

Q. On 42.052.

A. What is it—

Q. On 42.052, you list everyone's address as 2029 Century Park East, 2100.

Do you see that?

MR. SHERMAN: Misstates testimony, mischaracterizes the document. He never said he filled out the information.

MS. TORRES: He signed it.

MR. SHERMAN: He never said he filled it out.

BY MS. TORRES:

Q. Do you see the address 2029 Century Park East—

A. Yes.

Q. —listed for every individual on that page?

A. Yes.

Q. And that was your address at the time?

A. My address, no.

Q. Whose address was it?

MR. SHERMAN: Speculation.

THE WITNESS: I don't recall.

BY MS. TORRES:

Q. You have no recollection, whatsoever?

A. No, I don't.

Q. Did you review this document before you signed it?

A. I don't recall.

Q. Did you review this document before you submitted it to the Secretary of State of Nevada?

MR. SHERMAN: Assumes facts, misstates testimony.

THE WITNESS: I don't recall. It's what, that eight years ago? No idea.

BY MS. TORRES:

Q. And you understand—well, can you read for me what it says just above your signature?

A. No.

MR. SHERMAN: The document speaks for itself. He is not going to read whatever it says there, which I can't read it.

BY MS. TORRES:

Q. You understood that when you were submitting this to the Secretary of State of Nevada that you were doing so under the penalty of perjury?

MR. SHERMAN: Misstates testimony. I don't think that he ever said that he submitted the document.

MS. TORRES: He did.

THE WITNESS: No, I didn't say I submitted it.

BY MS. TORRES:

Q. You didn't submit this to the Secretary of State of Nevada?

A. No, I believe I signed that. I believe that's my signature but that's it.

Q. Did you authorize it to be submitted to the Secretary of State of Nevada?

A. I believe I did.

Q. And when you signed this document, did you understand that you were signing it under penalty of perjury?

A. No, I did not.

Q. I'm going to ask the court reporter to mark as Exhibit 9 copies of—certified copies of documents from the Secretary of State.

(Plaintiff's Exhibit 9 was marked for identification by the court reporter and is attached hereto.)

BY MS. TORRES:

Q. I'm going to direct your attention to-it says Exhibit 2295 at the bottom. It has an AECOM Bates number but it is difficult to read.

A. Okay.

Q. Do you see that document?

A. 295?

Q. It's 95.

MR. SHERMAN: Bottom middle of the page says Exhibit 2, and underneath, it says 95, which she is referring to.

THE WITNESS: Yeah, I got it.

BY MS. TORRES:

Q. And that's your signature on the bottom left-hand corner, isn't it?

A. I believe it is.

Q. And you signed as President of Morrison Knudsen Corporation of Vietnam.

Do you see that?

A. Yes.

Q. And you listed yourself as President, Secretary and Treasurer?

MR. SHERMAN: Assumes facts.

BY MS. TORRES:

Q. Correct?

A. Yes.

MR. SHERMAN: Assumes facts.

THE WITNESS: It appears that way.

BY MS. TORRES:

Q. Or you are listed as President, Secretary and Treasurer, correct?

A. Yeah, that's what it says.

Q. And you—and Mr. Ripley is listed as a director.

MR. SHERMAN: Document speaks for itself.

BY MS. TORRES:

Q. How did you become an officer of Morrison Knudsen Corporation of Vietnam?

A. How? Through this filing.

Q. Did you have any authority from anyone to make this filing?

MR. SHERMAN: Assumes facts, vague.

THE WITNESS: Whose authority would I be looking for?

MR. SHERMAN: Legal, as well.

THE WITNESS: Legal.

MR. SHERMAN: No, no, those are my objections.

Go ahead.

THE WITNESS: Who would I?

BY MS. TORRES:

Q. You just did this filing on your own. You didn't ask anybody about permission?

A. Well, I did it on behalf of Henry Blum to revive it or whatever, but as far as permission goes, no, I don't know who the hell I would ask for permission for.

Q. Let's take a look at page 99. Do you see that?

A. Uh-huh.

Q. And that's your signature on the top line next to "President"?

A. I believe it is.

Q. And that's Mr. Blum's signature right below yours?

A. I'm going to—I can't be positive that is his, no.

Q. Well, you recognize this—and the document starts on page 97, so 97, 98, 99, also say certificate of revival and they say pages 1, 2 and 3.

Do you see that?

A. Yes.

Q. Who filled out the information on this–on those pages?

MR. SHERMAN: Speculation, assumes facts.

THE WITNESS: I believe it was Henry Blum.

BY MS. TORRES:

Q. Did Mr. Blum then provide it to you?

A. Yeah, I would assume, yes.

Q. That's the best—

MR. SHERMAN: Don't assume.

THE WITNESS: The best I can recall, yes.

BY MS. TORRES:

Q. And did you read if before you signed it?

A. I don't recall.

Q. Is it your practice to read documents before you sign them?

MR. SHERMAN: Vague.

THE WITNESS: Is it my practice?

BY MS. TORRES:

Q. Yes.

A. I don't think so, no.

Q. Do you typically sign documents that you haven't read?

MR. SHERMAN: Vague.

THE WITNESS: It depends on the document.

BY MS. TORRES:

Q. Did you know what this was when you signed it?

A. Yeah, I knew it was a revival.

Q. You were—you understood you were signing it as the purported President?

A. I believe so, yes.

Q. And you see here it says the undersigned—there is a check—there is a check or an "X" in the box that says,

"The undersigned declare that they are the persons who have been designated by a majority of the directors in office to sign this certificate and that no stock has been issued. Membership approval not required under NRS81.010(2)."

Do you see that?

A. Yes, I see that.

Q. Who—what directors in office designated you to sign this document?

MR. SHERMAN: Assumes facts, speculation, legal.

THE WITNESS: It would have been just Henry Blum.

BY MS. TORRES:

Q. Henry Blum—this is a document that revived a corporation that had been named "Morrison Knudsen Corporation of Vietnam," correct?

MR. SHERMAN: The document speaks for itself.

THE WITNESS: Yeah, I believe so.

BY MS. TORRES:

Q. And Mr. Blum had not been involved with Morrison Knudsen Corporation of Vietnam prior to its dissolution, had he?

MR. SHERMAN: Speculation.

THE WITNESS: I don't know.

BY MS. TORRES:

Q. You understood that he was not involved with Morrison Knudsen Corporation prior to reviving any of these entities, don't you?

MR. SHERMAN: It's vague, vague, legal, speculation.

THE WITNESS: No, he was involved since 2008.

BY MS. TORRES:

Q. Because he revived Morrison Knudsen Services, correct?

MR. SHERMAN: Same objections.

THE WITNESS: Correct.

BY MS. TORRES:

Q. And he didn't have authority from Morrison Knudsen to do that, did he?

MR. SHERMAN: Assumes facts, same objections.

THE WITNESS: Morrison Knudsen?

BY MS. TORRES:

Q. Yeah.

A. And who would that be?

Q. The entity that dissolved it.

He didn't go and get permission from anybody to revive this entity, did he?

MR. SHERMAN: Same objections.

THE WITNESS: There was no Morrison Knudsen other than us.

BY MS. TORRES:

Q. Prior to reviving these entities, did anybody associated with corporate defendants get permission from anyone else?

MR. SHERMAN: Vague, assumes facts.

THE WITNESS: I don't know who this other group you are referring to is, but I'm going to say no, anyway.

BY MS. TORRES:

Q. Are you familiar with Morrison Knudsen Corporation?

A. Yes.

Q. What is it?

A. It's a company.

Q. What company? Is it a company that exists today?

A. No, not anymore.

Q. When was the first time you heard the term or the name "Morrison Knudsen"?

A. Maybe 2007.

Q. And who did you hear it from?

A. Henry Blum.

Q. What did Mr. Blum tell you about it?

A. I don't recall.

MR. SHERMAN: Assumes facts not in evidence.

BY MS. TORRES:

Q. You don't recall anything?

MR. SHERMAN: Vague.

THE WITNESS: No, not from . . .

BY MS. TORRES:

Q. Were you aware that it had been a large engineering and construction firm in the 20th century?

A. I don't recall when, but when I followed up on it, I just heard it was some bankrupt company. That was about all I knew about it.

Q. Did you do anything to find out any more information about it?

A. At the time?

Q. Uh-huh.

MR. SHERMAN: Vague.

THE WITNESS: No.

BY MS. TORRES:

Q. So at the time you signed this document, this certificate of revival, did you have permission from anyone other than Mr. Blum?

MR. SHERMAN: Asked and answered, vague, assumes facts.

THE WITNESS: Permission to sign that?

BY MS. TORRES:

Q. Yes.

A. No.

Q. And to your knowledge, did Mr. Blum have permission from anyone to sign that document?

MR. SHERMAN: Same objection, speculation.

THE WITNESS: Do I know if he did?

BY MS. TORRES:

Q. Yes.

A. No, I don't have a clue.

Q. It says here,

"I declare under the penalty of perjury that the revival has been authorized by a court of competent jurisdiction or by the duly elected Board of Directors of the entity, or if the entity has no Board of Directors, its equivalent of such Board."

Do you see that?

A. Yes.

Q. Did you read that before you signed this document?

A. I don't recall.

Q. Did you have authority from any court of competent jurisdiction?

MR. SHERMAN: Assumes facts, speculation, legal, asked and answered.

THE WITNESS: Only from Henry.

BY MS. TORRES:

Q. Henry is not a court, I assume.

A. Oh, no. It says from a court? Is that what you asked?

Q. Yeah.

A. No, no court.

Q. And it says right below that,

"I declare to the best of my knowledge under penalty of perjury, that the information contained

herein is correct and acknowledge that pursuant to NRS 239.330, it is a Category C felony to knowingly offer any false or forged instrument for filing with the Office of the Secretary of State."

Do you see that?

A. Yes, I see it.

Q. Did you read that before you signed this document?

A. I don't recall.

Q. Listed here is the address 2049 Century Park East, Suite 3850.

A. Do you see that?

MR. SHERMAN: Where?

MS. TORRES: I'm sorry, on page 2.

THE WITNESS: Yes.

BY MS. TORRES:

Q. Was that your address at the time?

A. No.

Q. Whose address was it?

A. It's Jahrmarkt's.

Q. Did you ask Mr. Jahrmarkt for permission before using his address?

MR. SHERMAN: Assumes facts.

THE WITNESS: Yes.

BY MS. TORRES:

Q. Did you compensate Mr. Jahrmarkt for the use of his address?

MR. SHERMAN: Assumes facts.

THE WITNESS: Not that I recall, no.

BY MS. TORRES:

Q. Was he your counsel at the time?

A. One of them, yes.

Q. Was he counsel for any of the corporate defendants in this case at this time?

A. No, just me.

Q. Why did you revive Morrison Knudsen Corporation of Vietnam?

MR. SHERMAN: Assumes facts, misstates testimony. He said that Henry Blum did.

MS. TORRES: Signed by Mr. Stone.

MR. SHERMAN: Yes.

THE WITNESS: Like I discussed before, it was for another line of work, maybe mining or something.

I don't recall, specifically.

BY MS. TORRES:

Q. Why didn't you just start a new company?

MR. SHERMAN: Misstates testimony. He said it was Henry Blum that did it.

THE WITNESS: I have no idea.

BY MS. TORRES:

Q. Any reason you couldn't have done this type of work under Topolewski America?

MR. SHERMAN: Legal, assumes facts, speculation, misstates testimony.

THE WITNESS: There was no connection to one another other than me, and I am out of the construction business, or I wanted to.

BY MS. TORRES:

Q. What do you mean you wanted out of the construction business?

A. Well, operating it is kind of a tough, unprofitable business.

Q. You wanted out of this construction business, so you signed a Certificate of Revival of Morrison Knudsen Corporation of Vietnam?

MR. SHERMAN: Misstates testimony. It's not the question you asked.

THE WITNESS: Yeah.

BY MS. TORRES:

Q. The business of Morrison Knudsen Corporation of Vietnam, as you described it earlier, was to do construction, correct?

MR. SHERMAN: Misstates testimony.

THE WITNESS: That's correct.

MR. SHERMAN: Let me make my objections.

THE WITNESS: Sorry.

BY MS. TORRES:

Q. Why did you revive Morrison Knudsen Corporation of Vietnam rather than just start an entirely new company with a different name?

MR. SHERMAN: Misstates testimony, narrative.

THE WITNESS: That was nothing I can have a clue about.

BY MS. TORRES:

Q. No clue?

A. Well, it started in '08. So is it my place to stop them?

Q. You're signing as the President here.

A. Yes.

Q. So who is the "them"?

A. The owners of the companies.

Q. Who are the owners of the companies?

A. I don't know.

Q. Directing your attention to the next page, Certificate of Amendment, that is your signature?

A. I believe it is.

Q. And did you submit this Certificate of Amendment to the Secretary of State of the State of Nevada?

A. I didn't submit it but I signed it, I believe.

Q. And you authorized it to be submitted?

MR. SHERMAN: Assumes facts not in evidence.

MS. TORRES: Let me rephrase my question.

BY MS. TORRES:

Q. You authorized this document that you signed, which is titled "Certificate of Amendment," to be submitted or filed to the Nevada Secretary of State, correct?

A. Yeah, I signed it and it was submitted.

Q. And it was submitted with your authority?

MR. SHERMAN: Assumes facts not in evidence.

THE WITNESS: My employer—I guess so.

MR. SHERMAN: Don't guess.

BY MS. TORRES:

Q. You understood it was going to be submitted when you signed it, correct?

A. Yes, but the authority thing . . .

Q. You knew it was going to—you signed the Certificate of Amendment knowing it was going to be submitted to the Secretary of State of Nevada, correct?

A. Yes.

Q. And when you signed the Certificate of Revival, you also knew it was going to be submitted to the Secretary of State of Nevada, correct?

A. Yes.

Q. Other than this one conversation that you only vaguely recall with Mr. Blum in or around 2007/2008, did you ever discuss the origin of the Morrison Knudsen name or company with anyone?

A. The origin?

Q. Yeah, did you ever discuss–

MR. SHERMAN: Vague, compound.

Go ahead.

BY MS. TORRES:

Q. —anything about Morrison Knudsen as an entity prior to or—other than the conversation you had with Mr. Blum roughly in 2007/2008?

MR. SHERMAN: Same objections.

THE WITNESS: No idea.

BY MS. TORRES:

Q. Do you recall ever did you—scratch that.

Did you discuss the fact that Morrison Knudsen was—had been a large engineering and construction company with anyone other than Mr. Blum in approximately 2007/2008?

A. I don't recall.

Q. Don't recall ever discussing that, whatsoever?

A. From eleven years ago?

Q. Yeah.

A. No.

Q. Do you recall discussing the history of Morrison Knudsen with anyone other than Mr. Blum in approximately 2007/2008?

MR. SHERMAN: Misstates prior testimony, assumes facts.

THE WITNESS: I don't recall.

BY MS. TORRES:

Q. Did you know anything about Morrison Knudsen other than the vague conversation that you can't really remember with Mr. Blum 2007/2008?

A. About the company?

Q. Yeah.

A. Did I remember anything about it?

Q. Did you know anything about it—

A. No.

Q. —other than what you learned from Mr. Blum?

A. No. Back then?

Q. Uh-huh.

A. No.

Q. Did you ever come to know anything about the company that has been called Morrison Knudsen prior to your revival of these entities in 2007/2008?

A. Did I know anything about it?

Q. Yeah.

A. Prior to 2007/2008?

Q. Yeah.

A. No, I don't think so.

Q. Did you ever come to learn anything about the company?

A. Yeah, later, I read about it.

Q. When did you read about it?

A. I don't recall.

Q. What did you read about it?

A. That it was bankrupt, gone.

Q. Why were you reviving a company that was bankrupt and gone?

A. That was Henry Blum.

MR. SHERMAN: Assumes facts, misstates testimony.

Go ahead.

THE WITNESS: That was Henry Blum's—brought it to my attention. I never asked them.

BY MS. TORRES:

Q. You never asked them why are we reviving companies that have been dissolved.

A. Did I ever ask him?

Q. Yeah.

MR. SHERMAN: Assumes facts not in evidence.

THE WITNESS: Not that I recall.

BY MS. TORRES:

Q. Did he ever tell you?

A. Did he tell me what?

Q. Did he ever tell you why he wanted to revive Morrison Knudsen entities that had been dissolved?

A. Well, I believe—I believe he thought it deserved a better fate than the way it got discarded.

MR. SHERMAN: Please, answer her question. Answer her question. Pay question to the question.

BY MS. TORRES:

Q. Why did you believe he thought it deserved a better fate than the way it got discarded?

A. I don't know.

Q. You don't have any idea why you believe that?

A. Why I believe what?

Q. That Henry Blum thought it deserved a better fate.

A. Well, other than getting discarded and as a bankrupt entity.

Q. How do you know it was a bankrupt entity?

MR. SHERMAN: Asked and answered.

THE WITNESS: I read about it later.

BY MS. TORRES:

Q. Where?

MR. SHERMAN: Asked and answered.

THE WITNESS: Where?

BY MS. TORRES:

Q. Yeah.

A. I don't recall.

Q. Do you recall anything about what you read later other than reading that it was a bankrupt entity?

MR. SHERMAN: Asked and answered.

THE WITNESS: No.

BY MS. TORRES:

Q. Do you recall why you read about it?

Did you decide to go and search—do any online searches for it?

MR. SHERMAN: Asked and answered, assumes facts.

THE WITNESS: You mean in '08 or '07?

BY MS. TORRES:

Q. Ever.

A. Yeah, I read about it.

Q. When?

A. I don't recall.

Q. Did you do any online searches in order to read about it?

A. I believe I did.

Q. Do you recall why?

Do you recall why you did online searches for Morrison Knudsen?

A. Yeah, because I was being named the President of it or I was the President of it.

Q. So before you accepted the position as President, you did some research on Morrison Knudsen.

Is that fair?

MR. SHERMAN: Misstates testimony.

THE WITNESS: I don't recall.

BY MS. TORRES:

Q. Approximately when, either before or after you first became President of one of the corporate defendants, did you do online research about Morrison Knudsen?

A. No idea.

Q. You don't remember whether it was two months before or three years later?

A. No, I don't.

Q. And you don't remember seeing anything other than it was a bankrupt company?

MR. SHERMAN: Misstates testimony.

THE WITNESS: Say that again. I don't remember?

BY MS. TORRES:

Q. Yeah.

Do you remember seeing—do you remembering so anything online about it other than that it was a bankrupt company?

A. No.

Q. That's all you remember about your online research results?

A. Yeah, best as I can recall.

Q. Did it—did it—did you wonder why you would be reviving a bankrupt company?

MR. SHERMAN: Asked and answered, assumes facts, misstates testimony—hang on. Well, let me finish.

Go ahead.

THE WITNESS: Did I ask?

BY MS. TORRES:

Q. Did you wonder?

A. Did I wonder, no.

Q. Didn't surprise you that you would be reviving a bankrupt entity.

MR. SHERMAN: Same objections.

THE WITNESS: No, it didn't surprise me.

BY MS. TORRES:

Q. Did Mr. Johnson promise you any compensation for being President of any of the corporate defendants?

MR. SHERMAN: Asked and answered.

THE WITNESS: Did he promise me anything, no.

BY MS. TORRES:

Q. Did you expect to receive any compensation?

A. Yes.

Q. What compensation did you expect to receive?

A. I don't recall.

Q. Did you expect to receive a share of the profits?

A. I don't recall.

I expected something like if they ever did get work, I expected something, but they did not.

Q. How much time did you spent as President in terms of daily activity as President or in any capacity in connection with the corporate defendants?

A. Maybe half a dozen hours a year.

Q. So six hours a year over the course of ten years?

A. As best as I recall, yeah.

Q. You used an E-mail Gary@Worrison-Knudsen.com?

A. Yes.

Q. Do you still use that E-mail?

A. No.

Q. Do you know whether that E-mail is still functional?

A. I don't think it is.

MR. SHERMAN: If you know.

THE WITNESS: Okay. Well, I don't know.

MR. SHERMAN: Don't guess.

BY MS. TORRES:

Q. What was the last time you used it?

A. Best of my knowledge, maybe a year ago.

Q. Mike Johnson's E-mail is Mike@Morrison-Knudsen.com?

A. I believe so, yes.

Q. Do you know whether Mr. Johnson uses that E-mail still?

A. I don't think so, no.

Q. When was the last time you received an E-mail from Mr. Johnson where he used that E-mail address?

A. I don't think he—well, I don't know if he's ever used that E-mail for me.

Q. What E-mail address did he use for you?

A. I can't remember it, offhand. It's a Gmail account, I believe.

Q. And that's—he used a Gmail account in connection with your work for Morrison Knudsen or for corporate defendants?

A. No, just with Jahrmarkt and me.

Q. Did you ever discuss with anybody the value of the Morrison Knudsen name?

A. No.

Q. Did you ever discuss with anybody the history of Morrison Knudsen?

MR. SHERMAN: Asked and answered?

THE WITNESS: No.

BY MS. TORRES:

Q. Did you know it had been a lead construction firm for the Hoover Dam?

MR. SHERMAN: Vague.

THE WITNESS: No.

BY MS. TORRES:

Q. Did you know anything about it, whatsoever, other than, as you claim, it went bankrupt?

A. It did go bankrupt.

MR. SHERMAN: Vague.

BY MS. TORRES:

Q. My question is different.

Did you know anything about it other than, as you claim, it went bankrupt? Anything else?

A. Other than being bankrupt? I know it's a public company.

Q. Anything else?

A. No.

Q. Did you ever go to the Morrison-Knudsen.com website?

A. Yeah.

MR. SHERMAN: Vague, by the way.

BY MS. TORRES:

Q. At the time you first became President of Morrison Knudsen Services, did you believe the defendants had the right to use "Morrison Knudsen" in its—in their corporate name?

A. Yes.

Q. Why?

A. Why not.

Q. What was the basis for your understanding that anyone could use the name "Morrison Knudsen"?

A. The fact that they were gone and no one was using them.

Q. Did you undertake any efforts to determine whether or not you could use the name "Morrison Knudsen"?

MR. SHERMAN: Vague, misstates testimony, speculation, assumes facts.

THE WITNESS: No.

BY MS. TORRES:

Q. Did you do anything to determine whether or not Morrison Knudsen was owned by another entity?

MR. SHERMAN: Same objections.

THE WITNESS: Yeah, they weren't active companies.

BY MS. TORRES:

Q. What do you mean "they weren't active companies"?

A. Well, that's when they were alive, right?

Q. My question was different.

Did you do anything to determine whether or not Morrison Knudsen had been acquired by any other company?

MR. SHERMAN: Same objections.

THE WITNESS: Did we do any research to see if they were acquired?

BY MS. TORRES:

Q. Yes.

A. No.

Did you believe that the Morrison Knudsen trademark had been abandoned?

MR. SHERMAN: Same.

THE WITNESS: No idea.

MR. SHERMAN: Legal, assumes facts, speculation.

Go ahead.

THE WITNESS: No idea.

BY MS. TORRES:

Q. Did you believe that the Morrison Knudsen logo had been abandoned?

MR. SHERMAN: Same objections.

THE WITNESS: No idea.

BY MS. TORRES:

Q. Did you do anything to find out whether or not the Morrison Knudsen trademark or logo had been abandoned?

MR. SHERMAN: Same objections.

THE WITNESS: No.

BY MS. TORRES:

Q. I'm going to ask the court reporter to mark as Exhibit 10, excerpts from the website Morrison-Knudsen.com.

(Plaintiff's Exhibit 10 was marked for identification by the court reporter and is attached hereto.)

BY MS. TORRES:

Q. Do you recognize the pages that—the printouts that constitute Exhibit 10?

A. Yeah, I have seen this.

Q. Do you recognize those as printouts from the corporate defendants' website?

A. Yes.

Q. And that website—

MR. SHERMAN: I'm going to object to this because this is not complete and it has language written on it, so.

MS. TORRES: You can make your objection.

MR. SHERMAN: Yeah, I'm making my objection.

Go ahead.

BY MS. TORRES:

Q. And the corporate defendants' website was at Morrison-Knudsen.com, correct?

A. Right.

Q. And it was also at Morrison-Knudsen.net, correct?

A. Yeah, I believe so.

Q. And it was the—it was the same website, just available at two different domain names, correct?

A. I believe that's correct.

Q. And you were responsible for registering those domain names?

A. No.

MR. SHERMAN: Assumes facts not in evidence.

BY MS. TORRES:

Q. Who was?

A. No idea.

Q. Was this website—well, who was responsible for developing the website?

A. I don't know.

Q. It was available as of 2008, though, correct?

MR. SHERMAN: Vague. What?

MS. TORRES: This website.

THE WITNESS: Available?

BY MS. TORRES:

Q. It was publicly available. You could go to Morrison-Knudsen.com.

A. I don't know.

Q. When you first became President of Morrison Knudsen Services, Inc., that entity had a website at Morrison-Knudsen.com, correct?

MR. SHERMAN: Assumes facts.

THE WITNESS: I don't recall.

BY MS. TORRES:

Q. When did you first recall seeing the website?

A. Best of my recollection, 2010/2011.

Q. Were there ever any other websites created for the corporate defendants?

A. No, not to my knowledge.

Q. What was the purpose of the website?

MR. SHERMAN: Vague, assumes facts, speculation.

THE WITNESS: To promote the company.

BY MS. TORRES:

Q. And "the company" being one or more of the corporate defendants, whichever one was needing promotion at the time.

MR. SHERMAN: Misstates testimony, assumes facts, speculation, vague.

THE WITNESS: Yeah, to promote the companies, yeah.

BY MS. TORRES:

Q. And specifically, it was—so if prospective customers wanted to find out something about the company, they could see what projects the company had done?

MR. SHERMAN: Same objections.

THE WITNESS: Yes.

MR. SHERMAN: Do you need—if you need to go use your phone, let's take a break. I would rather you focus on her questions.

THE WITNESS: No, I am good.

BY MS. TORRES:

Q. Is this website still active?

MR. SHERMAN: If you are referring to whatever this document is in Exhibit 10, I'm going to instruct the witness not to answer.

If you want to ask about is the website you have been discussing active, I will let you ask that question, but this is not a representative of the website. This is just printouts and we don't know where it comes from. It doesn't have any sort of—

MS. TORRES: Counsel, Counsel, you can state your objection. No coaching.

MR. SHERMAN: Well, I'm going to instruct the witness not to answer if you are going to ask him about what is in the documents.

MS. TORRES: What is the basis of your instruction?

MR. SHERMAN: Because it's not representative of anything that we know of anything.

MS. TORRES: Is there a privilege instruction?

MR. SHERMAN: Is there a privilege instruction, no.

BY MS. TORRES:

Q. The pictures that are depicted on the first page of Exhibit 10, do you see that?

A. Yeah.

Q. You recognize that as a depiction of the home page of Morrison-Knudsen.com, correct?

A. Yes.

Q. And turning to page 2, there is an "About MK" section.

Do you see that?

A. Yes.

Q. And you recognize that also as a printout of the—of a page on the Morrison Knudsen website, correct?

MR. SHERMAN: Vague and ambiguous. It's cut off.

THE WITNESS: Yes.

BY MS. TORRES:

Q. And page 3, it's an image of a documentary—or of a video, rather, and it says, "Watch the documentary of the history of Morrison Knudsen."

Do you see that?

A. Yes.

Q. And you recall that video being available on the Morrison-Knudson.com website, right, correct?

MR. SHERMAN: Assumes facts.

THE WITNESS: Yeah, I think so. I don't think I watched it but I think it's on there.

BY MS. TORRES:

Q. And then there is another video on the next page.

Do you see that?

MR. SHERMAN: Mischaracterizing the documents. These are not videos. These are pictures.

BY MS. TORRES:

Q. There is an imagine of a video.

Do you see that?

A. Yes, I see it.

Q. And you recall that being, also—that video, also, being available on the Morrison Knudsen website?

MR. SHERMAN: Objection. It's not an video. It's an image of an image.

Go ahead. I made my objection.

THE WITNESS: This, no, I don't recall this.

BY MS. TORRES:

Q. Turn the page to exhibit—to page 5, rather.

A. Yeah.

Q. Do you recall equipment for sale?

A. Yes.

Q. Equipment for sale page being available on Morrison-Knudsen.com?

A. Yes.

Q. And it was—do you recall this specific equipment being available?

MR. SHERMAN: Objection; vague.

THE WITNESS: Yeah, I remember this, sure.

BY MS. TORRES:

Q. And who monitored sales at Morrison-Knudsen.com, that E-mail address?

A. No idea.

Q. Was there a salesperson for the company?

A. A salesperson, not that I can recall, no.

Q. There was no person who was responsible for selling equipment for any of the corporate defendants?

A. Not that I recall, no.

Q. Do you recognize this equipment? Like have you ever seen it, personally?

A. Yes.

Q. Where did you see it?

A. I believe this is in Nevada.

Q. Is that a Nevada license plate?

A. I can't tell.

Q. Is a Nevada license plate white?

MR. SHERMAN: Vague.

THE WITNESS: They got blue, they got white, they got a gold.

BY MS. TORRES:

Q. So where did you see equipment in Nevada?

A. I believe that's—I think that's—what is that place? It's a little town north of Las Vegas. I think that's where that is.

Q. Henderson?

A. No, north, the other way. No, it's pretty small.

MR. SHERMAN: Mesquite? I'm not testifying. I'm just saying.

THE WITNESS: I don't think that is it, either.

BY MS. TORRES:

Q. Did you physically inspect that equipment?

A. No.

Q. Was this at a job site that you saw it?

A. No.

Q. How did you—what brought you to see this equipment?

A. I don't recall.

Q. Do you know whose equipment it was?

A. Yeah, I believe it was Morrison Knudsen's.

Q. One of the corporate defendants?

A. Correct.

Q. Do you know if the equipment still is in the possession of any of the corporate defendants?

A. That, I don't know.

Q. Did the corporate defendants ever sell any equipment?

A. I don't know.

Q. Directing your attention to page 6.

A. Yeah.

Q. Do you recognize this as a page from the Morrison-Knudsen.com website?

A. Yes.

Q. Directing your attention to page 7, do you recall that equipment being listed for sale on the Morrison-Knudson.com website?

A. Yeah, I have seen it.

Q. And did you ever see this equipment in person?

A. No.

Q. Do you see the round red logo?

A. Yes.

Q. Do you know what logo that is?

A. Yeah, it's Morrison Knudsen.

Q. It's the same logo that is in the upper left-hand corner on the top?

A. Yes.

Q. I'm going to ask you to flip through these pages and ask you if there is any that you don't recall being on the Morrison-Knudsen.com website.

A. I believe I have seen all of these, yeah.

Q. Turning to the first page of Exhibit 10, did the corporate defendants have any involvement in any of the projects depicted on this page?

MR. SHERMAN: Vague, assumes facts.

THE WITNESS: Yes.

BY MS. TORRES:

Q. Which?

A. They were involved with the dam and the pipeline. The space thing, I am not sure.

Q. When you say "they," you are not talking about corporate defendants after they were revived by you and Mr. Blum and whoever else revived, correct?

You are talking about Morrison Knudsen prior to its dissolution.

A. I don't understand what you just said.

Q. Let's talk about corporate defendants as the corporate entities that were revived by you and Mr. Blum and whoever else filed revivals.

A. Sure.

Q. Let's talk about the original MK as the company that you say you don't know much about but heard or read that it was bankrupt.

Okay?

A. Right.

Q. These projects—were corporate defendants involved in these projects?

MR. SHERMAN: Speculation, assumes facts, vague and ambiguous.

THE WITNESS: Well, it was my understanding they were one in the same.

BY MS. TORRES:

Q. What do you mean "they were one in the same"?

A. Well, we revived Morrison Knudsen.

Q. With no one's permission?

MR. SHERMAN: Assumes facts.

Well, was that a question?

MS. TORRES: Correct.

BY MS. TORRES:

Q. You revived Morrison Knudsen with no one's permission?

MR. SHERMAN: Assumes facts.

THE WITNESS: I had no idea you needed permission.

BY MS. TORRES:

Q. No one involved with corporate defendants from 2008 onward had any involvement in these projects, correct?

MR. SHERMAN: Assumes facts not in evidence, speculation, vague.

THE WITNESS: Well, if you are saying if there is anything around since that dam was built, probably not.

BY MS. TORRES:

Q. And the dam, do you know which dam that is?

A. Yeah, it's the Hoover.

Q. And the Hoover Dam was built by a consortium lead by the original MK, correct?

A. I don't know.

MR. SHERMAN: Assumes facts.

BY MS. TORRES:

Q. You just told me that you knew—that you believed that Morrison Knudsen was involved with this project.

A. Yeah. You said the lead contractor.

Q. So what is your understanding of Morrison Knudsen—the original MK involvement with the Hoover Dam?

A. Well, they participated in building it.

Q. And so it was the original MK that participated in building the Hoover Dam, not anybody involved with corporate defendants, correct?

MR. SHERMAN: Vague.

THE WITNESS: Say that again.

BY MS. TORRES:

Q. The original MK was involved in building the Hoover Dam, right?

A. Well, I don't see any difference between the original and the defendants.

Q. That's because you revived them, correct?

A. Yeah.

Q. Let's talk about Morrison-Knudsen Company, Inc.

A. Yes.

Q. Actually, let's talk about Morrison Knudsen International.

That company was not revived by you, correct? That company has never been dissolved.

MR. SHERMAN: Legal, vague, speculation, assumes facts not in evidence.

THE WITNESS: I couldn't answer that.

BY MS. TORRES:

Q. You didn't fill a Certificate of Revival for Morrison Knudsen International, did you?

A. Revival?

Q. Yeah.

A. I don't recall, no.

Q. That—that company used to be called ePlanet Communications, correct?

MR. SHERMAN: Assumes facts, vague, speculation.

THE WITNESS: I believe so.

BY MS. TORRES:

Q. And ePlanet Communications had nothing to do with Morrison Knudsen, did it?

MR. SHERMAN: Same objections.

THE WITNESS: Yeah, I believe that's true, yeah.

BY MS. TORRES:

Q. What do you mean you believe?

A. I am agreeing with you, yes.

Q. In fact, you just changed the name from ePlanet Communications to Morrison Knudsen International in 2016, correct?

MR. SHERMAN: Same objections.

THE WITNESS: Yes.

BY MS. TORRES:

Q. What was the business of ePlanet Communications prior to your changing its name?

A. I believe—or best that I can recall, I think it was doing fiber optics.

Q. And Morrison Knudsen Company was also not a Morrison Knudsen entity prior to its revival, correct?

A. Yeah, that's correct.

MR. SHERMAN: Vague and ambiguous, speculation.

BY MS. TORRES:

Q. Morrison Knudsen Company had been named Westland Petroleum Corporation, correct?

MR. SHERMAN: Same objections.

THE WITNESS: I believe so.

BY MS. TORRES:

Q. And Westland Petroleum Corporation had no relationship to Morrison Knudsen, did it?

A. I don't know.

MR. SHERMAN: Same objections.

BY MS. TORRES:

Q. Did you have any permission from anybody to resurrect Westland Petroleum Corporation?

MR. SHERMAN: Same objections.

THE WITNESS: I don't recall.

BY MS. TORRES:

Q. So is it fair to say that the only involvement that any of the corporate defendants had in connection with the projects on the first page of this exhibit is that they were involved prior to their dissolution and your subsequent revival of them?

MR. SHERMAN: Vague.

THE WITNESS: I don't understand that. What are you saying?

BY MS. TORRES:

Q. Did any of the corporate defendants do any work in connection with the Hoover Dam after you revived the first one?

A. You lost me.

MR. SHERMAN: Assumes facts.

BY MS. TORRES:

Q. Did any of the corporate defendants—you revived the first corporate defendant—

A. Yeah, yeah, yeah.

Q. —in 2008, correct?

A. Yeah.

Q. We have already established that.

A. Yeah.

Q. From 2008 onward, did any of the corporate defendants have any involvement in the Hoover dam?

MR. SHERMAN: Vague, assumes facts.

THE WITNESS: Since from 2008 on?

BY MS. TORRES:

Q. Yeah.

A. Well, that would be pretty tough to do, wouldn't it.

Q. Just asking the question.

Did corporate defendants have any work for Hoover Dam after your revival?

A. No.

MR. SHERMAN: Same objections.

BY MS. TORRES:

Q. Did corporate defendants have any work or do any work in connection with the pipeline after your revival?

A. No.

MR. SHERMAN: Same objections.

BY MS. TORRES:

Q. And did corporate defendants have any involvement in this Space Shuttle post your revival of these entities?

MR. SHERMAN: Same objections.

THE WITNESS: No.

BY MS. TORRES:

Q. So your only basis for putting these on here is the work that was done by Morrison Knudsen entities prior to their dissolution.

MR. SHERMAN: Misstates the testimony.

THE WITNESS: Say that again.

BY MS. TORRES:

Q. The only basis for putting these—the only factual basis you have to claim any involvement by the corporate defendants in any of these projects is work that was done by Morrison Knudsen entities prior to 2008 when you revived the first one.

MR. SHERMAN: Same objections.

THE WITNESS: Yeah, I think that is accurate.

BY MS. TORRES:

Q. And this entire history on page 2, all of that is history about the Morrison Knudsen Company

prior to your revival of that—of those entities, correct?

A. I believe so, yeah.

Q. And this documentary on page 3—or that is the screenshot that is depicted on page 3—that is not a documentary about the Morrison Knudsen entities post your revival, is it?

A. I believe that's accurate, yes.

Q. And let's go to page 7.

The equipment that is shown here with the Morrison-Knudson.com or the Morrison Knudsen logo, do you see that?

A. Yes.

Q. That equipment was never owned by any Morrison Knudsen entity other than the entities you revived post 2008?

A. Yes, that's true.

Q. Who paid for these? Who paid for this equipment?

A. I don't know. I presume the company.

Q. Do you know whether—do you know how this equipment was maintained?

A. Maintained?

Q. You have a background in construction, correct?

A. Uh-huh.

Q. And you understand that you have to maintain construction equipment, right?

A. They didn't use it.

Q. They didn't use that equipment?

A. Well, we did not have any jobs.

Q. Did they purchase the equipment?

A. Yes, I believe so.

Q. Did they purchase it new?

A. I don't think so.

Q. Do you know from whom they purchased it?

A. No, I don't.

Q. Did they just put it on the job site and take pictures?

What did they do with the equipment?

MR. SHERMAN: Assumes facts not in evidence, misstates testimony.

BY MS. TORRES:

Q. What did they do with it?

A. I believe they tried to sell it.

Q. Did you rent it to anyone?

A. No.

Q. Do you know whether any of this equipment was sold?

A. No, I don't.

Q. It says here on page 7 the equipment that is depicted on that page was located in California and Colorado.

Do you see that?

A. Yes.

Q. Where did the company—where did corporate defendants keep equipment in California?

A. I don't know.

Q. No idea?

A. No idea.

Q. Where did they keep equipment in Colorado?

A. No idea.

Q. Who would know?

A. No idea.

Q. Directing your attention to page 6, see where it says,

"Morrison Knudsen financial can assist its partners by taking equity positions in a variety of projects."

A. Yeah.

Q. Did corporate defendants take equity positions in any projects?

A. No.

Q. See where it says,

"We can back your project with our engineering capabilities, construction resources, our equipment lend/lease and financing of your construct costs."

Do you see that?

A. Yes.

Q. What engineering capabilities could you back someone else's projects with?

MR. SHERMAN: Assumes facts, speculation.

THE WITNESS: I don't know.

BY MS. TORRES:

Q. Do you know whether they were—the company had any engineering capabilities that they could back somebody else's project with?

MR. SHERMAN: Same objections.

THE WITNESS: No, I don't.

BY MS. TORRES:

Q. What construction resources did corporate defendants have or did any of the defendants have that they could use to back someone else's project with?

A. I don't know.

Q. What equipment lend/lease program did corporate defendants or any defendants have that they could use to back a third party's project?

A. I don't know.

Q. When it refers to "our engineering capabilities, construction resources"—do you see that?

A. Yes.

Q. Are those referring to the corporate defendants' capabilities and construction resource or were they referring to the original MK's construction capabilities and resources?

MR. SHERMAN: Mischaracterizes the document, misstates the testimony, assumes facts not in evidence, speculation, vague.

THE WITNESS: I don't know.

BY MS. TORRES:

Q. It says,

"We actively seek out positions in mining, all power sources including solar, toll roads, airport concessions, oil and gas projects, pipelines, commercial development, industrial development, seaborne facilities and transportation." Do you see that?

A. Yes.

Q. Did defendants actively seek out any positions in mines?

A Not to my knowledge.

Q. Did they actively seek out positions in power sources?

A. No, not to my knowledge.

Q. Did they actively seek out positions in toll roads or airport concessions or oil and gas projects?

A. No.

Q. Did they actively seek out positions in pipelines or commercial development or industrial development?

A. No, not to my knowledge.

Q. Did they actively seek out positions in seaborne facilities and transportation.

A. No, not to my knowledge.

Q. Did they ever obtain a position in any of those areas?

A. No, not to my knowledge.

Q. So that's not a true statement, I take it, the statement on this website—this statement we just read.

MR. SHERMAN: Mischaracterizes the document, the document speaks for itself, misstates the testimony, speculation, vague, assumes facts.

THE WITNESS: I believe it says seeking, doesn't it?

BY MS. TORRES:

Q. Yeah.

A. Yeah.

Q. And you just told me they never sought such positions.

MR. SHERMAN: Misstates testimony.

THE WITNESS: No, they didn't.

MS. TORRES: We have to take a break because there is no more time left on the video.

THE VIDEOGRAPHER: We're off the record. The time is 2:55. This is the end of disk two of the deposition of Mr. Gary Topolewski.

(Off the record.)

THE VIDEOGRAPHER: And we're back on the record. The time is 3:32. This is the disc number three of the videotaped deposition of Mr. Gary Topolewski.

BY MS. TORRES:

Q. Why did you change the name of ePlanet to Morrison Knudsen?

MR. SHERMAN: Assumes facts.

THE WITNESS: I don't recall.

BY MS. TORRES:

Q. No recollection, whatsoever?

A. No.

Q. Who is Patrick Topolewski?

A. Brother.

Q. Where does he live?

A. China.

Q. Whereabouts in China?

A. No idea.

Q. Have you ever visited him in China?

A. No.

Q. Do you have any other brothers who are involved with corporate defendants?

A. Corporate defendants, no.

Q. Who is Grant Sawyer?

A. He used to work for ePlanet.

Q. Did he ever work for corporate defendants?

A. No.

Q. Who owns ePlanet?

MR. SHERMAN: Speculation, legal, assumes facts.

THE WITNESS: I don't know.

BY MS. TORRES:

Q. Is Bud Zukaloff involved in ePlanet?

MR. SHERMAN: Same objections.

THE WITNESS: Not to my knowledge.

BY MS. TORRES:

Q. Do you know Charles Burke?

A. No.

Q. James Henderson?

A. No.

Q. Michael Barnes?

A. No.

Q. Do you know why defendants revived Westland Petroleum?

A. No.

Q. Do you know why they changed the name of Westland Petroleum to a Morrison Knudsen entity?

MR. SHERMAN: Same objections.

THE WITNESS: Well, as I said earlier, they wanted the four different companies to do different things, the environmental, mining, infrastructure.

BY MS. TORRES:

Q. Given the fact that according to you the first one had never done anything, why did they need three more?

A. Big plans, I guess.

MR. SHERMAN: Same objections.

BY MS. TORRES:

Q. Isn't it because there were a number of liens against Morrison Knudsen Services?

A. Liens?

Q. Yes.

MR. SHERMAN: Argumentative, same objections.

THE WITNESS: What kind of liens?

BY MS. TORRES:

Q. Bank liens, financing liens.

A. Not that I know of, no.

Q. Do you know what a UCC filing is?

A. Yes.

Q. Were there ever any UCC filings against Morrison Knudsen Services?

A. Not to my knowledge.

Q. The equipment that we looked at in Exhibit 10 earlier with the Morrison Knudsen logo on it—

A. Yes.

Q. —was that logo actually on the equipment or was it Photoshopped in the picture?

MR. SHERMAN: Same objections.

THE WITNESS: I don't know. I assume it was a sticker.

MR. SHERMAN: Don't assume.

THE WITNESS: All right.

MR. SHERMAN: Either you know or you don't know.

BY MS. TORRES:

Q. Do you know?

A. No.

Q. Were any of the projects shown on the Morrison-Knudsen.com website actually projects that corporate defendants had any involvement with

post revival by you and Mr. Blum and whoever else?

MR. SHERMAN: Vague, misstates testimony, assumes facts, speculation.

THE WITNESS: Well, without looking at the website, I don't know.

BY MS. TORRES:

Q. Can you take a look at Exhibit 10.

A. 10?

Q. That's it.

A. On the front?

Q. We marked it as Exhibit 10. If you want to look at the front, it says Exhibit 10.

A. Okay.

Q. So what I am asking you is whether or not any of the projects in here are actually projects that corporate defendants worked on or—

A. Oh, since?

Q. Yeah, since.

A. '08?

Q. Yes, since '08.

A. No.

Q. All of these—

MR. SHERMAN: I will object. Again, this is not the website.

BY MS. TORRES:

Q. All of the projects depicted on the Morrison-Knudsen.com website were projects formed by Morrison Knudsen entities prior to 2008, correct?

MR. SHERMAN: Same objections.

THE WITNESS: I believe so.

BY MS. TORRES:

Q. Did you do anything to determine whether any company or person was still using the Morrison Knudsen name prior to the time that Defendants revived the first of the corporate entities in this case?

MR. SHERMAN: Same objections.

THE WITNESS: Did I check if there was any of the companies?

BY MS. TORRES:

Q. Yeah, did you do—

A. No, no, I did not.

Q. You didn't do anything to determine whether anyone else had rights to use that name.

MR. SHERMAN: Same objections.

THE WITNESS: Yeah, I believe that's true.

BY MS. TORRES:

Q. And to the best of your knowledge, did anyone involved with corporate defendants do anything to determine whether or not anyone else had rights to use the Morrison Knudsen name?

MR. SHERMAN: Same objections.

THE WITNESS: I don't know.

BY MS. TORRES:

Q. You don't know of any efforts by anyone?

A. Yeah, correct.

Q. I'm going to ask the court reporter to mark as the next five exhibits in order, a series of press releases.

(Plaintiff's Exhibits 11 through 15 were marked for identification by the court reporter and are attached hereto.)

MR. SHERMAN: This is 11 through 16–15.

MS. TORRES: Yeah.

BY MS. TORRES:

Q. For the record, Exhibit 11 is a press release dated September 23, 2015, source, Morrison Knudsen Corporation.

12 is a press release dated October 23, 2015, source, Morrison Knudsen corporation.

13 is a press release dated March 10, 2016, same source.

14 is a press release dated June 30, 2016, also, Morrison Knudsen Corporation as the source.

And 15 is a press release dated April 11, 2017, source, Morrison Knudsen.

Mr. Topolewski, have you ever seen any of these press releases before?

A. No.

Q. Never seen a single one?

A. No.

Q. Was Morrison Knudsen awarded a $450 million remedial cleanup project?

A. No.

Q. So to the best of your knowledge, that is a false statement?

MR. SHERMAN: Misstates testimony.

THE WITNESS: Yeah, I don't think—none of these projects ever happened.

BY MS. TORRES:

Q. Are you—were you aware that the company was issuing press releases?

A. No.

Q. If you turn to Exhibit 12, it says "Contact Information, Henry Blum." Do you see that?

A. Yes.

Q. HBlumMorrison-Knudson.com, that was his E-mail address?

A. I believe it is, yeah.

Q. Any reason to believe Mr. Blum did not issue this press release?

A. I would have no knowledge if he did it or not.

Q. Looking at exhibit—and is it fair to say that—

A. Which one?

Q. Exhibit 12.

A. Okay.

Q. The one that has Henry Blum's name on it.

A. Yes.

Q. Is it fair to say that Morrison Knudsen was—well, was Morrison Knudsen awarded a $380 million Superfund site cleanup project?

MR. SHERMAN: Speculation.

THE WITNESS: I want to say no.

BY MS. TORRES:

Q. Looking at Exhibit 13, do you know Jason Butler?

A. No, I don't.

Q. Do you believe that is a real person?

A. I have no idea.

Q. Was Morrison Knudsen awarded a $570 million environmental cleanup project?

A. Not to my knowledge.

Q. Looking at Exhibit 14, was Morrison Knudsen awarded a $36 million mining project?

A. Not to my knowledge.

Q. Did Morrison Knudsen do anything for Blackstone Mining Group?

A. No, not to my knowledge.

Q. Who is Dick Blanchard?

A. I do not know.

Q. Never heard of Mr. Blanchard?

A. No, I haven't.

Q. Did the company do any work in Canada?

A. No.

MR. SHERMAN: Vague, speculation, assumes facts on that last one.

BY MS. TORRES:

Q. Broadly speaking, did the company do anything in Canada?

A. No.

MR. SHERMAN: Same objections.

BY MS. TORRES:

Q. Directing your attention to Exhibit 15, "Morrison Knudsen awarded 1.2 Billion Construction and Engineering Contract."

Do you see that?

A. Yes.

Q. Again, Mr. Blum is the contact at the bottom?

A. Yes.

Q. Do you know anything about the Indonesian Infrastructure Partnership awarding Morrison Knudsen a $1.2 billion contract?

A. No, I don't.

Q. Do you believe it?

A. No, I don't think it did.

Q. You don't believe Morrison Knudsen received a $1.2 billion contract from the Indonesian Infrastructure Partnership?

A. No, not to my knowledge.

Q. Did you know if Morrison-Knudsen received any contract or any work from the Indonesian Infrastructure Partnership?

A. Not to my knowledge.

Q. To your knowledge, has Morrison Knudsen done any work in Indonesia at all?

A. I think maybe April, May.

Q. To the best of your recollection, was it before or after they had been produced?

A. You mean to you guys?

Q. Yes.

A. I don't recall.

Q. You see the revenue line?

A. Yes.

Q. The revenue line for each year corresponds to the revenue provided in the second supplemental response to interrogatory two, correct?

A. Yes.

Q. And directly below "Revenue," it says "Costs of Sales" and there is only one line item directly there.

Do you see that?

A. Yes.

Q. If you look at the year ended December 31, 2014, which is the first column on the first page.

A. Okay. Yeah.

Q. 31, dash, December?

A. Yeah, yeah.

Q. 2014?

A. Yes.

Q. You understand that to correspond to year ended December 31, 2014, correct?

A. Yes.

Q. And it has direct labor costs listed at $598,709.

Do you see that?

A. Yes.

Q. And do you know what those direct labor costs were for?

A. I presume salaries.

Q. Whose salaries?

A. Blum and Mike Johnson, for sure.

MR. SHERMAN: Do you know or are you presuming?

THE WITNESS: I don't know.

BY MS. TORRES:

Q. You were President of MK Services in 2014, correct?

A. I believe for a brief period, yes.

Q. You were President in 2013, also?

A. I would have to look at the files.

Q. Why did you say "for a brief period"?

A. No, you said in '14.

Q. Right.

In 2014, you said, "For a brief period."

A. Yeah, I believe so, yeah.

Q. And in 2013, you don't remember?

A. No.

Q. So when you were President in 2014, who was employed by the company MK Services?

A. Blum, for sure, and I believe Hale and Ripley.

Q. And did they all get salaries?

A. I don't know.

Q. You were also President and, in fact, held other titles of MK Corporation in 2014?

A. I believe so.

Q. Do you know who the employees were of that entity?

A. No.

Q. Were they the same employees, Blum and Ripley?

A. I don't know.

Q. You don't know who was an employee of MK Corporation while you were its President?

A. Correct.

Q. Do you have any knowledge, whatsoever, as to who was drawing a salary from any of the corporate entities?

A. No.

MR. SHERMAN: Asked and answered.

BY MS. TORRES:

Q. Do you see these operating expenses?

A. Yes.

Q. Do you know what insurance the company would—what insurance expenses the company had—

A. No.

Q. —in 2014?

A. No.

Q. Do you know what insurance expenses the company had at any time from December or from 2013 onward?

A. No.

Q. "Auto and Truck Expenses," do you see that?

A. Yes.

Q. Do you know what auto and truck expenses the company had while you were President?

A. No.

Q. Do you have any information about what auto and truck expenses the company had at any time—

A. No.

Q. —from 2013 on?

A. No.

Q. Do you have any knowledge of any of the operating expenses listed here at any time from 2013 onward?

A. No.

Q. Do you know whether the company took out any loans?

A. No.

Q. Who would know?

A. No idea.

Q. Do you see the pretax income at the bottom or close to the bottom?

A. Yes.

Q. Do you see the net income at the bottom?

A. Yes.

Q. And no income taxes being paid?

A. Right.

Q. Can you tell me how if the company lost $940,981 in 2013, how it was able to pay any of its direct labor costs?

A. No.

Q. Do you have any idea how if it lost that much money in 2013, it was able to pay any of its operating expenses that year or the following year?

A. No.

Q. Do you have any idea given—well, am I reading this correctly, that according to these income statements, all four of the corporate defendants lost more than $640,000 a year and up to nine—almost $941,000?

A. Are where is that?

Q. 940,981.

A. Oh, yes, yeah, that's what the statements say.

Q. With that kind of—those kinds of losses every year, do you have any idea how they could possibly pay these direct labor or operating expenses?

A. No, they must have put money into it.

Q. Who?

A. The owners.

Q. Who are the owners?

MR. SHERMAN: Asked and answered.

THE WITNESS: You have already asked me that a few times.

BY MS. TORRES:

Q. So when you say they must have put money into it, are you speculating?

A. Yeah, that is a fair presumption.

MR. SHERMAN: Don't speculate, please.

BY MS. TORRES:

Q. Were these corporate entities used to launder money?

MR. SHERMAN: I'm going to instruct the witness not to answer.

MS. TORRES: On what basis?

MR. SHERMAN: Fifth Amendment.

BY MS. TORRES:

Q. Are you going to take your counsel's instruction?

A. Yes.

MR. SHERMAN: And, also, it assumes facts and speculation and misstates testimony.

BY MS. TORRES:

Q. Do you know who was responsible for accounting for any of the corporate defendants?

A. No.

Q. Do you know what role—let me rephrase. Do you know what role Mr. Blum played for leading the corporate defendants other than approaching you to be the President—or President of one or more of those entities?

A. His role in?

Q. Yeah.

A. I believe he was looking for some of these jobs to bid on.

Q. So what was his background?

A. Construction.

Q. How do you know that?

A. That's when I met him, he was working for another construction company.

Q. And who were you working for at that time?

MR. SHERMAN: Asked and answered.

THE WITNESS: I had Topolewski.

BY MS. TORRES:

Q. Topolewski America?

A. Yes. You already asked that.

Q. And how did you meet Mr. Blum, specifically? Did you meet him at a trade show? Did you meet him on a job? How?

A. I don't recall.

Q. You don't recall anything about your first introduction to Mr. Blum?

A. No.

Q. Did you ever communicate with Mr. Blum by E-mail?

A. I don't recall.

Q. How did Mr. Blum approach you in 2014 to become again President of Morrison Knudsen Services and, I believe, Morrison Knudsen Corporation?

A. Best I recall, he phoned me.

Q. Did he send you any information?

MR. SHERMAN: Vague.

BY MS. TORRES:

Q. Let me rephrase this.

Did he send you any information about any jobs he was trying to bid?

A. No. As I stated earlier, the only one we bid was the AECOM.

Q. How did that job come to your attention?

A. I believe Henry forwarded me that E-mail.

Q. Which E-mail are you talking about?

A. Where someone at AECOM contacted us about that Nevada project.

Q. I'm going to ask the court reporter to mark as Exhibit 18, an E-mail dated 4/19/2013 from BDavis@next-star.us to Info@Morrison-Knudsen.com.

(Plaintiff's Exhibit 18 was marked for identification by the court reporter and is attached hereto.)

BY MS. TORRES:

Q. Do you remember this E-mail exchange?

A. No, I have never seen this.

Q. Looking at the last—well, looking at the E-mail from Brandon Davis to Info@Morrison-Knudsen.com that starts on the bottom of the first page—

A. Yeah.

Q. —and continues to the top of the second page—

A. Yes.

Q. —do you see he asks a number of questions about the MK brand.

A. Yes.

Q. And he says,

"I know MK brand was part of WGI still, did the MK brand not go with WGI in the sale to URS?"

A. Yeah.

MR. SHERMAN: Document speaks for itself, speculation.

BY MS. TORRES:

Q. Do you know what WGI refers to there?

A. No.

Q. Do you know who URS is?

A. Yeah, I know who URS is.

Q. What is URS.

A. A company AECOM bought.

Q. And were you aware that URS had purchased a company called Washington Group International?

A. No.

Q. You see the response to Mr. Davis's questions says,

"It did but sold off divisions they no longer wanted or needed."

Do you see that?

A. Yeah.

Q. That is not true, is it?

A. I have no idea.

Q. MK—it says,

"MK was the part of Washington but when they were bought, URS raised money by selling MK. Mostly mining and federal government work in North America and a project in China."

Do you see that?

A. Yes.

Q. The MK entities that you were President of and involved with corporate defendants in this case were not sold off by URS to raise money, were they?

MR. SHERMAN: Misstates testimony, assumes facts, speculation, legal.

THE WITNESS: I have no idea. I have just never seen this E-mail before, so.

BY MS. TORRES:

Q. But you understand that you didn't acquire and Mr. Blum didn't acquire corporate defendants in this case by buying them from URS, correct?

MR. SHERMAN: Assumes facts, speculation.

THE WITNESS: I think that's correct.

BY MS. TORRES:

Q. Because the way you gained control of the corporate defendants here is by reviving them with the Nevada Secretary of State, correct?

MR. SHERMAN: Legal.

THE WITNESS: I believe that's correct.

BY MS. TORRES:

Q. I'm going to ask the court reporter to mark as Exhibit 19, another E-mail exchange between Brandon David and Info@Morrison-Knudsen.com.

(Plaintiff's Exhibit 19 was marked for identification by the court reporter and is attached hereto.)

BY MS. TORRES:

Q. Do you recognize this E-mail exchange?

A. I have read it. I don't recognize it.

Q. Had you seen it prior to this litigation?

A. Yes.

Q. When did you first see it?

A. I don't recall.

Q. Was it in approximately December of 2015?

A. I don't recall.

[. . .]

[June 18, 2018, Transcript, p. 239]

. . . Exhibit 3?

MR. SHERMAN: As what? Same handwriting as what?

BY MS. TORRES:

Q. Same handwriting on the assignment of trademark as on Exhibit 3, page 51.

MR. SHERMAN: So by your question then, you believe that it is because you want him to agree with you.

MS. TORRES: I'm asking him if he does agree with me, yes.

THE WITNESS: 51?

MS. TORRES: Page 151.

MR. SHERMAN: One, period, 51.

THE WITNESS: No idea.

BY MS. TORRES:

Q. Directing your attention to page 30 of Exhibit 3.

MR. SHERMAN: And can I she's asking if you agree with her.

MS. TORRES: I haven't asked any question yet.

MR. SHERMAN: You did about the other pages.

MS. TORRES: Yes.

MR. SHERMAN: So okay, because either he does agree with you or he doesn't.

MS. TORRES: He's answered.

MR. SHERMAN: He has no idea is not an answer.

BY MS. TORRES:

Q. Would you agree with me that the handwriting on the top of page 30 of Exhibit 3 is the same as the handwriting on the second page of Exhibit 26?

A. No, no idea.

Q. Doesn't look that way to you?

A. No.

Q. When did you first become aware that a trademark assignment had been filed with the USPTO for that trademark.

MR. SHERMAN: Assumes facts, legal conclusion, speculation, misstates testimony.

THE WITNESS: The trademark was what?

BY MS. TORRES:

Q. Filed with—the assignment was filed with the USPTO.

A. When this litigation came up.

Q. And you're aware that the trademark assignment document, Exhibit 26, came from the files of corporate defendants?

A. No, I don't know that.

Q. You didn't see this at the time it was produced to us?

MR. SHERMAN: Asked and answered.

THE WITNESS: No.

BY MS. TORRES:

Q. When did you first see it?

MR. SHERMAN: Asked and answered.

THE WITNESS: When this litigation started, somewhere in there.

BY MS. TORRES:

Q. So prior to—approximately a year ago.

A. This here?

Q. Yes.

A. No, this one, no.

Q. What about the—

A. This is the first I have seen it.

Q. What about this?

A. Yeah.

Q. The second page?

A. Yes.

Q. Have you seen that?

A. No.

Q. You have never seen that, either?

A. No.

Q. I am going to ask the court reporter to mark as Exhibit 27, "Trademark/Service Mark Application, Principal Register," filing date 3/26/ 2016, for the mark "Morrison Knudsen."

(Plaintiff's Exhibit 27 was marked for identification by the court reporter and is attached hereto.)

BY MS. TORRES:

Q. Do you recognize this application?

MR. SHERMAN: Objection to the characterization of this document as the application.

THE WITNESS: No.

BY MS. TORRES:

Q. Are you aware that Morrison Knudsen Corporation, one of the corporate defendants in this litigation, applied for a trademark with the USPTO of "Morrison Knudsen"?

MR. SHERMAN: Assumes facts, vague and ambiguous.

THE WITNESS: Yes.

MR. SHERMAN: Wait, wait, wait.

Vague and ambiguous, speculation, calls for a legal conclusion.

THE WITNESS: Yes.

BY MS. TORRES:

Q. When did you first become aware of that?

A. This litigation.

Q. How did you first become aware of it?

A. It was in your filings.

Q. Were you aware of it from any other source other than may filing or our filing?

A. No.

Q. Did you do anything to find out whether or not this trademark application had been filed by anyone in connection with corporate defendants?

A. No.

Q. Are you familiar with the law firm of-I'm not even sure what the law firm is—Legal Force?

A. No.

Q. Do you know anyone named Christopher Civil, Chris Civil?

A. No.

Q. Are you familiar with Raj Abhyanker?

A. No.

Q. John Salcido?

A. No.

Q. Jessica Tam?

A. No.

Q. Laura Figel?

A. No.

Q. Geneva Lai?

A. No.

Q. Never communicated with any of them?

A. No.

Q. Do you recognize the depictions on the last two pages of this exhibit?

A. Yes.

Q. And those are depictions or printouts from the Morrison-Knudsen.com website, correct?

MR. SHERMAN: Assumes facts, misstates the document, document speaks for itself.

THE WITNESS: I believe so, yes.

BY MS. TORRES:

Q. If you look on the first page, it says "First Use Anywhere Date."

Do you see that at the bottom of the first page?

A. Yeah.

Q. And the first use anywhere date is at least as early as 04/18/1993.

Do you see that?

A. Yes.

Q. That was not a use by any of the defendants—at least not any of the defendants post 2008, correct?

MR. SHERMAN: Misstates—

MS. TORRES: That's actually a poor question. I will rephrase.

BY MS. TORRES:

Q. None of the defendants in this litigation ever used the mark "Morrison Knudsen" prior to 2008; is that correct?

MR. SHERMAN: Asked and answered, assumes facts, speculation, misstates testimony.

THE WITNESS: Did they use the mark? Is that what you asked?

BY MS. TORRES:

Q. Yes, prior to 2008.

A. No.

Q. Looking above, it says,

"Construction and repair services in conviction public and private sector projects."

Do you see that?

A. Yes.

Q. And it's your testimony that Morrison Knudsen Corporation didn't actually conduct any construction and repair services for any purpose, correct?

MR. SHERMAN: Misstates testimony, asked and answered.

THE WITNESS: Yeah, I believe so. That's correct.

BY MS. TORRES:

Q. I'm going ask the court reporter to mark as Exhibit 28, a pleading electronically filed 6/19/2017, in McCormick 101, LLC, versus Topolewski America and Gary G. Topolewski.

(Plaintiff's Exhibit 28 was marked for identification by the court reporter and is attached hereto.)

BY MS. TORRES:

Q. Have you seen this document before?

A. No.

Q. Are you the Gary G. Topolewski named on the caption page?

A. Yes.

MR. SHERMAN: Document speaks for itself.

BY MS. TORRES:

Q. I'm going to ask the court reporter to mark as Exhibit 29, a reply to Plaintiff's opposition to motion to continue OSC re contempt of court.

(Plaintiff's Exhibit 29 was marked for identification by the court reporter and is attached hereto.)

BY MS. TORRES:

Q. Do you see that?

A. Are we on 28?

MS. TORRES: I am just marking 29. I will ask you about 28 in a minute.

BY MS. TORRES:

Q. Were you aware that Exhibit 28 had been filed on your behalf?

MR. SHERMAN: Mischaracterizes the document. It's not just on his behalf.

THE WITNESS: 28?

BY MS. TORRES:

Q. Yes.

A. I know of the lawsuit but those filings-excuse me—no, I have never read those.

Q. And Donald H. Williams was your counsel in that litigation?

A. Yes.

Q. Is he still your counsel in that litigation?

A. Yes.

Q. And you understood that he answered the complaint filed by McCormick 101 on your behalf and on behalf of Topolewski America, Inc.?

A. Yes.

Q. And you're aware that he filed counterclaims on your behalf and on behalf of Topolewski America, Inc.?

MR. SHERMAN: Calls for a legal conclusion.

THE WITNESS: Yeah, I believe so.

BY MS. TORRES:

Q. And he states—or this document filed on your behalf states Gary G. Topolewski AKA Gary Topolewski is a residence of Clark County, Nevada.

Do you see that?

A. What page is that on?

Q. Page 3.

A. Yeah, I see that.

MR. SHERMAN: I don't. Where is it?

BY MS. TORRES:

Q. Was that a true statement?

MR. SHERMAN: Hang on. Where are you? I am on page—

THE WITNESS: Page 3.

MR. SHERMAN: I don't see that on page 3.

MS. TORRES: Page 3, paragraph two of the counterclaim.

MR. SHERMAN: Then I must be looking at something else because I don't see it.

MS. TORRES: You may be looking at 29 instead of 28.

MR. SHERMAN: Are you back on 28? Hang on, hang on.

I see what you are talking about.

BY MS. TORRES:

Q. At the time of this filing in June 2017, were you a residence of Clark County, Nevada?

MR. SHERMAN: Calls for a legal conclusion.

THE WITNESS: No.

BY MS. TORRES:

Q. So that statement there in this pleading is false?

MR. SHERMAN: Calls for a legal conclusion, document speaks for itself.

THE WITNESS: Yeah, I didn't live there.

BY MS. TORRES:

Q. Were you the President of Topolewski America at the time your counsel filed this answer and counterclaim?

MR. SHERMAN: Asked and answered.

THE WITNESS: No.

BY MS. TORRES:

Q. Directing your attention to Exhibit 29, directing your attention to the last page.

A. Yes.

Q. That is your signature on that check?

A. I don't think so, no.

Q. No. It's your testimony that is not your signature?

MR. SHERMAN: Asked and answered.

BY MS. TORRES:

Q. I want you to look at it closely.

A. I don't believe so, no.

Q. So on page 2 of Exhibit 29 where it says as a showing of good faith, Topolewski sent a check to McCormick 101, LLC, in the amount of $75,000—

A. Yes.

Q. —do you see that?

A. Yes.

Q. Did you send a check to McCormick 101 in the amount of $75,000?

A. No, I believe he is referring to the company.

Q. He refers to the company above as Topolewski America.

A. Well, he refers to me as Gary Topolewski, so.

Q. That's true.

Were you, in fact, out of the country and not able to attend the OSC?

MR. SHERMAN: Vague and ambiguous.

BY MS. TORRES:

Q. Do you recall signing a declaration?

A. What date was that?

Q. March of 2018.

MR. SHERMAN: That is not what it says.

MS. TORRES: I'm asking a question.

BY MS. TORRES:

Q. Do you recall signing a declaration under penalty of perjury swearing that you were out of the country on a particular date in connection with this lawsuit?

A. I don't recall that.

Q. Is it your testimony you did not?

A. No.

MR. SHERMAN: Misstates.

THE WITNESS: I don't recall.

MR. SHERMAN: Misstates the testimony.

[. . .]

DECLARATION OF DAN P. SEDOR IN SUPPORT OF DEFENDANT GARY G. TOPOLEWSKI'S OPPOSITION TO PLAINTIFF'S MOTION FOR DISCOVERY SANCTIONS, TERMINATING SANCTIONS, AND ATTORNEY'S FEES (DECEMBER 28, 2021)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AECOM ENERGY & CONSTRUCTION, INC., AN OHIO CORPORATION,

Plaintiff,

v.

JOHN RIPLEY, ET AL.,

Defendants.

Case No. 2:17-cv-05398-RSWL (SSx)

Assigned to: Judge Ronald S.W. Lew

DECLARATION OF DAN P. SEDOR IN SUPPORT OF DEFENDANT GARY G. TOPOLEWSKI'S OPPOSITION TO PLAINTIFF'S MOTION FOR DISCOVERY SANCTIONS, TERMINATING SANCTIONS, AND ATTORNEY'S FEES

Date: January 18, 2022
Time: 10:00 a.m.
Ctrm: TBD

Action Filed: July 21, 2017
Discovery Cutoff: November 22, 2021
Pretrial Conference: January 25, 2022
Trial Date: March 1, 2022

DECLARATION OF DAN P. SEDOR

I, Dan P. Sedor, declare as follows:

1. I am an attorney duly admitted to practice before this Court. I am a partner with Jeffer Mangels Butler & Mitchell LLP, attorneys of record in this action for Defendant Gary G. Topolewski. I have personal knowledge of the facts set forth herein directly or from my review of my firm's files in this matter. If called as a witness, I could and would competently testify to the matters stated herein. I make this declaration in support of Defendant Gary G. Topolewski's Opposition to Plaintiff's Motion for Discovery Sanctions, Terminating Sanctions, and Attorney's Fees.

2. Attached hereto as **Exhibit 1** is an excerpt from a December 17, 2021 email exchange between me and Youngmoon Chang, counsel for Plaintiff.

3. Attached hereto as **Exhibit 2** is a true and correct copy of Plaintiff's Second Set of Requests for Production, served in this action on January 12, 2018.

4. Attached hereto as **Exhibit 3** is a true and correct copy of Mr. Topolewski's Third Amended Responses to Plaintiff's Requests for Production, served in this action on July 20, 2018 .

5. Attached hereto as **Exhibit 4** is a true and correct copy of letter, dated September 10, 2021, sent from NameBright.com to Yungmoon Chang, counsel

for Plaintiff, in response to a subpoena served by Plaintiff.

6. After the remand of this case to this Court from the Ninth Circuit Court of Appeals, Plaintiff's counsel never reached out to my firm to obtain responses to any outstanding discovery, nor did Plaintiff's counsel ever contact my firm to schedule a deposition of my client, Mr. Topolewski.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 28th day of December, 2021, at Los Angeles, California.

/s/ Dan P. Sedor

DECLARATION OF YUNGMOON CHANG IN SUPPORT OF AECOM'S MOTION FOR DISCOVERY SANCTIONS, TERMINATING SANCTIONS, AND ATTORNEY'S FEES (DECEMBER 17, 2021)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AECOM ENERGY & CONSTRUCTION, INC., AN OHIO CORPORATION,

Plaintiff,

v.

GARY TOPOLEWSKI, ET AL.,

Defendants.

Case No. 2:17-cv-05398-RSWL (AGRx)

Before: Hon. Ronald S.W. LEW,
Senior U.S. District Judge.

DECLARATION OF YUNGMOON CHANG IN SUPPORT OF AECOM'S MOTION FOR DISCOVERY SANCTIONS, TERMINATING SANCTIONS, AND ATTORNEY'S FEES

Complaint Filed Date: July 21, 2017

Judge: Hon. Ronald S.W. Lew
Hearing date: January 18, 2022
Time: 10:00 a.m.

Discovery cutoff: November 22, 2021
Pretrial conference: January 25, 2022
Trial date: March 1, 2022

I, Yungmoon Chang, hereby declare as follows:

1. I am a member in good standing of the State Bar of California and of the United States District Court for the Central District of California. I am an associate at Kirkland & Ellis LLP, and counsel of record for Plaintiff AECOM Energy & Construction, Inc. ("AECOM"). I submit this declaration in conjunction with AECOM's Motion for Discovery Sanctions, Terminating Sanctions, and Attorney's Fees.

2. I have personal knowledge of all of the matters set forth in this declaration, and if called, could and would testify competently thereto.

3. Attached as **Exhibit 1** is a true and correct copy of an email exchange from June 24, 2021, between John Jahrmarkt, Stan Gibson, Lauren Babst, Diana, Torres, and me. On June 24, 2021, I notified Mr. Gibson that the websites www.morrison-knudsen.com and www.morrisonknudsen.com were live. I further notified him that the domain registration website NameBright.com indicated the urls were last updated on March 26, 2021 and May 19, 2021. I further notified him that the address for the registrant was listed as 18034 Ventura Blvd, #102, Encino, CA 91316, which had been linked to Gary Topolewski's companies, Metal Jeans and Topolewski America, Inc. I further notified him that Mr. Topolewski's company, Metal Jeans, filed a statement of information no change on March 16, 2021, with an electronic signature "Diane Torres." Approximately two hours

later, Mr. Jahrmarkt responded that the websites should be offline now.

4 Attached as **Exhibits 2** and **3** are true and correct copies of the domain registration website NameBright.com, as of June 22, 2021. Exhibit 2 shows registry level information for the domain morrisonknudsen.com and indicates it was created on June 1, 2020, last updated on May 19, 2020, lists an admin email of info@morrison-knudsen.com, and a registrant address at 18034 Ventura Blvd #102, Encino CA 91316. Exhibit 3 shows registry level information for the domain morrison-knudsen.com and indicates it was created on March 25, 2008, last updated March 26, 2021, and lists an admin email of morrison-knudsen@domainsbyproxy.com.

5. Attached as **Exhibit 4** is a true and correct copy of a document subpoena response from Encino Mail and More, 18034 Ventura Boulevard, Encino, CA 91316. The application includes the following names in which the applicant's mail will be delivered: Topolewski America, Metal Jeans, Reid Fleming, and Gary Topolewski. The application lists the address to be used for delivery as Gary Topolewski, PMB 102.

6. Attached as **Exhibit 5** is a true and correct copy of the business records that were pulled at my direction from the Nevada Secretary of State for Northern Resources Inc., on or around November 2021. On page 29 of the exhibit, Gary Topolewski lists the address 18034 Ventura Blvd #102, Encino, CA 91316.

7. Attached as **Exhibit 6** is a true and correct copy of the business records that were pulled at my direction from the Nevada Secretary of State for

Topolewski North America Inc., on or around November 2021. On page 3 of the exhibit, the address 18034 Ventura Blvd, Encino, CA 91316 is listed.

8. Attached as **Exhibit 7** is a true and correct copy of Plaintiff's First Set of Interrogatories Directed to All Defendants, which was served on December 4, 2017. Interrogatory No. 2 requests "For each Corporate Defendant, identify all revenue earned since the Date of Inception."

9. Attached as **Exhibit 8** is a true and correct copy of Plaintiff's First Set of Requests for Admission Directed to Gary Topolewski [1-14], which was served on May 2, 2018.

10. Attached as **Exhibits 9, 10**, and **11** are other discovery requests to which Defendants did not respond. **Exhibit 9** is a true and correct copy of Plaintiff's Second Set of Requests for Admission Directed to Defendant Gary Topolewski [15-273], which was served on May 23, 2018. **Exhibit 10** is a true and correct copy of Plaintiff's Third Set of Interrogatories Directed to All Defendants, which was served on May 23, 2018. **Exhibit 11** is a true and correct copy of Plaintiff's Third Request for Production of Documents Directed to All Defendants [22-26], which was served on May 23, 2018. Defendants did not serve responses to any of the requests contained in **Exhibits 9, 10**, or **11**.

11. Attached as **Exhibit 12** is a true and correct copy of an email exchange between counsel at Adli Law Group, then counsel of record for Defendants, Diana Torres, and me, dated May 30-31, 2018. Mr. Adli stated that Mr. Johnson was traveling and would not be available for the noticed date of his

deposition. I responded that AECOM would take Mr. Johnson's nonappearance by telephone. Mr. Sherman responded "That's fine."

12. Attached as **Exhibit 13** is a true and correct copy of an email exchange between counsel at Adli Law Group, then counsel of record for Defendants, Diana Torres, and me, dated July 10, 2018. I notified Mr. Sherman that Defendants previously indicated they would provide a follow-up deposition date for Mr. Topolewski and asked for a date before July 17, 2018. I also stated that Corporate Defendants' 30(b)(6) witnesses failed to appear for their depositions, and despite multiple promises, Defendants did not offer alternative dates.

13. Attached as **Exhibit 14** is a true and correct copy of Defendants' Second Supplemental Response to First and Second Set of Interrogatories, served on May 15, 2018. Defendants' supplemental response to Interrogatory No. 3 states "Gary Topolewski is not an officer or director of any Defendant and that anything to the contrary stated in a declaration signed was in error." **Ex. 14** at 7.

14. Attached as **Exhibit 15** is a true and correct copy of an email exchange between John Jarhmarkt, Diana Torres, and me, dated May 7 and 10, 2018. On May 7, 2018, I stated that AECOM first noticed the depositions of Bud Zukaloff, Gary Topolewski, Mike Johnson, Carol Weys, Grant Sawyer, Henry Blum, John Ripley, Todd Hale, and Tom Porter on February 21, 2018. Defendants canceled the depositions. On April 13, 2018, AECOM noticed the depositions of Carol Weys, Gary Topolewski, Mike Johnson, John Ripley, Todd Hale, Bud Zukaloff, Tom Porter, Henry Blum, Grant

Sawyer, and Dick Blanchard. Two months after the initial notices, Defendants stated that only two of the individuals were affiliated with Defendants, despite the individuals having been identified by and/or linked to Defendants in publicly available documents.

15. Attached as **Exhibit 16** is a true and correct copy of the Wikipedia page for John Ripley (USMC), prepared at my direction on November 21, 2021. According to Wikipedia, Mr. Ripley was a decorated United States Marine Corps Colonel who received the Navy Cross for his actions during combat during the Vietnam War.

16. Counsel for Defendants represented that they had attempted service of discovery requests on AECOM by hand on the last permissible day before the discovery cutoff. Counsel then stated that the process server was unable to enter the building, because AECOM's counsel's office "closed an hour early that day for vacation." A true and correct copy of the email exchange is attached as **Exhibit 17**. AECOM's counsel checked its security logs and reviewed videotape footage for the building for the day the process server supposedly attempted to enter the building. Finding no record of such attempted service, AECOM disputed Defendants' representation. Defendants did not provide any further documentation or further assert that service had been attempted.

17. Attached as **Exhibit 18** is a true and correct copy of the Statement of Information No Change for the entity Metal Jeans Inc., filed on March 16, 2021 on the California Secretary of State website, which I accessed and saved. The electronic signature lists "Diane Torres."

18. Attached as **Exhibit 19** is a true and correct copy of an email exchange between Stanley Gibson, Lauren Babst, John Jahrmarkt, Diana Torres, and me, dated June 24, 2021. The email chain is a continuation of the chain attached as **Exhibit 1**. Mr. Gibson stated that Metal Jeans has no bearing on this matter and he did not understand how Diane Torres has anything to do with this. Ms. Torres responded she did not know whether Mr. Topolewski thought it was funny or a scare tactic, but it was neither and stated we look forward to his correction and expect it will not happen again.

19. Attached as **Exhibit 20** is a true and correct copy of the business records that were pulled at my direction from the Nevada Secretary of State for Metal Jeans Inc., on or around November 2021.

20. Defendants have made two productions in this case. On April 2, 2018, Defendants made their first production of a 96-page PDF. The entirety of the production was documents available to the public (business records from the Nevada Secretary of State, articles, business searches) or communications with AECOM regarding a bid request on or around December 16, 2015. On May 15, 2018, Defendants made their second production of a 6-page PDF. Of this production, two pages are the Income Statements attached as **Exhibit 29** and four pages are emails (one of which is with AECOM). In total, 97 of the 102 total produced pages are publicly available or are communications with AECOM.

21. On October 5, 2021, Corporate Defendants served discovery. Attached as **Exhibit 21** is a true and correct copy of The Morrison Knudsen Defendants' Request for Production of Documents to Plaintiff

AECOM Energy & Construction, Inc. Attached as **Exhibit 22** is a true and correct copy of The Morrison Knudsen Defendants' Interrogatories to Plaintiff AECOM Energy & Construction, Inc.

22. On October 15, 2021, Defendant Topolewski served discovery. Attached as **Exhibit 23** is a true and correct copy of Defendant Gary G. Topolewski's Requests for Production of Documents (Set One) to Plaintiff AECOM Energy & Construction, Inc. Attached as **Exhibit 24** is a true and correct copy of Defendant Gary G. Topolewski's Interrogatories (Set One) to Plaintiff AECOM Energy & Construction, Inc.

23. On October 19, 2021, Corporate Defendants served The Morrison Knudsen Defendants' Notice of Taking Deposition of Plaintiff AECOM Energy & Construction, Inc. Employees and Persons Most Knowledgeable. A true and correct copy is attached as **Exhibit 25**.

24. A true and correct copy of the press release titled "Morrison Knudsen Awarded $36 Million Mine Engineering Contract" dated June 30, 2016, is attached as Exhibit 26.

25. Defendants also published at least two other press releases. A true and correct copy of the press release titled "Morrison Knudsen Awarded $570 Million Environmental Clean Up Project" dated March 10, 2016, is attached as **Exhibit 27**. A true and correct copy of the press release titled "Morrison Knudsen Awarded $1.2 Billion Construction and Engineering Contract" dated April 11, 2017, is attached as **Exhibit 28**.

26. The total amounts advertised in the press releases in Exhibits 26, 27, and 28 is $1.806 billion.

$36 million represents approximately 2% of $1.806 billion.

27. On May 15, 2018, Defendants produced the two pages of which true and correct copies are attached as **Exhibit 29**. The two pages are labeled to represent four years of "Income Statement" for all four Corporate Defendants.

28. The sum of the costs and expenses for the four years covered in the income statement is:

Year	**Total Cost of Sales**	**Total Operating Expenses**	**Total**
2013	754,054	194,025	948,079
2014	598,709	263,617	862,326
2015	553,220	154,071	707,291
2016	483,994	163,638	647,632

The sum of the totals for 2013-2016 is 3,165,328. Additionally, estimating the same total costs and expenses of $647,632 for each of the years 2017 through 2021 brings the total to $6,403,488. Three times $6,403,488 is $19,210,464. $19,210,464 is approximately 1% of $1.806 billion.

29. AECOM filed the Complaint in this case on July 21, 2017. Dkt. 1. On May 17, 2019, Defendants filed a Notice of Appeal to the Ninth Circuit. Dkt. 308. There are approximately 22 months between those two dates. On April 16, 2021, the Court ordered a hearing on the Mandate of the Ninth Circuit Court of Appeals. Dkt. 341. Between April 16, 2021, and December 17, 2021, is approximately eight months.

Thus, the case has been pending in District Court approximately 30 months, or approximately 900 days.

30. Attached as **Exhibit 30** is a true and correct copy of the Nevada Secretary of State entity information for Defendant Goodbrand Corporation (formerly MK Corporation), which was prepared at my direction on November 21, 2021. The entity status was "Active" as of that date. All Corporate Officers and Directors listed as their address 2049 Century Park East Suite 2525, Los Angeles, CA 90067. I understand this is the address for counsel, Mr. John Jahrmarkt.

31. Attached as **Exhibit 31** is a true and correct copy of the Nevada Secretary of State entity information for Defendant Majestic Services Inc. (formerly MK Services), which was prepared at my direction on November 21, 2021. The entity status was "Active" as of that date. All Corporate Officers and Directors list as their address 2049 Century Park East Suite 2525, Los Angeles, CA 90067. I understand this is the address for counsel, Mr. John Jahrmarkt.

32. Attached as **Exhibit 32** is a true and correct copy of the Nevada Secretary of State entity information for Defendant Northern Majestic International Inc. (formerly MK International), which was prepared at my direction on November 21, 2021. The entity status was "Active" as of that date. All Corporate Officers and Directors list as their address 2049 Century Park East Suite 2525, Los Angeles, CA 90067. I understand this is the address for counsel, Mr. John Jahrmarkt.

33. Attached as **Exhibit 33** is a true and correct copy of the Nevada Secretary of State entity infor-

mation for Defendant Goodbrand Company Inc. (formerly MK Company Inc.), which was prepared at my direction on November 21, 2021. The entity status was "Active" as of that date. All Corporate Officers and Directors list as their address 2049 Century Park East Suite 2525, Los Angeles, CA 90067. I understand this is the address for counsel, Mr. John Jahrmarkt.

34. Attached as Exhibit 34 is a true and correct copy of screenshots from the website morrison-knudsen.com. The screenshots were gathered on or around May 5, 2021 at my direction.

35. On July 30, 2021, AECOM served or first attempted service of eleven subpoenas on Go Daddy, TurnCommerce, ATT, Pacific Bell Telephone, Verizon, Sprint PCS, Sprint Spectrum, Century Communications, Cellco, T-Mobile, and Adli Law Group. True and correct copies of the subpoenas, respectively, are attached as **Exhibits 35-45**.

36. On August 20, 2021, AECOM served or attempted service of two subpoenas on US Bancorp and Citi Bank. True and correct copies of the subpoenas, respectively, are attached as **Exhibits 46, 47**.

37. On September 16, 2021, AECOM served or first attempted service of five subpoenas on US Bank National Association, Go Daddy, Verizon Wireless Telecom Inc., Lumen CenturyLink, and Sprint Spectrum T Mobile. True and correct copies of the subpoenas, respectively, are attached as **Exhibits 48-52**.

38. True and correct copies of the responses to the subpoenas are attached at **Exhibits 53-62**. For example, **Exhibit 53** is correspondence from US

Bancorp stating "they received a Motion to Quash on 8/30/2021 it was filed on 8/27/2021 at this time they will not be releasing any records." **Exhibit 59** is correspondence from AT&T stating "We are in receipt of an Application for a Motion to Quash in the above referenced case. [AT&T] cannot produce information responsive to the Legal Demand until it receives an order denying the motion to quash or a letter from the opposing counsel withdrawing the motion to quash."

39. Attached as Exhibit 63 are true and correct copies of screenshots of the website Morrison-knudsen .com collected around November 2018.

40. Attached as Exhibit 64 is a true and correct copy of filings from *Topolewski v. AECOM Energy & Construction, Inc., et al.,* 21STCV30981 (LA. Super. Ct. 2021), including the Court Order dated November 30, 2021. On page 11 of Exhibit 64, the Order states " . . . Plaintiff should have filed a motion before Judge Lew. He was the one who entered the judgment in the first place. He is the one who would know what has been vacated and what has not. And he has jurisdiction over the parties involved. Judge Lew could have ordered AECOM to withdraw the abstract. He still can. There was no need to file a new lawsuit in this court to obtain relief that is available in a case already pending." On page 12 of Exhibit 64, the Order states "The law here is as clear as it ever gets in the anti-SLAPP context. . . . Plaintiff has no hope of prevailing on this case." The case was dismissed with prejudice. Ex. 64 at 13.

41. AECOM submitted amended abstracts of judgment, and on June 22, 2021, notices of deficiency issued because the principal fee line was left blank,

rather than having a zero. Dkts. 352-62. AECOM resubmitted amended abstracts of judgment, which were entered on June 29, 2021. Dkts. 363-71.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 17th day of December, 2021, at Los Angeles, California.

/s/ Yungmoon Chang

DEFENDANT GARY TOPOLEWSKI'S THIRD AMENDED RESPONSES TO PLAINTIFF'S REQUEST FOR PRODUCTION (JULY 20, 2021)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AECOM ENERGY & CONSTRUCTION, INC., AN OHIO CORPORATION,

Plaintiff,

v.

JOHN RIPLEY, ET AL.,

Defendants.

Case No. 2:17-cv-05398-RSWL (SSx)

DEFENDANT GARY TOPOLEWSKI'S THIRD AMENDED RESPONSES TO PLAINTIFF'S REQUEST FOR PRODUCTION

Complaint Filed Date: July 21, 2017

Before: Hon. Ronald S.W. LEW, Senior U.S. District Judge.

Defendant Gary Topolewski ("Defendant") hereby provides Third Amended Responses Plaintiff's Requests for Production of Documents and declaration as follows:

PRELIMINARY STATEMENT

To the extent that Responding Party's investigation and analysis of the facts and data relating to this action are ongoing, and the Responding Party's discovery in this action, as well as trial preparation, are not completed, Responding Party's response is made without prejudice to its right to modify or supplement the response upon completion of discovery, and to use at trial, for any motion, and for any other purpose, any documents, facts or evidence of any sort later discovered, developed, or analyzed by Responding Party; responses set forth herein are true and correct to the best of the Responding Party's knowledge as of the date of the response, are based upon the documents and information presently available and are subject to corrections for inadvertent errors, mistakes or omissions. In addition, Responding Party's responses set forth herein are subject to and without waiving, but on the contrary reserving, the right to introduce, use or refer to documents or information presently in possession, but not yet analyzed and/or evaluated, as well as the right to amend or supplemental the responses in the event that any information or documents previously available are unintentionally overlooked.

It should be noted that Responding Party has not yet completed formal discovery pertaining to the witnesses and parties to this case, nor has Responding Party completed its own internal inspection with respect to this matter. Accordingly, the following responses are based upon limited information and documents that are presently available and known to Responding Party.

The following responses are given without prejudice to Responding Party's right to produce evidence of any subsequently discovered fact or facts which this Responding Party may later recall. Responding Party, accordingly, reserves the right to change any and all answers herein as additional facts are ascertained, analysis are made, and investigations are completed. The answers contained herein are made in good-faith effort to supply as much factual information as is presently known but should in no way be to the prejudice of this Responding Party in relation to further discovery or investigation.

Responding Party's ultimate response will be based on information currently available to Responding Party, which, after reasonable and diligent investigation, Responding Party believes in good-faith to be responsive. Responding Party reserves the right to use at Trial any and all evidence subsequently discovered without notice to adversary(s) and will supplement the response upon the discovery of additional evidence to the extent, if any, required of it by applicable law.

GENERAL OBJECTIONS

Responding Party makes the following objections ("General Objections") to the Requests, which apply as appropriate to all definitions and Document Requests found therein:

1. Responding Party's response to each Request is made subject to and without waiver of any objections as to privilege or as to the competency, relevancy, materiality, or admissibility as evidence for any other purpose, of any of the information provided or

referred to, or of any of the Responses given herein, or of the subject matter thereof, in any proceedings.

2. Responding Party objects to the proffered definitions and instructions to the extent that they conflict with or seek to expand the requirements of the California Rules of Civil Procedure, any orders of this Court, or any stipulations or agreements of the Parties (collectively referred to as "Rules").

3. Responding Party objects to these Requests to the extent that they seek to inquire into matters or seek documents that are protected by the attorney client privilege, the work product doctrine, immunity or any other applicable privilege. The responses to the Requests contained herein shall not be construed to include any waiver by Responding Party of the attorney client privilege, the work product privilege or any other privilege or immunity, all responses herein being expressly subject to such objection. Inadvertent production of any information that is privileged, protected from disclosure, or otherwise immune from discovery shall not constitute a waiver of any privilege or protection or of the right to object to the use of the information that was inadvertently produced. Responding Party reserves the right to recall from discovery any inadvertently produced document that is protected by the attorney-client privilege, the work-product immunity doctrine, or any other applicable privilege or immunity.

4. Responding Party objects to these Requests to the extent they are not limited to an identifiable and relevant time period and/or scope and, as such, are overly broad, unduly burdensome, vexatious and harassing, and not reasonably calculated to lead to the discovery of admissible evidence.

5. Responding Party objects to the Requests' characterizations of facts, documents, theories or conclusions. By responding to a Request, Responding Party does not admit or accept its characterizations of facts, documents, theories or conclusions.

6. Responding Party objects to each Request to the extent that any Request may be construed as requiring Responding Party to characterize documents or their contents or to speculate as to what the documents may or may not show.

7. These general objections are continuing in nature and are incorporated by reference in the response to each of the requests for production set forth below. By responding to the requests for production, Responding Party does not waive any of the foregoing objections.

9. Responding Party objects to the form of the Request as well as to the Definitions set forth in the Request.

10. The Request requires that Responding Party provide responses not required by statute and that those responses be provided subject to definitions and instructions not permitted by statute. The Requests seek documents pertinent to and likely in the custody of other entities, over which Responding Party lacks any custody, control or possession.

FURTHER SUPPLEMENTAL RESPONSES TO REQUESTS FOR PRODUCTION

Request No. 19:

All documents relating to or reflecting any revenue received by any Defendant arising in any

way relating to the use of the Morrison Knudsen name or logo, including all monthly, quarterly and annual income statements, balance sheets and other financial statements of any Corporate Defendant since such Corporate Defendant's date of inception.

Response to Request No. 19:

Objection, trade secret, overbroad, irrelevant, invasive of privacy rights, invasive of third party rights.

Supplemental Response to Request No. 19:

Objection, trade secret, overbroad, irrelevant, invasive of privacy rights, invasive of third party rights. Responding Parties have responsive documents that are being withheld on the basis of all objections.

Further Supplemental Response to Request No. 19:

Objection, overbroad as to the time frame since the Plaintiff has stated that the time of infringement started in 2017. Subject to the general and specific objections, Responding Parties will produce any responsive documents that were created no earlier than January 1, 2017.

Third Supplemental Response to Request No. 19:

Subject to the general and specific objections, Defendant Gary Topolewski is unaware whether or not responding documents exist. If they existed, Defendant does not have possession or control of documents.

Request No. 20:

All tax returns and bank statements of any Corporate Defendant since such Corporate Defendant's Date of Inception.

Response to Request No. 20:

Objection, overbroad, irrelevant, invasive of privacy rights, invasive of financial privacy.

Supplemental Response to Request No. 20:

Objection, trade secret, overbroad, irrelevant, invasive of privacy rights, invasive of third party rights. Responding Parties have responsive documents that are being withheld on the basis of all objections.

Further Supplemental Response to Request No. 20:

Objection, overbroad as to the time frame since the Plaintiff has stated that the time of infringement started in 2017. Subject to the general and specific objections, Responding Parties will produce any responsive documents that were created no earlier than January 1, 2017.

Third Supplemental Response to Request No. 20:

Subject to the general and specific objections, Defendant Gary Topolewski is not required to produce personal records pursuant to Court Order ECF No. #154 and withholds personal records as such. Further, Defendant Gary Topolewski is not in possession or control of requested records of Corporate Defendants.

ADLI LAW GROUP P.C.

By: /s/ Dariush G. Adli
Dariush G. Adli
Drew H. Sherman
Joshua H. Eichenstein
Attorneys for Defendants: Gary Topolewski, Morrison Knudsen Corporation, et. al.

Dated: July 20, 2018

DEFENDANT GARY TOPOLEWSKI'S DECLARATION IN SUPPORT OF THIRD AMENDED RESPONSES TO PLAINTIFF'S REQUEST FOR PRODUCTION PURSUANT TO COURT ORDER ECF DKT 154 (JULY 20, 2021)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AECOM ENERGY & CONSTRUCTION, INC., AN OHIO CORPORATION,

Plaintiff,

v.

JOHN RIPLEY, ET AL.,

Defendants.

Case No. 2:17-cv-05398-RSWL (SSx)

DEFENDANT GARY TOPOLEWSKI'S DECLARATION IN SUPPORT OF THIRD AMENDED RESPONSES TO PLAINTIFF'S REQUEST FOR PRODUCTION PURSUANT TO COURT ORDER ECF DKT 154

Complaint Filed Date: July 21, 2017

Before: Hon. Ronald S.W. LEW,
Senior U.S. District Judge.

I, Gary Topolewski, am a Defendant in the above entitled action. I have read Plaintiff's request for production of documents and provided the response on behalf of myself personally. I am familiar with the contents of both. Based on my knowledge, the responses to are true.

I am no longer affiliated with Morrison Knudsen and therefore not a representative of corporate Defendants for which one would be required to produce responsive documents. I do not have access to corporate records responsive to this request, if they exist.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing responses are true and correct.

/s/ Gary Topolewski

Date: July 20, 2018

NOTICE OF DEFAULT BY CLERK PER FED. R. CIV. P. 55(A) (DECEMBER 4, 2017)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AECOM ENERGY & CONSTRUCTION, INC.,

Plaintiff(s),

v.

JOHN RIPLEY, ET AL.,

Defendant(s).

Case No. 2:17-cv-05398-RSWL-SS

DEFAULT BY CLERK FED. R. CIV. P. 55(A)

It appearing from the records in the above-entitled action that summons has been served upon the defendant(s) named below, and it further appearing from the affidavit of counsel for Plaintiff, and other evidence as required by F. R. Civ. P. 55(a), that each of the below defendants have failed to plead or otherwise defend in said action as directed in said Summons and as provided in the Federal Rules of Civil Procedure:

Now, therefore, on request of counsel, the DEFAULT of each of the following named defendant(s) is hereby entered:

Bud Zukaloff, an individual
John Ripley, an individual
Todd Hale, an individual
Henry Blum, an individual

Clerk, U.S. District Court

By /s/ Sharon Hall–Brown
Deputy Clerk

Date: December 4, 2017

COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES (DECEMBER 4, 2017)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AECOM ENERGY & CONSTRUCTION, INC., AN OHIO CORPORATION,

Plaintiff,

v.

JOHN RIPLEY, AN INDIVIDUAL; TODD HALE, AN INDIVIDUAL; GARY TOPOLEWSKI, AN INDIVIDUAL; HENRY BLUM, AN INDIVIDUAL; BUD ZUKALOFF, AN INDIVIDUAL; "MORRISON KNUDSEN CORPORATION," A NEVADA CORPORATION; "MORRISONKNUDSEN COMPANY, INC.," A NEVADA CORPORATION; "MORRISONKNUDSEN SERVICES, INC.," A NEVADA CORPORATION; AND "MORRISON-KNUDSEN INTERNATIONAL INC.," A NEVADA CORPORATION,

Defendants.

Case No. 2:17-cv-05398

COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES

1. **FALSE DESIGNATION OF ORIGIN/AFFILIATION/PASSING OFF;**
2. **FALSE ADVERTISING;**
3. **CYBERPIRACY;**
4. **CA COMMON LAW UNFAIR COMPETITION;**
5. **CA STATUTORY UNFAIR COMPETITION;**
6. **CA STATUTORY FALSE ADVERTISING;**

AND

7. **PETITION FOR CANCELLATION OF A REGISTERED MARK**

DEMAND FOR JURY TRIAL

Plaintiff AECOM Energy & Construction, Inc. ("AECOM") brings this action against Defendants for injunctive relief and damage. The allegations herein are made based on personal knowledge as to AECOM and its own actions and interactions, and upon information and belief as to all other matters.

INTRODUCTION

1. This case is about a remarkable fraud by Defendants to usurp the identity and goodwill of Morrison Knudsen Corporation, an iconic company in modern American history, whose accomplishments include some of this nation's greatest and most well-known engineering and construction feats ("MK"). In doing so, Defendants have falsified corporate records, submitted false statements to both federal and state

government agencies, and have created a website www.morrison-knudsen.com (the "Fraudulent Website") on which they falsely claim that MK's previous projects, as well as its long and storied past, is their own. Through this website, they offer for sale to the public used construction equipment and seek equity stakes in other projects—all by fraudulently trading on the knowledge, experience, and business reputation of MK.

2. AECOM, the successor to MK, sent a cease and desist letter to Defendants to reach a resolution to this matter. Defendants' brazen response was to accuse AECOM of attempting to trade off MK's goodwill—the goodwill that rightly belongs to AECOM. AECOM tried again to resolve this matter without court intervention, explaining the acquisitions that form the basis for AECOM's rights. This time, Defendants did not respond. As of this date, Defendants continue to impersonate MK, a company with which they have no actual relationship. AECOM thus files this action to enjoin Defendants from further fraudulent use of MK's name, trademarks and corporate records, and from falsely asserting or taking any further action to convey an affiliation or other relationship with MK, including through the use of the Fraudulent Website.

THE PARTIES

3. Plaintiff AECOM is an Ohio corporation with its principal place of business located at 1999 Avenue of the Stars, Suite #2600, Los Angeles, California 90067. AECOM is an engineering firm that provides a wide range of services, including design, construction, technical services, management and capital. Formerly

known as Morrison Knudsen Corporation and then as Washington Group International, AECOM was the registered owner of MK's trademark rights in the United States.

4. Defendant Morrison Knudsen Corporation is a Nevada Corporation, with its principal place of business at 2049 Century Park East, Suite 3850, Los Angeles, California 90067 (diagonally across the street from that of AECOM).

5. Defendant Morrison-Knudsen Company, Inc. is a Nevada Corporation, with its principal place of business at 2049 Century Park East, Suite 3850, Los Angeles, California 90067.

6. Defendant Morrison Knudsen International Inc. is a Nevada Corporation, with its principal place of business at 2049 Century Park East, Suite 3850, Los Angeles, California 90067.

7. Defendant Morrison-Knudsen Services, Inc. is a Nevada Corporation, with its principal place of business at 2049 Century Park East, Suite 3850, Los Angeles, California 90067.

8. Defendant John Ripley is an individual residing and working in Los Angeles, California, and, along with the other individual Defendants, controls the Defendant entities.

9. Defendant Gary Topolewski is an individual residing and working in Los Angeles, California, and, along with the other individual Defendants, controls the Defendant entities.

10. Defendant Todd Hale is an individual residing and working in Los Angeles, California, and, along

with the other individual Defendants, controls the Defendant entities.

11. Defendant Bud Zukaloff is an individual residing and working in Los Angeles, California, and, along with the other individual Defendants, controls the Defendant entities.

12. Defendant Henry Blum is an individual residing and working in Los Angeles, California, and, along with the other individual Defendants, controls the Defendant entities.

13. At all relevant times, each of the Defendants was the agent and alter ego of each other Defendant, acting for and on behalf of each of the other Defendants, all of whom act as a single enterprise, with unity of purpose and control.

JURISDICTION AND VENUE

14. This action arises under the Lanham Act, 15 U.S.C. §§ 1051 *et seq.*, and California statutory and common law. This Court has subject matter jurisdiction pursuant to 15 U.S.C. § 1121 *et seq.*, and 28 U.S.C. §§ 1331 (federal question jurisdiction), 1338(a) and 1338(b). This Court has supplemental jurisdiction over the Fourth, Fifth, and Sixth Causes of Action below, pursuant to 28 U.S.C. § 1367(a).

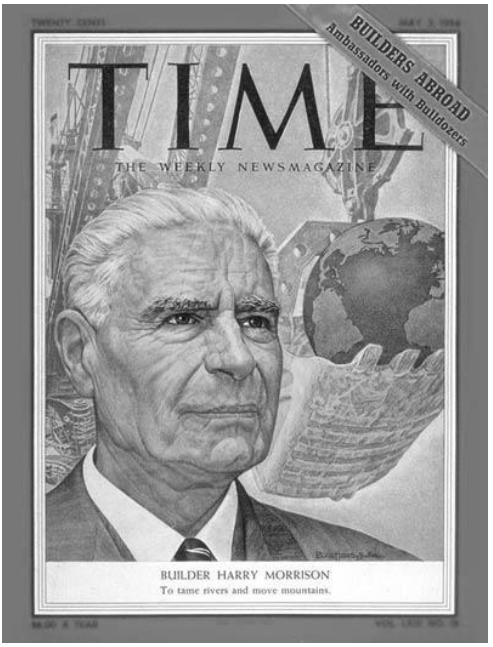
15. Each of the Defendants is subject to personal jurisdiction in this Court based on continuous and systematic contacts within this judicial district. In multiple documents filed with government entities, Defendants state that their address is 2049 Century Park East Suite 3850, Los Angeles, CA 90067.

16. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b), (c) and (d) because a substantial amount of the events and injury occurred in this judicial district and Defendants themselves claim to operate their principal place of business in this district.

BACKGROUND

Morrison Knudsen Corporation

17. MK was founded in the early part of the 20th Century by Harry Morrison and Morris Knudsen, and became a storied engineering firm. MK's first successful project was the construction of the Three-Mile Falls Dam in Oregon in 1914. Within twenty years, MK was building such notable projects as the Hoover Dam. By mid-century, MK had reportedly built over 100 dams, as well as numerous airfields, military bases, ships, and countless other projects, throughout the world. In 1954, TIME magazine's cover featured Harry Morrison, proclaiming him as "the man who has done more than anyone else to change the face of the earth."



BUILDER HARRY MORRISSON
TO TAME RIVERS AND MOVE MOUNTAINS.

18. Over the following forty years, MK would build such notable projects as the San Francisco-Oakland Bay Bridge and the Trans-Alaska Pipeline, to name just two. MK also broadened into railway design and construction, and spun off a separate entity called MK Rail.

19. In 1996, MK and another construction and engineering firm, Washington Construction Group, Inc. merged, with the surviving entity operating under the name Morrison Knudsen Corporation and continuing to offer the same services that MK had offered for nearly a century. In 2000, however, MK changed its name to Washington Group International. In 2007, engineering and construction firm URS Corp. ("URS") acquired MK, then known as Washington Group

International, and its operational subsidiaries, which were renamed but continued to operate as wholly owned subsidiaries of URS. Despite its changes in name and ownership, MK continued to offer the same types of engineering and construction services that had made it one of the most influential companies ever to exist in its industry.

AECOM

20. Headquartered in Los Angeles, California, AECOM is a subsidiary of a multinational engineering firm of the same name, with expertise in design, consulting, construction, and management services. Until 2000, Plaintiff AECOM was named Morrison Knudsen Corporation, an Ohio subsidiary of its Delaware parent, also called Morrison Knudsen Corporation. In 2000, AECOM's name (Morrison Knudsen Corporation) changed to Washington Group International. In 2007, Washington Group International and its related entities were acquired by URS Corp. In 2014, AECOM's parent company, also called AECOM, acquired URS and its related entities when URS merged with an AECOM subsidiary. In connection with that acquisition, Plaintiff AECOM's name became what it is today: AECOM Energy & Construction, Inc.

21. The AECOM entities employ more than 87,000 people around the globe, and provide services to a wide range of clients in over 150 countries. The new World Trade Center in New York, the Hong Kong International Airport, Dubai Healthcare City, London Gateway, The Royal Bank of Scotland and, closer to home, the new Los Angeles NFL stadium being built for the Chargers, are among the many

projects engineered or built by AECOM entities. For the past three years, AECOM has been named one of the "World's Most Admired Companies" by Fortune magazine.

22. Despite its name changes, AECOM proudly uses the MK name, as well as MK trademarks, in brochures and client presentations to tout MK and its expertise as among the entities that helped make the AECOM entities the premier engineering and construction firm that it is today.

The Morrison Knudsen Mark

23. Throughout the course of its existence, MK used many trademarks, including the word mark MORRISON KNUDSEN, the MK logo and the combined word and design mark MKCO MORRISON KNUDSEN (each an "MK Mark"; collectively, the "MK Marks").

24. Through their consistent use for roughly 100 years, the MK Marks achieved tremendous recognition and goodwill, and became associated with MK's premier design, engineering, and construction services. The MK Marks have appeared, among other places, on construction equipment, locomotive parts, and design materials, and denote the expertise of a company that built American airfields in World War II, NASA's Kennedy Space Center, and the Hoover Dam. Even today, years after the company changed its corporate name, the MK Marks appear in AECOM

promotional materials detailing a century of design, engineering and construction expertise.

25. Over the course of many decades, MK had several trademark registrations for engineering and construction services, including, but not limited to, the following:

Reg. No. 0980525; Registered Mar. 12, 1974 –Nov. 18, 1980.

Reg. No. 0980526; Registered Mar. 12, 1974 –Nov. 18, 1980.

Reg. No. 1176535; Registered Nov. 3, 1981– May 27, 1988.

Reg. No. 1176536; Registered Nov. 3, 1981– May 27, 1988.

Reg. No. 1699437; Registered July 7, 1992– Feb. 5, 2016.

Reg. No. 1716505; Registered Sept. 15, 1992 –Feb. 5, 2016.

Reg. No. 1744815; Registered Jan. 5, 1993– Feb. 5, 2016.

Reg. No. 1874224; Registered Jan. 17, 1995 –Jan. 26, 2002.

Reg. No. 1874254; Registered Jan. 17, 1995 –Jan. 26, 2002.

Reg. No. 1900555; Registered June 20, 1995 –June 29, 2002.

Reg. No. 1921850; Registered Sept. 26, 1995 –July 20, 2002.

Reg. No. 2199496; Registered Oct. 27, 1998–May 30, 2009.

26. Although the last registrations for the MK Marks lapsed in 2016, AECOM has been using the MK Marks in its marketing materials to refer to MK and its goodwill. They retain residual goodwill to this day, which belongs to AECOM.

DEFENDANTS' FRAUD

Defendants Take over Two Dissolved Affiliates of MK and Two Unrelated Entities That They Renamed as MK Affiliates

27. In 2008, unbeknownst to MK, Defendants began what would become an intricate series of frauds designed to trade off, and indeed take over, the MK identity.

Morrison-Knudsen Services

28. Defendants first fraudulently took over Morrison-Knudsen Services, Inc., an affiliate of MK that was incorporated in 1982 but dissolved in 2002 when its Vice President and General Counsel, Richard Parry, along with its Secretary, Craig G. Taylor, filed a certificate of dissolution with the Nevada Secretary of State.

29. On July 28, 2008, however, Hale, purporting to be President of Morrison-Knudsen Services but acting fraudulently on behalf of all Defendants, revived that corporation. To do so, he filed a Certificate of Revival of a Nevada Corporation, seeking reinstatement of that entity, falsely swearing under penalty of perjury that he had authority from the board of directors of Morrison-Knudsen Services, Inc. to do so. Based on

that false statement, Morrison-Knudsen Services, Inc. was revived. In the Certificate of Revival, Hale, acting on behalf of all Defendants, listed Blum as Vice President and the Registered Agent for service of process at 2756 N. Green Valley Parkway #414, Henderson, Nevada 89014 (which appears to be a UPS Store), and listed himself as President and Ripley as Secretary, with an address of 6433 Topanga Canyon Blvd #165, Woodland Hills, CA 91303. Each year thereafter, Defendants filed fraudulent statements of officers and directors, under penalty of perjury.

30. By at least mid-2011, Defendants had moved to their current business address on Century Park East in Los Angeles. On May 24, 2011, Topolewski, acting on behalf of all Defendants, filed the annual list of officers and directors of the fraudulently-revived Morrison-Knudsen Services, Inc. listing himself as Chairman, Hale as President, Blum as Vice President, and Ripley as Secretary, all with the address of 2049 Century Park East, Suite 3850, Los Angeles, California 90067. He also listed Blum as the agent for service of process at the same UPS Store in Henderson, Nevada.

31. Zukaloff, who listed himself as the company's "Compliance Officer," signed a list of officers and directors of Morrison-Knudsen Services, Inc., sworn under penalty of perjury, which he filed with the Nevada Secretary of State in May 2013.

Morrison Knudsen Corporation of Viet Nam

32. Defendants similarly took over another dissolved Nevada affiliate of MK, Morrison Knudsen Corporation of Viet Nam. That entity had been incorporated in 1996, but was dissolved in 2002 by Richard Parry, its General Counsel and Corporate

Secretary. On October 22, 2014, however, Topolewski and Blum, acting on behalf of all Defendants, submitted a form to the Nevada Secretary of State asking to have Morrison Knudsen Corporation of Viet Nam re-instated, and swearing under penalty of perjury that they had the authority from the Board of Directors of that company to do so. The certificate of revival listed Topolewski as President, Secretary and Treasurer, Blum as Vice President, and both Ripley and Hale as Directors. The address for each of the officers was 2049 Century Park East, Suite 3850, Los Angeles, California 90067. The Certificate of Revival also listed Blum as the agent for service of process, at the same UPS Store address in Henderson, Nevada, that Defendants used for service of process for each of the other Defendant entities. Topolewski's and Blum's statements under oath were false: they had no authority to take any action whatsoever on behalf of the dissolved Morrison Knudsen Corporation of Viet Nam. Nonetheless, with their false sworn statement to the government of Nevada, Morrison Knudsen Corporation of Viet Nam was revived.

33. On October 30, 2014, Topolewski, again falsely swearing that he had the authority to do so, changed the name of Morrison Knudsen Corporation of Viet Nam to "Morrison Knudsen Corporation." In reliance on this false statement, the Nevada Secretary of State recorded the name change. Each year since then, Defendants filed fraudulent statements of officers and directors, under penalty of perjury.

Morrison Knudsen International

34. Defendants also changed the name of an existing unrelated company that Defendants had

operated for years, to make it appear to be an affiliate of MK. In 2012, Topolewski was President and Secretary of E Planet Communications, Inc., a Nevada corporation formed in 2011. On May 23, 2016, E Planet Communication's Compliance Officer, Zukaloff, filed a Certificate of Amendment with the Nevada Secretary of State changing E Planet Communications Inc.'s name to Morrison Knudsen International Inc. The most recent list of officers and directors of this entity was filed with the Nevada Secretary of State in January 2017 by Blum under penalty of perjury. In that document, Blum listed himself as Vice President and listed 2049 Century Park East, Suite 3850, Los Angeles, California 90067, as the address for each of the company's officers and directors. Until June 28, 2017, the address for the agent for service of process for this entity was listed as 2657 North Green Valley Parkway, #414, Henderson, Nevada 89014, the same UPS Store address that Defendants used for service of process for each of the other Defendant entities.

Morrison-Knudsen Company

35. Finally, Defendants also fraudulently took control of a wholly unrelated defunct entity and renamed it to indicate that it too was an affiliate of MK (which it was not). Westland Petroleum Corporation ("WPC") was an entity incorporated in Nevada in 1926 that had fallen out of good standing in or around 2013. On October 6, 2016, however, Defendants, through "John Anderson," listed as the Vice President of WPC, requested and received reinstatement of WPC with the Nevada Secretary of State. That same day, "Anderson," an agent of Defendants, filed a list of officers and directors, citing 2049 Century Park East, Suite 3850, Los Angeles, California 90067

as the address for several of the officers and directors, and submitted a change of registered agent form, listing himself as the agent for service of process, with the same UPS Store address in Henderson, Nevada, that Defendants used for service of process for each of the other Defendant entities.

36. On or about October 18, 2016, Defendants requested that WPC's name be changed to Morrison-Knudsen Company, Inc., a change that was thereafter reflected on the books and records of the Nevada Secretary of State. The Certificate of Amendment changing the company's name was signed by Ripley. Each of those forms was signed and submitted to the Nevada Secretary of State with the false statement, sworn under penalty of perjury, that the signer had the authority to act on behalf of the company.

Defendants' Fraudulent Statements to the USPTO

37. Defendants also made knowing false statements to a federal government agency, the United States Patent & Trademark Office ("USPTO"). At all relevant times until November 10, 2014, the USPTO's records for MORRISON KNUDSEN, Reg. No. 1716505 and MKCO MORRISON KNUDSEN, Reg. No. 1744815, used MK's Boise, Idaho address. On November 10, 2014, however, Hale, acting on behalf of all Defendants, submitted "change of address" requests to the USPTO, seeking to change the address for Reg. No. 1744815 and Reg. No. 1716505 to the address used by Defendants: 2049 Century Park East, Suite 3850, Los Angeles, California 90067 and to the email address of Todd.Hale@Morrison-Knudsen.com. In doing so, knowingly made false representations to the

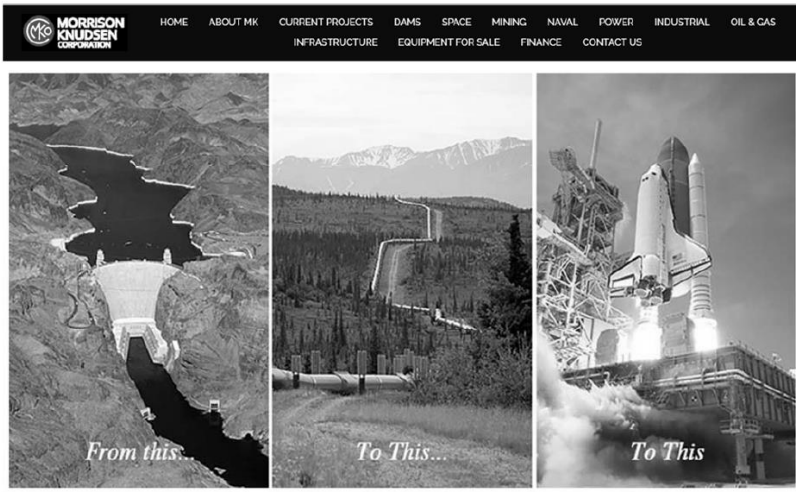
USPTO: MK's address had not changed, and neither MK nor its attorney of record authorized Hale to change the registrations' records at all, let alone to change the addresses to physical and electronic addresses controlled by Defendants. In reliance upon Hale's fraudulent statement, the USPTO changed the addresses of record for those two registrations to Defendants' address and Hale's email address. Defendants effectively then had control of MK's trademark registrations, No. 1744815 and No. 1716505.

38. Defendants' fraud on the USPTO did not end there. One year later, on November 11, 2015, Zukaloff, acting on behalf of all Defendants, forged an assignment of Reg. No 1744815 to themselves as "Morrison Knudsen Corporation, 2049 Century Park East, Suite 3850, Los Angeles, California 90067." Defendants listed an email address associated with the domain of the Fraudulent Website, pat@morrison-knudsen.com.

39. One month after Reg. No. 1744815 was cancelled, Defendants made yet more false statements to the USPTO. On March 26, 2016, Defendants applied to register the mark MORRISON KNUDSEN, falsely representing to the USPTO that they had the right and authority to do so and that the mark's first use in commerce was "at least as early as April 18, 1933," *i.e.*, a date when MK, not Defendants, used the "Morrison Knudsen" name. In reliance on Defendants' false affirmation that they were the rightful owners of the mark and had the right to claim a first use date of April 18, 1933, the USPTO issued Registration No. 5077287 for MORRISON KNUDSEN on November 8, 2016, for the following services: Construction and repair services in connection with public and private sector projects, namely, construction of dam

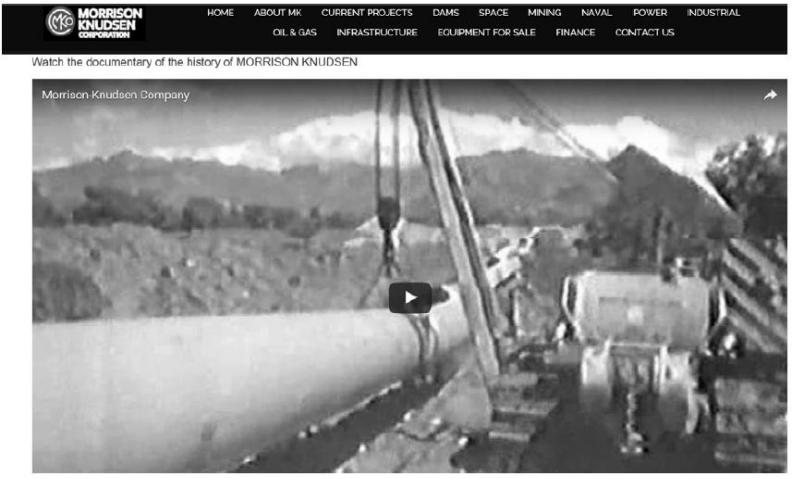
sites and utility facilities, construction of bridge, road, rail, marine and air transportation facilities, and construction of industrial facilities; General construction contracting. The registrant is listed as "Morrison Knudsen Corporation" with an address at 2049 Century Park East Suite 3850, Los Angeles, California 90067.

40. Having defrauded the USPTO into changing the registration records of the MK Marks and issuing Defendants their own registration, and having defrauded the Nevada Secretary of State into reinstating and renaming corporations such that they bear the "Morrison Knudsen" name and list Defendants as their officers and directors, Defendants now masquerade as MK to the general public and to the engineering and construction industry. On the Fraudulent Website, Defendants pretend to be the actual MK, describing MK's history and some of the many projects MK designed, engineered and constructed. They do so, in part, by using images of MK projects. A snapshot of the home page of the Fraudulent Website is depicted below.

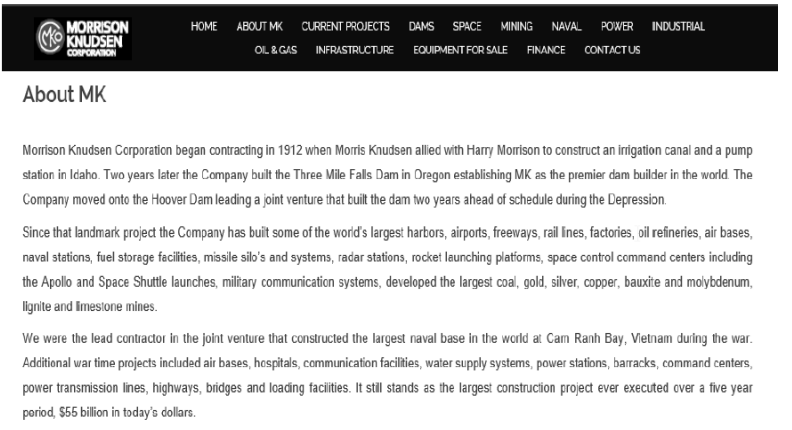


FROM THIS… TO THIS… TO THIS

41. Among other false statements, in a section titled "About MK," Defendants include a detailed description of MK's corporate history and use video documentaries about MK that MK produced, doing so in a way that falsely claims MK's history and achievements as their own.



42. Lest there be any doubt that Defendants are pretending to be MK, they refer to MK and its work by using "we" and "our." Indeed, Defendants go so far as to say: "We are the world's largest dam builder and constructor of hydro power projects with 160 dams built in the Company's history along with 100 hydro power plants;" Defendants well know that statement actually describes MK (now AECOM), *not* Defendants.



MORRISON KNUDSEN CORPORATION

HOME ABOUT MK CURRENT PROJECTS DAMS SPACE MINING NAVAL POWER INDUSTRIAL
OIL & GAS INFRASTRUCTURE EQUIPMENT FOR SALE FINANCE CONTACT US

About MK

Morrison Knudsen Corporation began contracting in 1912 when Morris Knudsen allied with Harry Morrison to construct an irrigation canal and a pump station in Idaho. Two years later the Company built the Three Mile Falls Dam in Oregon establishing MK as the premier dam builder in the world. The Company moved onto the Hoover Dam leading a joint venture that built the dam two years ahead of schedule during the Depression.

Since that landmark project the Company has built some of the world's largest harbors, airports, freeways, rail lines, factories, oil refineries, air bases, naval stations, fuel storage facilities, missile silo's and systems, radar stations, rocket launching platforms, space control command centers including the Apollo and Space Shuttle launches, military communication systems, developed the largest coal, gold, silver, copper, bauxite and molybdenum, lignite and limestone mines.

We were the lead contractor in the joint venture that constructed the largest naval base in the world at Cam Ranh Bay, Vietnam during the war. Additional war time projects included air bases, hospitals, communication facilities, water supply systems, power stations, barracks, command centers, power transmission lines, highways, bridges and loading facilities. It still stands as the largest construction project ever executed over a five year period, $55 billion in today's dollars.

Transcription

Morrison Knudsen Corporation began contracting in 1912 when Morris Knudsen allied with Harry Morrisson to construct an irrigation canal and a pump station in Idaho. Two years later the Company built the Three Mile Dam in Oregon establishing MK as the premier Dam builder in the world. The company moved on to the Hoover Dam leading a joint venture that built the dam two years ahead of schedule during the depression.

Since that landmark project the company has built some of the world's largest harbors, airports, freeways, rail lines, factories, oil refineries, air bases, naval stations, fuel storage facilities, missile silos and systems radar systems, rocket launching platforms, space control command centers, including the Apollo and space shuttle launches military communication systems, developed the largest coal, gold, silver, copper, bauxite, molybdenum lignite and limestone mines.

We were the lead contractor in the joint venture that constructed the largest naval base in the world at Cam Ranh Bay. Vietnam during the war period additional wartime projects included air bases, hospitals, communication facilities, water supply systems, power stations, barracks, command centers, power transmission lines, highways, bridges and landing facilities. It still stands as the largest construction project ever executed over a five year period. $55 billion in today's dollars.

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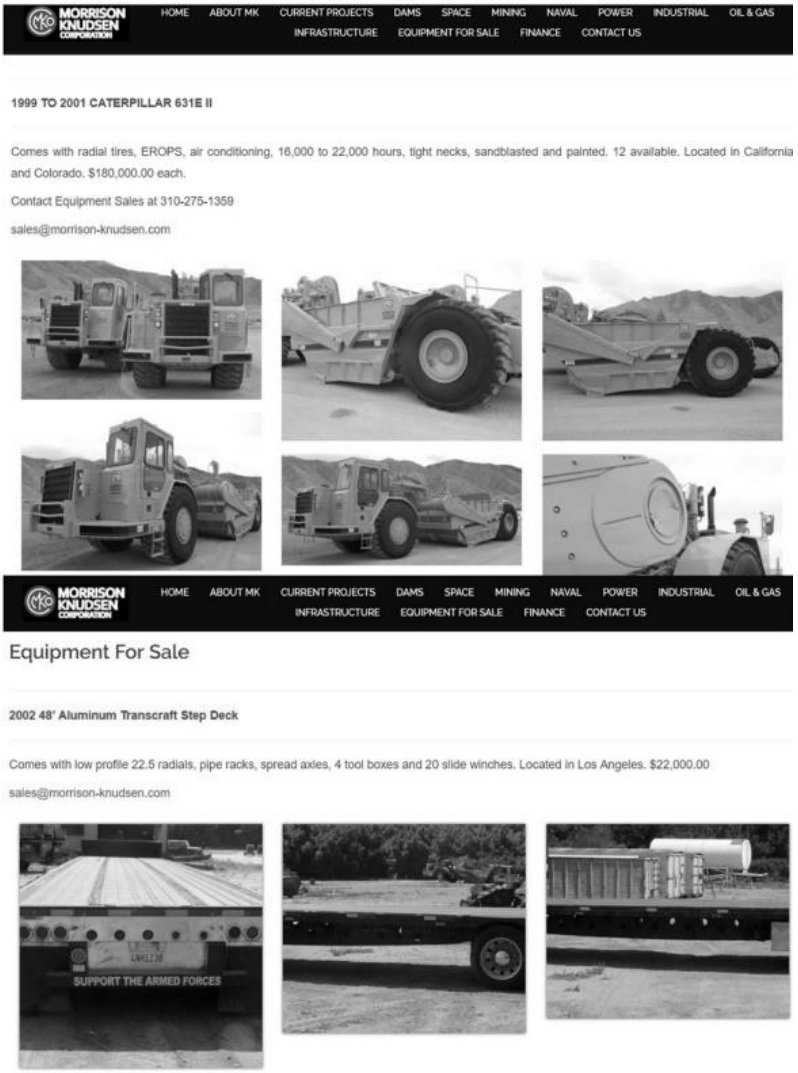
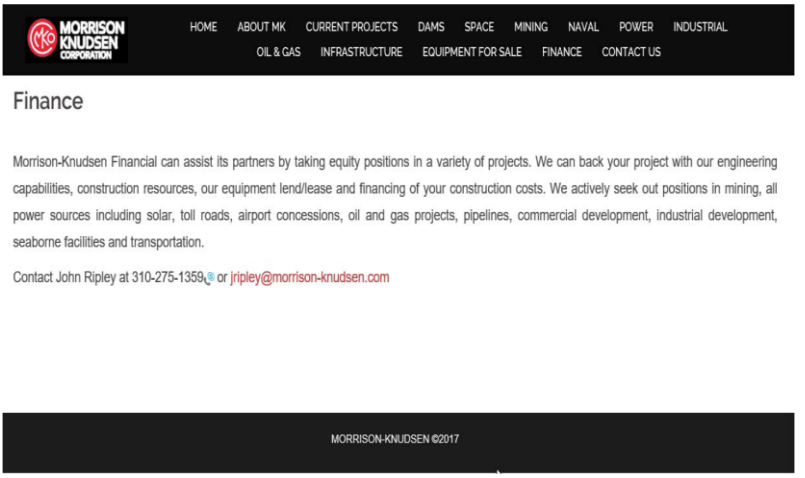
43. Defendants have engaged in this elaborate fraud so that they can use the Fraudulent Website to deceive others for financial gain. On a page titled "Equipment For Sale," Defendants offer for sale construction equipment ranging from used tractors to refurbished dump valves. Indeed, as of the date of this complaint, Defendants list for sale a 2002 Transcraft Step Deck, twelve Caterpillar 631E II's, six Caterpillar 637D's, ten Northern Toolboxes, one Caterpillar D9R, and five water towers—many of which bear the Morrison Knudsen name and logo, effectively reinforcing the message that these products are being offered for sale by MK after having been used, maintained, and inspected by MK, all of which is false. Because of Defendants' false statements on the Fraudulent Website and because of Defendants' use of the MK Marks on the pictured equipment, purchasers and prospective purchasers of the equipment are likely to be confused and deceived.



44. Defendants also seek to profit another way: by soliciting equity positions in third party contracts. Specifically, on the Fraudulent Website, Defendants falsely claim they are currently pursuing projects across the United States, displaying images of multiple project sites and showing the use of construction

equipment similar to that listed for sale. On a separate Finance page, Defendants falsely claim that they can assist others by "taking equity positions in a variety of projects," and that they can "back your project with [MK's] engineering capabilities, construction resources, . . . equipment lend/lease and financing." Defendants' statements are false: Defendants cannot actually back anyone's project with MK's engineering capabilities or construction resources, because Defendants are not MK, but mere imposters. Notably, Defendants list Ripley, along with his email address and Defendants' phone number, as the person to contact concerning such opportunities on the Finance page of the Fraudulent Website.



Transcription

Finance

Morrison-Knudsen Financial can assist its partners by taking equity positions in a variety of projects. We can back your project with our engineering capabilities, construction resources, our equipment

lend/lease and financing of your construction costs. We actively seek out positions in mining, all power sources including solar, toll roads, airport concessions, oil and gas projects, pipelines, commercial development, industrial development, seaborne facilities and transportation.

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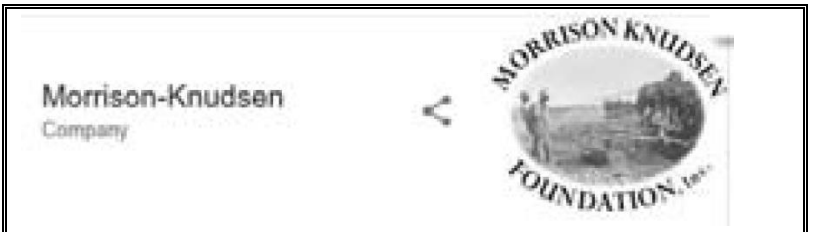
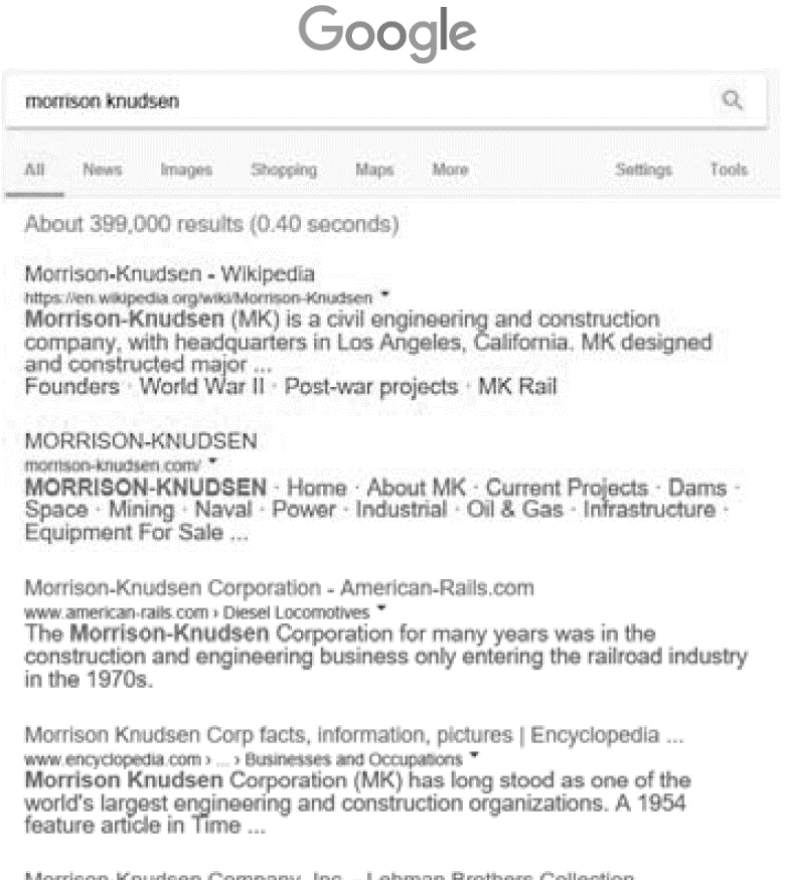
45. At no point did Defendants receive authorization to use the Morrison Knudsen name or the MK Marks, or claim any association, affiliation, or sponsorship whatsoever. Through their unauthorized conduct, however, Defendants have succeeded in deceiving third parties into believing that they are the real MK. Indeed, online searches for "Morrison Knudsen" return the Fraudulent Website at or near the top of the results and the Wikipedia page for MK wrongly identifies the Fraudulent Website as MK's official website and wrongly claims that MK changed its name in 2007 to Morrison-Knudsen International, one of the entities Defendants now control.



Morrison-Knudsen is a civil engineering and construction company with headquarters in Los Angeles, California. MK designed and constructed major infrastructure throughout the world and was one of the … Wikipedia



Defendants' Continued Infringement Despite Notice

46. In May of 2017, AECOM wrote to Defendants requesting that Defendants cease any unauthorized usage of the Morrison Knudsen mark and never again claim an affiliation with MK or its projects. Ripley responded, accusing AECOM of fraudulently misrepresenting its relationship to MK, and threatening to pursue legal action. On June 13, 2017, AECOM replied, detailing the acquisition history of MK and including links to supporting SEC documents. AECOM

also demanded, among other things, that Ripley inform AECOM of any basis for believing that Defendants have the right to claim to be MK. As of the date of this complaint, neither Ripley, nor any other Defendant, has responded. Defendants' infringement and demonstrably false claims of being MK continue to harm AECOM and its legacy as the successor to MK and its goodwill.

COUNT I
(FALSE DESIGNATION OF ORIGIN/AFFILIATION/ PASSING OFF)

47. AECOM incorporates and realleges by reference each and every paragraph herein as if set forth in full in this count.

48. Defendants' actions as alleged herein violate 15 U.S.C. § 1125(a)(1)(A). Through their statements on the Fraudulent Website and in press releases, and by using the domain name of the Fraudulent Website (www.morrison-knudsen.com), Defendants pass themselves off as MK, and pass off MK's celebrated projects and history as their own. Defendants then use MK's history and experience, the Morrison Knudsen name and the MK Marks, which retain residual goodwill, to pass off and sell construction-related products and services. In doing so, Defendants falsely designate the origin of their products and services as coming from MK, which they do not, and falsely convey an association and affiliation with, as well as a sponsorship by, MK.

49. As a result of Defendants' conduct, the public and potential consumers of the types of products and

services Defendants offer are likely to be confused and deceived.

50. Defendants' actions have been and continue to be knowing and willful.

51. As a direct and proximate result of Defendants' conduct, AECOM has suffered irreparable harm and will continue to suffer such harm unless Defendants are enjoined from such further conduct.

COUNT II
(FALSE ADVERTISING IN VIOLATION OF THE LANHAM ACT)

52. AECOM incorporates and realleges by reference each and every paragraph herein as if set forth in full in this count.

53. Defendants' actions as alleged herein violate 15 U.S.C. § 1125(a)(1)(B). On the Fraudulent Website, Defendants falsely claim that MK and AECOM projects are Defendants' projects, and that Defendants were involved with and, indeed, are the principals behind those projects. In addition, Defendants falsely state that the products and services they offer come from MK and that they can "back your project with [MK's] engineering capabilities, construction resources, . . . equipment lend/lease and financing." Defendants also falsely claim, in press releases, that MK is bidding and winning contracts. These press statements falsely advertise to the public that MK is responsible for projects with which MK is not actually involved. Defendants' statements about the nature and quality of the products and services they provide, as set forth herein, are false and likely to deceive, indeed defraud, actual and potential customers and business partners.

Defendants' statements injure AECOM commercially, by diminishing the value of their strategic acquisition investments. Defendants' statements also cause competitive injury because Defendants' false claims that MK's and AECOM's accomplishments are their own impedes AECOM's right and ability to tout those accomplishments in its own presentations.

54. Defendants' actions have been and continue to be knowing and willful.

55. As a direct and proximate result of Defendants' conduct, AECOM has suffered irreparable harm and will continue to suffer such harm unless Defendants are enjoined from such further conduct.

COUNT III
(CYBERPIRACY)

56. AECOM incorporates and realleges by reference each and every paragraph herein as if set forth in full in this count.

57. Defendants' actions as alleged herein violate 15 U.S.C. § 1125(d). Defendants registered the domain name www.morrison-knudsen.com at a time when the MK Marks were distinctive, and indeed were registered with the USPTO. The domain name www.morrison-knudsen.com is not just confusingly similar but nearly identical to that MK Mark. Defendants' use of the domain name www.morrison-knudsen.com is likely to confuse or deceive consumers into believing that there is an association or affiliation between Defendants and their website on the one hand, and MK (now AECOM) on the other hand, where there is none. In registering and using the domain name www.morrison-knudsen.com, Defendants had, and con-

tinue to have, a bad faith intent to profit from the MORRISON KNUDSEN mark and its goodwill, which belongs to AECOM.

58. Defendants' actions have been and continue to be knowing and willful.

59. As a direct and proximate result of Defendants' conduct, AECOM has suffered irreparable harm and will continue to suffer such harm unless Defendants are enjoined from such further conduct.

COUNT IV
(CA COMMON LAW UNFAIR COMPETITION)

60. AECOM incorporates and realleges by reference each and every paragraph herein as if set forth in full in this count.

61. Defendants' actions as alleged herein violate California Common Law. AECOM has common law trademark rights through the strategic use of the MK Marks, which retain residual goodwill, in promotional materials.

62. Defendants falsely claim MK's storied history of over 100 years as their own and use the Morrison Knudsen name and MK Marks in connection with their offering construction equipment and related services, despite having no affiliation or association with MK.

63. Defendants' conduct is likely to cause consumer confusion as to whether Defendants' offerings originate from MK (now AECOM), or are associated, affiliated, connected with, or approved or sponsored by AECOM. Moreover, Defendants' references to MK and use of the MK Marks deprives AECOM of the

goodwill from MK and the MK Marks that it rightfully owns.

64. Defendants' actions have been and continue to be knowing and willful.

65. As a direct and proximate result of Defendants' conduct, Plaintiff has suffered irreparable harm and will continue to suffer such harm unless Defendants are enjoined from such further conduct.

COUNT V
(CA STATUTORY UNFAIR COMPETITION)

66. AECOM incorporates and realleges by reference each and every paragraph herein as if set forth in full in this count.

67. As described herein, Defendants have engaged in fraudulent, unfair and unlawful conduct in violation of Cal. Bus. & Prof. Code §§ 17200 *et seq.*, including through the fraudulent statements to the Nevada Secretary of State, to the USPTO, on the Fraudulent Website and in the press, claiming that Defendants are MK and the products and services they offer come from MK.

68. Defendants' actions have been and continue to be knowing and willful.

69. As a direct and proximate result of Defendants' conduct, AECOM has suffered injury and irreparable harm and will continue to suffer such injury and irreparable harm unless Defendants are enjoined from such further conduct.

COUNT VI
(CA STATUTORY FALSE ADVERTISING)

70. AECOM incorporates and realleges by reference each and every paragraph herein as if set forth in full in this count.

71. Defendants' actions as alleged herein violate Cal. Bus. & Prof. Code § 17500. On the Fraudulent Website, Defendants falsely claim that MK and AECOM projects are Defendants' projects, and that Defendants were involved with and, indeed, are the principals behind those projects. In addition, Defendants falsely state that the products and services they provide come from MK and that they can "back your project with [MK's] engineering capabilities, construction resources, . . . equipment lend/lease and financing." Defendants also falsely claim, in press releases, that MK is bidding and winning contracts. These press statements falsely advertise to the public that MK is responsible for projects with which MK is not actually involved. Defendants' statements about the nature and quality of the products and services they offer, as set forth herein, are false and likely to deceive, indeed defraud, actual and potential customers and business partners. Defendants' statements injure AECOM commercially, by diminishing the value of their strategic investments. Defendants' statements also cause competitive injury because Defendants' false claims that MK's and AECOM's accomplishments are their own impedes AECOM's right and ability to tout those accomplishments in its own presentations.

72. Defendants' actions have been and continue to be knowing and willful.

73. As a direct and proximate result of Defendants' conduct, AECOM has suffered irreparable harm and will continue to suffer such harm unless Defendants are enjoined from such further conduct.

COUNT VII
(PETITION FOR CANCELLATION OF TRADEMARK REGISTRATION)

74. AECOM incorporates and realleges by reference each and every paragraph herein as if set forth in full in this count.

75. Defendants' actions as alleged herein violate 15 U.S.C. § 1064. AECOM is being irreparably harmed and damaged by Defendants' registration of the MORRISON KNUDSEN mark, Registration No. 5077287, on the principal register.

76. Defendants have committed fraud on the USPTO as set forth herein.

77. AECOM has rights to the MK Marks that are prior to Defendants' claimed rights and, indeed, Defendants' claimed rights and usage are actually the rights and usage of AECOM. Defendants registration falsely identifies the source of Defendants' goods and services and is likely to cause confusion.

78. AECOM requests that Registration No. 5077287 be cancelled.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff AECOM prays that this Court provide relief by:

1. Preliminarily and permanently enjoining and restraining each of the Defendants, and each of their

officers, directors, agents, employees and all other individuals, firms, corporations, associations and partnerships affiliated, associated or acting in concert with them, from using the Morrison Knudsen name, any of the MK Marks, or any other mark, symbol, name, domain name or logo that is likely to cause confusion or to cause mistake or to deceive people into believing that Defendants or any services or goods that Defendants entered into the stream of commerce originate from MK or AECOM, are in any way sponsored, endorsed, licensed by MK or AECOM, or are affiliated with MK or AECOM;

2. Preliminarily and permanently enjoining and restraining each of the Defendants, and each of their officers, directors, agents, employees and all other individuals, firms, corporations, associations and partnerships affiliated, associated or acting in concert with them, from falsely stating that they are MK or any related entity, or that they are associated in any way with MK or AECOM or their projects;

3. Ordering Defendants to provide AECOM an accounting of their profits and advantages received from improperly using the MK Marks and the Morrison Knudsen name;

4. Ordering that the domain name www.morrison-knudsen.com be transferred to the control of AECOM;

5. Ordering that control of the corporate records for Defendants Morrison-Knudsen Services, Inc. and Morrison Knudsen Corporation be transferred to AECOM;

6. Ordering that Defendant Morrison Knudsen Company, Inc. be dissolved;

7. Ordering that Defendant Morrison Knudsen International's corporate name be returned to EPlanet Communications, Inc. or such other name that does not consist of or incorporate "Morrison Knudsen," MK, or any name confusingly similar to "Morrison Knudsen";

8. Ordering that Defendants take all available steps to retract and correct statements made in other media or to actual or potential customers and business partners concerning their relationship with MK or MK's accomplishments;

9. Awarding AECOM its reasonable attorneys' fees and costs pursuant to 15 U.S.C. § 1117 or as allowed by any other statute or legal doctrine, including California Code of Civil Procedure § 1021.5;

10. Awarding AECOM such other and further relief or remedy that the Court may deem just and proper.

Respectfully submitted,

Kirkland & Ellis LLP

/s/ Diana M. Torres
Attorney for Plaintiff
AECOM Energy & Construction, Inc.

Dated: July 21, 2017

MK DEFENDANT'S
MEET AND CONFER EMAILS

From: Chang, Yungmoon

To: "Sedor, Dan P."; John Jahrmarkt, Esq.; John Jahrmarkt

Cc: Torres, Diana; Catuara, Keith R.; Beltran, Maria Monica; Gibson, Stan; Babst, Lauren; Victoria Murray (Legal Assistant to John Jahrmarkt, Esq); Jimenez, Sheila

Subject: RE: Aecom Energy & Construction, Inc. v Ripley, et al. | MK Defendant's Meet and Confer Letter

Date: Friday, December 17, 2021 7:35:00 PM

Dan,

Fact discovery closed nearly a month ago. We will not stipulate to move a date that has already passed. Defendants have demonstrated time and time again that they refuse to provide even basic discovery (including that which they withheld in violation of court orders). E.g., Dkt. 397 at 2-3 (noting the subpoena for bank statements "seeks information that the court already ordered Defendants to produce"). Any failure by Defendants to supplement the discovery record is a mistake of their own making, and there is no basis to provide a prolonged opportunity for gamesmanship.

If Defendants still require continuing the pretrial and trial dates, please propose dates.

Best,

Yungmoon Chang

KIRKLAND & ELLIS LLP
2049 Century Park East, Los Angeles, CA 90067
T +1 310 552 4359
F +1 310 552 5900
yungmoon.chang@kirkland.com

From: Sedor, Dan P. <DSedor@JMBM.com>

Sent: Friday, December 17, 2021 12:46 PM

To: Chang, Yungmoon <yungmoon.chang@kirkland.com>; John Jahrmarkt, Esq. <johnjahrmarkt@gmail.com>; John Jahrmarkt <jjlawyer@mail.com>

Cc: Torres, Diana <diana.torres@kirkland.com>; Catuara, Keith R. <kcatuara@kirkland.com>; Beltran, Maria Monica <maria.beltran@kirkland.com>; Gibson, Stan <SMG@JMBM.com>; Babst, Lauren <LXB@JMBM.com>; Victoria Murray (Legal Assistant to John Jahrmarkt, Esq) <jjlegalassistant@gmail.com>; Jimenez, Sheila <SJ2@JMBM.com>

Subject: RE: Aecom Energy & Construction, Inc. v Ripley, et al. | MK Defendant's Meet and Confer Letter

Youngmoon –

As you are likely aware, the Magistrate Judge's order on the defendants' motions to quash Aecom's

third party subpoenas and Aecom's motion to compel compliance with Aecom's Request for Production No. 21 was filed this morning. The Magistrate Judge granted the motion to quash Aecom's subpoena to Adli Law Group, granted protective orders on Aecom's US Bancorp subpoena as to Gary Topolewski and the other individuals named in the subpoena, and on the Aecom's subpoenas to the telecommunications providers as to the Metal Jeans and Topolewski America telephone numbers, and denied Aecom's motion to compel compliance with Request for Production No. 21.

The Magistrate Judge otherwise allowed Aecom to proceed with its third party subpoenas as to the Corporate Defendants. In light of this ruling, we think that the best way to proceed at this point is to stipulate to continue the trial and trial dates, the discovery cutoff, and the hearing date and briefing schedule on the defendants' motions for summary judgment and Aecom's motion for discovery sanctions. This will give Aecom time to conduct the discovery permitted by the Magistrate Judge's order and to file its motion and opposition with the results of that discovery. Otherwise, we are concerned that the Court will need to continue these matters on its own because the record will not be complete.

Please let us know today if you are agreeable to such a stipulation.

Dan Sedor

From: Chang, Yungmoon
<yungmoon.chang@kirkland.com>

Sent: Thursday, December 16, 2021 6:59 PM

To: Sedor, Dan P. <DSedor@JMBM.com>;
John Jahrmarkt, Esq. <johnjahrmarkt@gmail.com>;
John Jahrmarkt <jjlawyer@mail.com>

Cc: Torres, Diana <diana.torres@kirkland.com>;
Catuara, Keith R. <kcatuara@kirkland.com>;
Beltran, Maria Monica
<maria.beltran@kirkland.com>; Gibson, Stan
<SMG@JMBM.com>; Babst, Lauren
<LXB@JMBM.com>; Victoria Murray (Legal
Assistant to John Jahrmarkt, Esq)
<jjlegalassistant@gmail.com>; Jimenez, Sheila
<SJ2@JMBM.com>

Subject: RE: Aecom Energy & Construction, Inc. v Ripley, et al. | MK Defendant's Meet and Confer Letter

Dan,

As you will recall, I suggested December 16 or 17 during the meet and confer, and stated that I needed to check my calendar to confirm. Please see John's Dec. 7 email below in this email chain sent following the meet and confer, stating "Dec 16 or 17" for opening motions. You then suggested filing opening motions on December 20, following which I proposed the last circulated schedule, and did not hear back.

As I said, AECOM will aim to file its motion tomorrow.

Yungmoon Chang

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From: Sedor, Dan P. <DSedor@JMBM.com>

Sent: Thursday, December 16, 2021 6:48 PM

To: Chang, Yungmoon <yungmoon.chang@kirkland.com>; Sedor, Dan P. <DSedor@JMBM.com>; John Jahrmarkt, Esq. <johnjahrmarkt@gmail.com>; John Jahrmarkt <jjlawyer@mail.com>

Cc: Torres, Diana <diana.torres@kirkland.com>; Catuara, Keith R. <kcatuara@kirkland.com>; Beltran, Maria Monica <maria.beltran@kirkland.com>; Gibson, Stan <SMG@JMBM.com>; Babst, Lauren <LXB@JMBM.com>; Victoria Murray (Legal Assistant to John Jahrmarkt, Esq) <jjlegalassistant@gmail.com>; Jimenez, Sheila <SJ2@JMBM.com>

Subject: RE: Aecom Energy & Construction, Inc. v Ripley, et al. | MK Defendant's Meet and Confer Letter

Youngmoon, we agreed during the December 7 meet and confer call that both sides' motions would be filed today. You declined our subsequent request to extend the briefing schedule. We expect you to abide by your prior commitment to file your motion today.

----Original message----

From: "Chang, Yungmoon" <yungmoon.chang@kirkland.com> Date: 12/16/21 6:38 PM (GMT-08:00)

To: "Sedor, Dan P." <DSedor@JMBM.com>, "John Jahrmarkt, Esq." <johnjahrmarkt@gmail.com>, John Jahrmarkt <jjlawyer@mail.com>

Cc: "Torres, Diana" <diana.torres@kirkland.com>, "Catuara, Keith R." <kcatuara@kirkland.com>, "Beltran, Maria Monica" <maria.beltran@kirkland.com>, "Gibson, Stan" <SMG@JMBM.com>, "Babst, Lauren" <LXB@JMBM.com>, "Victoria Murray (Legal Assistant to John Jahrmarkt, Esq)" <jjlegalassistant@gmail.com>, "Jimenez, Sheila" <SJ2@JMBM.com>

Subject: RE: Aecom Energy & Construction, Inc. v Ripley, et al. | MK Defendant's Meet and Confer Letter

Dan and John,

I had not received a response to my email proposing the dates below. Nevertheless, AECOM will aim to file its opening motion tomorrow (Dec. 17). Please let us know if Defendants still wish to continue the pretrial conference and trial dates.

Thanks,

Yungmoon Chang

KIRKLAND & ELLIS LLP
2049 Century Park East, Los Angeles, CA 90067
T +1 310 552 4359
F +1 310 552 5900
yungmoon.chang@kirkland.com

From: Chang, Yungmoon

Sent: Wednesday, December 8, 2021 4:14 PM

To: 'Sedor, Dan P.' <DSedor@JMBM.com>; John Jahrmarkt, Esq. <johnjahrmarkt@gmail.com>; John Jahrmarkt <jjlawyer@mail.com>

Cc: Torres, Diana <diana.torres@kirkland.com>; Catuara, Keith R. <kcatuara@kirkland.com>; Beltran, Maria Monica <maria.beltran@kirkland.com>; Gibson, Stan <SMG@JMBM.com>; Babst, Lauren <LXB@JMBM.com>; Victoria Murray (Legal Assistant to John Jahrmarkt, Esq) <jjlegalassistant@gmail.com>; Jimenez, Sheila <SJ2@JMBM.com>

Subject: RE: Aecom Energy & Construction, Inc. v Ripley, et al. | MK Defendant's Meet and Confer Letter

Unfortunately, I have upcoming trials on January 31, February 22, and April 26, so January 18 is the latest hearing date I could accommodate. However, we could agree to a continuance of the PTC and trial, but only on the condition that you do not use such an accommodation as a basis for seeking a continuance of the hearing date and/or briefing schedule.

- 12/16-Opening motions

- 12/28-Oppositions
- 1/04-Reply
- 1/18-Hearing
- 4/05-PTC
- 5/17-Trial

If these dates work for both of you, please prepare a joint stip.

Thanks,

Yungmoon Chang

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2049 Century Park East, Los Angeles, CA 90067
T +1 310 552 4359
F +1 310 552 5900
yungmoon.chang@kirkland.com

From: Sedor, Dan P. <DSedor@JMBM.com>

Sent: Tuesday, December 7, 2021 2:48 PM

To: John Jahrmarkt, Esq. <johnjahrmarkt@gmail.com>; Chang, Yungmoon <yungmoon.chang@kirkland.com>; John Jahrmarkt <jjlawyer@mail.com>

Cc: Torres, Diana <diana.torres@kirkland.com>; Catuara, Keith R. <kcatuara@kirkland.com>; Beltran, Maria Monica <maria.beltran@kirkland.com>; Gibson, Stan <SMG@JMBM.com>; Babst, Lauren <LXB@JMBM.com>; Victoria Murray (Legal Assistant to John Jahrmarkt, Esq) <jjlegalassistant@gmail.com>; Jimenez, Sheila

<SJ2@JMBM.com>

Subject: RE: Aecom Energy & Construction, Inc. v Ripley, et al. | MK Defendant's Meet and Confer Letter

Another week is fine with us.

From: John Jahrmarkt, Esq.
<johnjahrmarkt@gmail.com>

Sent: Tuesday, December 7, 2021 2:48 PM

To: Sedor, Dan P. <DSedor@JMBM.com>; Chang, Yungmoon <yungmoon.chang@kirkland.com>; John Jahrmarkt <jjlawyer@mail.com>

Cc: Torres, Diana <diana.torres@kirkland.com>; Catuara, Keith R. <kcatuara@kirkland.com>; Beltran, Maria Monica <maria.beltran@kirkland.com>; Gibson, Stan <SMG@JMBM.com>; Babst, Lauren <LXB@JMBM.com>; Victoria Murray (Legal Assistant to John Jahrmarkt, Esq) <jjlegalassistant@gmail.com>; Jimenez, Sheila <SJ2@JMBM.com>

Subject: RE: Aecom Energy & Construction, Inc. v Ripley, et al. | MK Defendant's Meet and Confer Letter

These proposed dates work for me, although I would like one more week on the opposition, reply and motion dates. But I could make it work if I need to as you suggest since Monday and Tuesday is enough time to work up the opposition

PLEASE NOTE OUR NEW SUITE NUMBER

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John Jahrmarkt, Esq.
Jahrmarkt & Associates
2049 Century Park East, Suite 2525
Los Angeles, California 90067
(310) 226-7676 (tel) (310) 226-7677 (fax)

From: Sedor, Dan P.

Sent: Tuesday, December 7, 2021 2:43 PM

To: John Jahrmarkt, Esq.; Chang, Yungmoon; John Jahrmarkt

Cc: Torres, Diana; Catuara, Keith R.; Beltran, Maria Monica; Gibson, Stan; Babst, Lauren; Victoria Murray (Legal Assistant to John Jahrmarkt, Esq); Jimenez, Sheila

Subject: RE: Aecom Energy & Construction, Inc. v Ripley, et al. | MK Defendant's Meet and Confer Letter

Youngmoon and John –

Following up on the subject of scheduling that we discussed this morning, we're fine with a continuance of the trial and pretrial dates. Stan will be lead counsel at trial, and he has a trial in another matter starting on April 11 that is set for three weeks. We therefore suggest that we agree to continue the March 1, 2022 trial date to May 17, 2022, continue the pretrial conference to April 5, 2022, and continue the pretrial disclosure deadlines by the same amount of time as the pretrial conference (10 weeks).

We'd also like to revisit the MSJ and sanctions motions briefing schedule that we discussed this morning. On reflection, and if we're going to continue the trial date, we'd prefer to avoid having to work over both the Christmas and New Year's holidays. We suggest filing the motions on December 20 and setting them for hearing on February 1, which would make oppositions due on January 11 and replies due January 18. Please let us know if that works for you.

On a housekeeping note, please copy my new assistant Sheila Jimenez on all emails in this matter, instead of Dianne Shorte.

Thanks.

Dan Sedor

From: John Jahrmarkt, Esq. <johnjahrmarkt@gmail.com>

Sent: Tuesday, December 7, 2021 11:43 AM

To: Sedor, Dan P. <DSedor@JMBM.com>; Chang, Yungmoon <yungmoon.chang@kirkland.com>; John Jahrmarkt <jjlawyer@mail.com>

Cc: Torres, Diana <diana.torres@kirkland.com>; Catuara, Keith R. <kcatuara@kirkland.com>; Beltran, Maria Monica <maria.beltran@kirkland.com>; Gibson, Stan <SMG@JMBM.com>; Babst, Lauren <LXB@JMBM.com>; Shorte, Dianne <DShorte@JMBM.com>; Victoria Murray (Legal Assistant to John Jahrmarkt, Esq) <jjlegalassistant@gmail.com>

Subject: RE: Aecom Energy & Construction, Inc. v

Ripley, et al. | MK Defendant's Meet and Confer Letter

briefing schedule for both motions:

File motions Dec 16 or 17

Opps due Dec 28

Reply due Jan 4

Hearing Jan 18

PLEASE NOTE OUR NEW SUITE NUMBER

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(310) 226-7676 (tel) (310) 226-7677 (fax)

From: Sedor, Dan P.

Sent: Tuesday, December 7, 2021 9:29 AM

To: Chang, Yungmoon; John Jahrmarkt, Esq.; John Jahrmarkt

Cc: Torres, Diana; Catuara, Keith R.; Beltran, Maria Monica; Gibson, Stan; Babst, Lauren; Shorte, Dianne; Victoria Murray (Legal Assistant to John Jahrmarkt, Esq)

Subject: RE: Aecom Energy & Construction, Inc. v Ripley, et al. | MK Defendant's Meet and Confer Letter

Confirmed. John?

From: Chang, Yungmoon
<yungmoon.chang@kirkland.com>

Sent: Friday, December 3, 2021 5:22 PM

To: John Jahrmarkt, Esq.
<johnjahrmarkt@gmail.com>; John Jahrmarkt
<jjlawyer@mail.com>

Cc: Torres, Diana <diana.torres@kirkland.com>;
Catuara, Keith R. <kcatuara@kirkland.com>;
Beltran, Maria Monica
<maria.beltran@kirkland.com>; Gibson, Stan
<SMG@JMBM.com>; Babst, Lauren
<LXB@JMBM.com>; Sedor, Dan P.
<DSedor@JMBM.com>; Shorte, Dianne
<DShorte@JMBM.com>; Victoria Murray (Legal
Assistant to John Jahrmarkt, Esq)
<jjlegalassistant@gmail.com>

Subject: RE: Aecom Energy & Construction, Inc. v Ripley, et al. | MK Defendant's Meet and Confer Letter

AECOM's motion for discovery sanctions and fees will be filed against all Defendants. We are available to meet and confer on Tuesday (12/7) at 11am regarding: (1) AECOM's motion for discovery sanctions and attorney's fees, and (2) Topolewski's motion for summary judgment.

If that time works for everyone, we can use the following dial-in: 1-866-331-1856,,13206066#

Best,

Yungmoon Chang

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F +1 310 552 5900
yungmoon.chang@kirkland.com

From: John Jahrmarkt, Esq.
<johnjahrmarkt@gmail.com>

Sent: Friday, December 3, 2021 4:30 PM

To: Chang, Yungmoon
<yungmoon.chang@kirkland.com>; John Jahrmarkt
<jjlawyer@mail.com>

Cc: Torres, Diana <diana.torres@kirkland.com>;
Catuara, Keith R. <kcatuara@kirkland.com>;
Beltran, Maria Monica
<maria.beltran@kirkland.com>; sgibson@jmbm.com;
lbabst@jmbm.com; dsedor@jmbm.com;
dshorte@jmbm.com; Victoria Murray (Legal
Assistant to John Jahrmarkt, Esq)
<jjlegalassistant@gmail.com>

Subject: RE: Aecom Energy & Construction, Inc. v Ripley, et al. | MK Defendant's Meet and Confer Letter

Yungmoon: Against whom do you intend to file this motion for sanctions and attorney's fees?

PLEASE NOTE OUR NEW SUITE NUMBER

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Los Angeles, California 90067

(310) 226-7676 (tel) (310) 226-7677 (fax)

From: Chang, Yungmoon

Sent: Friday, December 3, 2021 10:13 AM

To: John Jahrmarkt, Esq.; John Jahrmarkt

Cc: Torres, Diana; Catuara, Keith R.; Beltran, Maria Monica; sgibson@jmbm.com; lbabst@jmbm.com; dsedor@jmbm.com; dshorte@jmbm.com; Victoria Murray (Legal Assistant to John Jahrmarkt, Esq)

Subject: RE: Aecom Energy & Construction, Inc. v Ripley, et al. | MK Defendant's Meet and Confer Letter

Dear John and Dan,

AECOM maintains there is no live dispute, however if Defendants choose to contact the magistrate judge, AECOM requests to be cc'ed on correspondence to Mr. Lozada pursuant to Judge Rosenberg's procedures.

Separately, AECOM intends to file a motion for discovery sanctions (including terminating sanctions) and for attorney's fees. Please let us know your availability to meet and confer on Dec. 7, 9, 10, or 14.

Throughout this litigation, courts have found multiple times that Defendants stonewalled AECOM from discovering any reliable financial information for use in the calculation of disgorgement of profits. Upon remand, AECOM sought to obtain such discovery from third parties. Defendants continued to stonewall proper discovery by objecting to every single subpoena AECOM served. As a result, AECOM will seek discovery sanctions in the form of Defendants being

precluded from contesting AECOM's damages calculations and entry of judgment in the amount of that calculation, as well as a per diem sanction. AECOM's motion is based on Federal Rule of Civil Procedure 37, for violation of numerous discovery orders (including orders compelling Defendants to produce financial information), failure to appear for depositions (Corporate Defendants, Mike Johnson, and Gary Topolewski for failure to sit for a full deposition), and failure to respond to interrogatories and requests for production. AECOM moves in the alternative for sanctions due to Defendants' spoliation of financial records, Federal Rule of Civil Procedure 26(g) permitting sanctions against signatories and their parties (including Mike Johnson's and Gary Topolewski's signatures on declarations), Federal Rule of Civil Procedure 16(f) for Defendants' failure to obey pretrial orders, including the preliminary injunction and orders re motions for contempt, Local Rule 83-7 for Defendants' willful and grossly negligent violations, and civil contempt based on the Court's inherent power to award such sanctions.

AECOM will also seek its attorney's fees based on the Court's previous exceptional case finding. Dkt. 243. AECOM will move, in the alternative, for fees pursuant to Federal Rules of Civil Procedure 37(d) and 16(f), Local Rule 83-7, and the Court's inherent power to award attorney's fees for bad faith pre-litigation conduct.

Best,

Yungmoon Chang

KIRKLAND & ELLIS LLP
2049 Century Park East, Los Angeles, CA 90067

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F +1 310 552 5900
yungmoon.chang@kirkland.com

From: John Jahrmarkt, Esq.
<johnjahrmarkt@gmail.com>

Sent: Tuesday, November 30, 2021 11:22 AM

To: Chang, Yungmoon
<yungmoon.chang@kirkland.com>; John Jahrmarkt
<jjlawyer@mail.com>

Cc: Torres, Diana <diana.torres@kirkland.com>;
Catuara, Keith R. <kcatuara@kirkland.com>;
Beltran, Maria Monica
<maria.beltran@kirkland.com>; sgibson@jmbm.com;
lbabst@jmbm.com;

dsedor@jmbm.com; dshorte@jmbm.com; Victoria
Murray (Legal Assistant to John Jahrmarkt, Esq)
<jjlegalassistant@gmail.com>

Subject: RE: Aecom Energy & Construction, Inc. v Ripley, et al. | MK Defendant's Meet and Confer Letter

Yungmoon, thanks for the response. I suggest that we schedule a call with the magistrate judge. Would you be willing to participate in such a call? If you are, I can call and get some dates.

PLEASE NOTE OUR NEW SUITE NUMBER

jjlawyer@mail.com
John Jahrmarkt, Esq.
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Los Angeles, California 90067
(310) 226-7676 (tel) (310) 226-7677 (fax)

From: Chang, Yungmoon

Sent: Saturday, November 27, 2021 8:12 AM

To: John Jahrmarkt

Cc: Torres, Diana; Catuara, Keith R.; Beltran, Maria Monica; sgibson@jmbm.com; lbabst@jmbm.com; dsedor@jmbm.com; dshorte@jmbm.com; Victoria Murray (Legal Assistant to John Jahrmarkt, Esq)

Subject: RE: Aecom Energy & Construction, Inc. v Ripley, et al. | MK Defendant's Meet and Confer Letter

Dear John,

Thank you for providing citations to authority. However, we disagree that a discovery motion is appropriate, for the following reasons.

First, the time has passed to file any discovery motions, since the discovery cutoff was November 22, 2021. Dkt. 361; *see also* Dkt. 385 at 17:1-2 ("November 22 will be the termination of the discovery"); *id.* at 17:3-5 ("you file motions with this court, and don't wait for the last day"). To the extent the topics sought in the October 2021 deposition notice are duplicative of topics already sought and objected to in the June 2018 deposition notice, the time to compel on those topics has been expired for even longer.

Second, even if the motion were timely (it is not), it does not bear merit. As you note, damage under 15 U.S.C. section 1117(a) may be calculated as: (1) a measure of plaintiff's own damage, *or* (2) a theory of

disgorgement of defendant's unjustly obtained profits. *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1407 (9th Cir. 1993) (emphasis added). AECOM has always disclosed that it will pursue the latter. Thus, evidence of AECOM's own damage are not relevant. Nor can equitable considerations justify Defendants' attempt to discover evidence of AECOM's use and profits. The authority to which you cite states that "[n]othing in the Lanham Act conditions an award of profits on plaintiff's proof of harm, and we've held that profits may be awarded in the absence of such proof." *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 831 (9th Cir. 2011); *see also Bandag, Inc. v. Al Bolser's Tire Stores, Inc.*, 750 F.2d 903, 919 (Fed. Cir. 1984) ("[A]n inability to show actual damage does not alone preclude a recovery under section 1117.").

Third, to the extent *Bandag* could be construed as requiring plaintiff to present evidence of damage, it applies when there is *no* willful infringement. For example, in *Bandag*, the Federal Circuit explicitly noted that "[t]he record evidences *no intent* on the part of [defendant] to use the [] mark." *Bandag*, 750 F.2d at 918 (emphasis added) (also noting the trademark use was in "a single annual edition"). Indeed, your other cited authority states that where infringement "is deliberate and willful," "[i]t seems scarcely equitable . . . for an infringer to reap the benefits of a trade-mark he has stolen, force the registrant to the expense and delay of litigation, and then escape payment of damage on the theory that the registrant suffered no loss. To impose on the infringer nothing more serious than an injunction when he is caught is a tacit invitation to other infringement." *Maier Brewing Co. v. Fleischmann Distilling Corp.*, 390 F.2d 117,

123 (9th Cir. 1968). In other words, when a plaintiff pursues the equitable remedy of disgorgement to prevent unjust enrichment, "[t]he dollar amount of the recovery in an accounting for profits under the unjust enrichment rationale has no relation to the damage, if any, sustained by the plaintiff in the cation." *Id.* at 124. Here, the Court's summary judgment order already determined Defendants' conduct was intentional and willful. *E.g.*, Dkt. 243 at 15-17 ("Plaintiff has offered ample evidence of each Defendants' willful infringement by their efforts in taking over the MK brand."). Thus, evidence of AECOM's use and profits, again, is not relevant.

Finally, even if discovery into AECOM's use and profits were relevant to disgorgement in the context of willful infringement (they are not), they are not relevant here, because Defendants have not produced any reliable evidence of their financial information. Thus, Defendants' statement that "Defendants should be able to offer evidence that Plaintiff never intended to or actually did sell goods or services in a manner similar to what Defendants did" bears no relevance because Defendants have not offered evidence of their own financial information. In any event, Defendants' argument is moot, because during underlying discovery, AECOM in fact produced numerous examples of AECOM's history of use of that MK name that demonstrated examples of the ways in which AECOM used the MK name.

Best,

Yungmoon Chang

KIRKLAND & ELLIS LLP
2049 Century Park East, Los Angeles, CA 90067
T +1 310 552 4359
F +1 310 552 5900
yungmoon.chang@kirkland.com

From: Victoria Murray (Legal Assistant to John Jahrmarkt, Esq) <jjlegalassistant@gmail.com>

Sent: Monday, November 22, 2021 2:36 PM

To: Chang, Yungmoon <yungmoon.chang@kirkland.com>

Cc: Torres, Diana <diana.torres@kirkland.com>; Catuara, Keith R. <kcatuara@kirkland.com>; Beltran, Maria Monica <maria.beltran@kirkland.com>; sgibson@jmbm.com; lbabst@jmbm.com; dsedor@jmbm.com; dshorte@jmbm.com; John Jahrmarkt <jjlawyer@mail.com>

Subject: Aecom Energy & Construction, Inc. v Ripley, et al. | MK Defendant's Meet and Confer Letter

Ms. Chang,

Enclosed herewith, please find the correspondence from our firm regarding a follow up to the meet and confer concerning Federal Rule of Civil Procedure 30(b)(6).

--

Sincerely,

Victoria Murray
Legal Assistant for John G. Jahrmarkt, Esq.
Jahrmarkt & Associates

2049 Century Park East, Suite 2525
Los Angeles, CA 90067
Tel: 310 226 7676 / Fax: 310 226 7677

DECLARATION OF MIKE JOHNSON REGARDING COMPLIANCE WITH COURT ORDER RE: PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION (NOVEMBER 9, 2017)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AECOM ENERGY & CONSTRUCTION, INC., AN OHIO CORPORATION,

Plaintiff,

v.

JOHN RIPLEY, AN INDIVIDUAL; TODD HALE, AN INDIVIDUAL; GARY TOPOLEWSKI, AN INDIVIDUAL; HENRY BLUM, AN INDIVIDUAL; BUD ZUKALOFF, AN INDIVIDUAL; "MORRISON KNUDSEN CORPORATION," A NEVADA CORPORATION; "MORRISONKNUDSEN COMPANY, INC.," A NEVADA CORPORATION; "MORRISONKNUDSEN SERVICES, INC.," A NEVADA CORPORATION; AND "MORRISON-KNUDSEN INTERNATIONAL INC.," A NEVADA CORPORATION,

Defendants.

Case No. 2:17-cv-05398-RSWL-SS

DECLARATION OF MIKE JOHNSON REGARDING COMPLIANCE WITH COURT

ORDER RE: PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

I, MIKE JOHNSON, declare:

1. I am over the age of eighteen (18) years and an officer of parties to this action. I am competent to testify as to the facts stated herein, and if called and sworn as a witness, I could and would competently testify as to the matters herein of my own personal knowledge.

2. I am a corporate officer of each Defendant "MORRISON KNUDSEN CORPORATION," a Nevada Corporation; "MORRISONKNUDSEN COMPANY, INC.," a Nevada Corporation; "MORRISONKNUDSEN SERVICES, INC.," a Nevada Corporation; and "MORRISON-KNUDSEN INTERNATIONAL INC.," a Nevada Corporation in this action.

3. I make this declaration in compliance with this Court's Order Re: Plaintiffs Motion for Preliminary Injunction. That order required that, within twenty-one days of the date Plaintiff posts the bond described in the Order, each Defendant file a sworn affidavit detailing the manner in which that Defendant has complied with this Order. I am filing this declaration on behalf of "MORRISONKNUDSEN COMPANY, INC.," a Nevada Corporation; "MORRISONKNUDSEN SERVICES, INC.," a Nevada Corporation; and "MORRISON-KNUDSEN INTERNATIONAL INC.," a Nevada Corporation.

4. On or about October 27, 2017 I directed my staff to change the corporate name of each defendant. We prepared certificates of amendment for each corporation. We filed four certificates of amendment on

October 27, 2017. These certificates of amendment contained some errors and we re-filed corrected versions today as they originally had the incorrect corporate name listed. True and correct copies of the certificates of amendments are attached hereto as exhibit "A" and by this reference incorporated herein as though fully set forth at length.

5. The certificates of amendment changed the corporate names as follows:

> Morrison Knudsen Corporation was changed to MK Corporation
>
> Morrison Knudsen Company, Inc. Was changed to MK Company Inc.
>
> Morrison Knudsen Services, Inc. was changed to MK Services Inc.
>
> Morrison Knudsen International Inc. was changed to MK International Inc.

6. On or about October 17, 2017, I directed my staff to pull down the website http://morrison-knudsen .com/. That was done and as of October 17, 2017, the website has only showed a landing page stating "under construction." No defendant currently uses the website for any purpose. A true and correct copy of a printout of the website is attached hereto as exhibit "B" and by this reference incorporated herein as though fully set forth at length.

7. I directed my staff to contact all vendors, suppliers, customers and creditors and inform them of the change of names as described above. This was done by my accounting staff, mostly Carol Weys. The identity of the third parties that were contacted is subject to trade secret and can not be listed here.

8. All of the outgoing messages on company voicemail systems of the defendants were changed to reflect the name changes above. To the best of my knowledge, each was changed to eliminate any reference to the name Morrison Knudsen. This was done for each company location.

9. Each company employee was contacted via email, phone or in person and told to stop using the name Morrison Knudsen and use MK instead.

10. I directed my accounting staff to change all letterhead and invoices to reflect the name changes above for the defendants. At my direction, they contacted Vista Print and ordered company printed materials such as letterhead and invoices using the new names.

11. I checked if we currently have any advertising out and we do not so no adds were changed.

12. A google search was performed of Morrison Knudsen at 2049 Century Park East to see what directories have our companies listed on the internet. We discovered listings as follows:

https://local.yahoo.com/info-201121437-morrison-knudsen-corporation-los-angeles;

https://www.b2byellowpages.com/company-information/291546517-morrison-knudsen-corp.html;

https://www.yellowpages.com/los-angeles-ca/mip/morrison-knudsen-corp-475483345

https://www.facebook.com/pages/Morrison-Knudsen-Corporation/1647649032153864

https://www.nevada-register.com/251673-morrison-knudsen-corporation

https//www.verimark.comitrademark-ownerimorrison-knudsen-corporation-649295

https//www.bizapedia.com/trademarksimorrison-knudscn-86954058.html

13. I directed my staff to contact each directory service and provide information that the company names have changed as set forth above. This was done by me, my accounting staff, mostly Carol Weys. We do not own or control those directory services so we cannot do more than request they make the changes.

I declare under penalty of perjury in accordance with the laws of the State of California and of the United States that the forgoing is true and correct and that this declaration was executed on November 9, 2017.

/s/ Mike Johnson