

Tentative Order Regarding Motion for Renewed Judgment as a Matter of Law [157], Applications to the Clerk to Tax Costs [156] [158], and Motions for Attorneys' Fees [159] [160]

Plaintiff and Counter Defendant, Takeya USA Corporation (“Takeya”), moves for renewed judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b). (Mot. RJMOL, Dkt. No. 157.) Defendant and Counter Claimant, Power Play Marketing Group, LLC (“PowerPlay”), opposed the motion. (Opp’n RJMOL, Dkt. No. 168.) Takeya replied. (Reply RJMOL, Dkt. No. 179.)

Takeya and PowerPlay also both move for attorneys’ fees and costs. (Takeya Mot., Dkt. No. 159; PowerPlay Mot., Dkt. No. 160.) Relatedly, both parties filed an application to the clerk to tax costs against the other party, and objected to the other’s application. (PowerPlay’s Appl., Dkt. No. 156; Takeya’s Appl., Dkt. No. 158; Takeya Objection, Dkt. No. 166; PowerPlay Objection, Dkt. No. 167.)

For the following reasons, the Court **GRANTS** the motion for renewed judgment as a matter of law, **GRANTS** Takeya’s motion for attorneys’ fees, and **DENIES** PowerPlay’s motion for attorneys’ fees.

I. BACKGROUND

The parties are familiar with the facts of the case. Accordingly, the Court recites them here only as necessary to resolve the present motions.

The following facts are undisputed. Takeya is a wholesaler of water bottles and related hydration products. (Jury Instrs., Dkt. No. 141, Instr. 12) (stipulated facts). PowerPlay is a sales representative agency. (Id.) Takeya and PowerPlay entered into multiple sales agreement, the latest signed on September 17, 2020 (the “Agreement”). (Id.) PowerPlay partners with manufacturers and wholesalers to place their products for sale in-store and online. (Id.) In exchange for PowerPlay’s services, Takeya agreed to pay PowerPlay certain commissions on the sales of Takeya products. (Id.) Takeya sent PowerPlay a written notice of

termination of the contract on March 11, 2021. (Id.)

On Takeya’s breach of contract claim, the jury found PowerPlay did not fail to do something that the contract required it to do. (Special Verdict, Dkt. No. 146, § A.) On PowerPlay’s breach of contract claim, the jury found Takeya did not fail to do something that the contract required it to do. (Id. § B.) Instead, the jury found Takeya did do something the contract prohibited it from doing. (Id.) But the jury also found PowerPlay was not harmed by Takeya’s breach of contract. (Id.) On PowerPlay’s claim for breach of the implied covenant of good faith and fair dealing, the jury found Takeya unfairly interfered with PowerPlay’s right to receive benefits of the contract. (Id. § C.) Accordingly, the jury awarded PowerPlay \$83,000 in damages. (Id.)

II. LEGAL STANDARD

A. *Renewed motion for Judgment as a Matter of Law: Rule 50(b)*

Pursuant to Fed. R. Civ. P. 50(a), a motion for judgment as a matter of law must be made before the case is submitted to the jury and must specify the judgment sought and the law and facts that entitle the movant to the judgment. Fed. R. Civ. P. 50(a). If the Court does not grant the motion, then “the court is considered to have submitted the action to the jury subject to the court’s later deciding the legal questions raised by the motion.” EEOC v. Go Daddy Software, Inc., 581 F.3d 951, 961 (9th Cir. 2009); Zion v. Cnty. of Orange, 2019 U.S. Dist. LEXIS 228259, at *15 (C.D. Cal. Apr. 17, 2019). A party may move to renew its motion for judgment as a matter of law under Fed. R. Civ. P. 50(a) within twenty-eight days after the entry of judgment, or if the motion addresses a jury issue not decided by a verdict, no later than twenty-eight days after the jury was discharged. Fed. R. Civ. P. 50(b). It may also move in the alternative a request for a new trial under Fed. R. Civ. P. 59. Id.

A moving party is entitled to judgment as a matter of law if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion that is contrary to the jury’s verdict. Go Daddy Software, Inc., 581 F.3d at 961. A jury’s verdict “must be upheld” if it is supported by substantial evidence, even where it “is possible to draw a contrary conclusions.” Pavao v. Pagay, 307 F.3d 915, 918 (9th Cir. 2002). In ruling on a motion for

judgment as a matter of law, the court may: “(a) allow the judgment to stand, (b) order a new trial, or (c) direct entry of judgment as a matter of law.” White v. Ford Motor Co., 312 F.3d 998, 1010 (9th Cir. 2002). Judgment is appropriate “if there is no legally sufficient basis for a reasonable jury to find for that party on that issue.” Costa v. Desert Palace, Inc., 299 F.3d 838, 859 (9th Cir. 2002). Additionally, when making its determination, the Court cannot “[m]ake credibility determinations” and “must disregard all evidence favorable to the moving party that the jury is not required to believe.” Tan Lam v. City of Los Banos, 976 F.3d 986, 995 (9th Cir. 2020) (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150–51 (2000)).

B. Motion for Attorneys’ Fees

In California, reasonable attorneys’ fees authorized by contract are awarded to the prevailing party “as fixed by the court.” Cal. Civ. Code. § 1717(a); see also EnPalm, LLC v. Teitler, 162 Cal. App. 4th 770, 774 (2008). The trial court has broad discretion to determine the amount of a reasonable fee, and the award of fees is governed by equitable principles. EnPalm, 162 Cal. App. 4th at 774 (citing PLCM Grp. v. Drexler, 22 Cal. 4th 1084, 1094–95 (2000)).

III. DISCUSSION

A. Renewed Motion for Judgment as a Matter of Law: Rule 50(b)

1. Arguments Not Raised in 50(a) Motion

As a threshold matter, the Court will address PowerPlay’s contention that Takeya raises arguments in its Rule 50(b) motion that Takeya did not raise in its Rule 50(a) motion.

A renewed motion for judgment as a matter of law under Rule 50(b) “is not a freestanding motion” and is “limited to the grounds asserted in the pre-deliberation Rule 50(a) motion.” Go Daddy Software, Inc., 581 F.3d at 961. A “party cannot raise arguments in its post-trial motion for judgment as a matter of law under Rule 50(b) that it did not raise in its pre-verdict Rule 50(a) motion.” OTR Wheel Eng’g, Inc. v. W. Worldwide Serv., Inc., 897 F.3d 1008, 1016 (9th Cir. 2018). This requirement is “strictly construed,” and forecloses both

50(b) motions brought where no 50(a) motion was raised, as well as grounds or arguments not raised in the party's pre-verdict motion. Id.; Tortu v. Las Vegas Metro. Police Dep't, 556 F.3d 1075, 1082 (9th Cir. 2009).

PowerPlay points to two arguments made by Takeya which PowerPlay argues were not initially brought in Takeya's Rule 50(a) motion. First, whether Takeya initially argued that the jury could not award damages because the breach of implied covenant of good faith and fair dealing claim is duplicative of the breach of contract claim. Second, whether Takeya's argument regarding the implied covenant of good faith and fair dealing is limited to only post-termination commissions. (Opp'n RJMOL at 18–19.)

First, PowerPlay argues Takeya is barred from arguing the jury could not award damages for breach of implied covenant based on Takeya's failure to pay pre-termination commissions because this claim is duplicative of the breach of contract claim. (Id. at 18–19.) In Takeya's Rule 50(b) motion, Takeya states "Courts routinely dispose of breach of the implied covenant claims that are duplicative of a breach of contract claim." (Mot. RJMOL at 23.) Takeya argues this is not a new argument but rather a way of explaining their initial argument. (Reply RJMOL at 17–18.) The Court agrees. Takeya appears to simply cite to cases where courts found there can be no breach of the implied covenant of good faith and fair dealing when the conduct at issue is already covered by the breach of contract claim. This is the crux of Takeya's Rule 50(a) and Rule 50(b) argument, a breach of contract and breach of implied covenant of good faith and fair dealing cannot co-exist where a party exercises an express contractual term.

Second, PowerPlay argues Takeya's Rule 50(b) motion is limited to PowerPlay's recovery of post-termination commissions. (Opp'n RJMOL at 19.) In Takeya's Rule 50(a) motion, Takeya argued it had "the right to terminate the parties' Agreement whenever, by providing the written notice of termination in thirty (30) days, regardless of whether PowerPlay also wanted to terminate the Agreement at that time." (Mot. JMOL, Dkt. No. 134, 15–16.) Takeya further argued, "[t]hus no matter when Takeya terminated PowerPlay, it would be the case that PowerPlay would have recently completed work for which sales orders would not be placed within the 30 days termination period due to the period of time between when a retailer awards a placement and when the order is placed." (Id. at 15.) The plain language of Takeya's arguments does not limit

itself to only post-termination commissions.

Accordingly, the Court finds Takeya did not raise any arguments in its Rule 50(b) motion not already raised in its Rule 50(a) motion.

2. Breach of the Implied Covenant of Good Faith and Fair Dealing

Takeya argues, under relevant case law, it could not have breached the implied covenant of good faith and fair dealing by exercising an express contractual right. (Mot. RJMOL at 20.) PowerPlay does not dispute this argument. Instead, PowerPlay argues Takeya is barred completely from challenging the verdict because the verdict was based on jury instructions Takeya agreed to. (Opp'n RJMOL at 16–18.)

PowerPlay argues the invited error doctrine should apply. The invited error doctrine provides that “[o]ne may not complain on review of errors below for which he is responsible.” Hudson v. Wylie, 242 F.2d 435, 448 (9th Cir. 1957). It thus “preclud[es] an appellant from complaining of errors which he commits or invites, or from taking a position contrary to that adopted in the trial court.” Id. This is because “[p]arties must abide by the consequences of their own acts and cannot seek a reversal of a case upon appeal for errors which they had committed or invited. One who by his conduct induces the commission of some error by the trial court, or, in other words, who has invited error, is estopped from insisting that the action of the court is erroneous.” Noble v. Miles, 129 Cal. App. 724, 727 (1933) (quoting 2 Cal. Jur. p. 846).

In its motion, Takeya argues “the theory of breach based on a failure to pay commissions owed pre-termination that went to the jury was substantively identical to one of PowerPlay’s theories for its breach of contract counterclaim.” (Mot. RJMOL at 22.) While Takeya does not explicitly challenge the jury instructions, Takeya appears to imply the jury should not have been instructed on the implied covenant counterclaim as it was duplicative of the breach of contract claim.

PowerPlay points out Takeya affirmatively filed amended jury instructions that based liability on termination of the contract to avoid paying pre-termination

commissions. (See Opp’n RJMOL at 18; Proposed Jury Instrs., Dkt. No. 133.) In those proposed instructions, Takeya argued “Takeya only owed PowerPlay commissions on any orders that occurred prior to and including April 11, 2021.” (*Id.* at 3, 5.) The final Jury Instruction No. 30 stated: “PowerPlay claims that Takeya breached the implied covenant of good faith and fair dealing with respect to the parties’ contract by terminating the contract to avoid paying commissions owed to PowerPlay for orders placed prior to and including April 11, 2021, the effective date of the termination.” (Jury Instrs. at 34.) These updated instructions followed the Court’s ruling that the claim for breach of the implied covenant of good faith and fair dealing could not be based on post-termination commissions.

PowerPlay relies on out of circuit or procedurally different cases. None of the cases PowerPlay relies on apply the invited error doctrine in the context of a Rule 50(a) or Rule 50(b) motion. See *United States v. Baldwin*, 987 F.2d 1432, 1437 (9th Cir. 1993) (“Where the defendant himself proposes the jury instruction he later challenges *on appeal*, we deny review under the invited error doctrine.”) (emphasis added). Relatedly, this Court has held:

Generally, a party must properly object to an error in an instruction or a failure to give a requested instruction. Fed. R. Civ. P. 51(d)(1). Nevertheless, [a] court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights. The Ninth Circuit instructs that in reviewing civil jury instructions for plain error, courts must consider whether (1) there was an error; (2) the error was obvious; . . . (3) the error affected substantial rights; and (4) the costs of correcting an error, and — in borderline cases — the effect that a verdict may have on nonparties. [T]he decision whether to correct a plain error under Federal Rule of Civil Procedure 51(d)(2) is discretionary.

Zion, 2019 U.S. Dist. LEXIS 228259, at *30 (internal citations and quotation marks omitted).

PowerPlay cites no binding nor on point authority in support of its position. The invited error doctrine is typically applied on appeal or on a motion to amend or alter judgment. Moreover, the Court only granted Takeya’s Rule 50(a) motion pertaining to post-termination commissions. As such, Takeya was required to still

tender jury instructions as to pre-termination commissions. Based on the foregoing the Court finds the invited error doctrine does not apply. Even if the doctrine applies, the Court has discretion to review this issue under Federal Rule of Civil Procedure 51(d).

As such, the Court will address Takeya's argument that it could not have breached the implied covenant of good faith and fair dealing. PowerPlay failed to address this argument in its opposition.

"The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." Guz v. Bechtel Nat. Inc., 24 Cal. 4th 317, 322 (2000).

The agreement between Takeya and PowerPlay provided: "b) Either party may terminate this Agreement (i) immediately upon any breach of this Agreement by the other party, or (ii) upon 30 days' prior written notice to the other party." (FAC, Dkt. No. 72, Ex. 1.) Accordingly, Takeya had the right to terminate the agreement with PowerPlay upon 30 days' prior written notice. The Supreme Court of California has held that the termination of a lease to claim appreciated rental value, as expressly permitted in the lease, cannot sustain a violation of the implied covenant of good faith and fair dealing. Carma Devs. (Cal.), Inc. v. Marathon Dev. Cal., Inc., 2 Cal. 4th 342, 376 (1992). In Carma, the court discussed Gerdlund v. Elec. Dispensers Int'l, which is relevant here. In Gerdlund, the Court of Appeal held the implied covenant of good faith and fair dealing could not apply in connection to the termination of a sales representation agreement. 190 Cal. App. 3d 263, 277 (1987). There, the court found the breach at issue related to an express termination provision, thus "it was error to instruct the jury to apply a good faith covenant at variance with [that] provision." Id. at 278.

Based on the agreement, Takeya had a contractual right to terminate the agreement for whatever reason. Given the applicable case law, Takeya could not have breached the implied covenant of good faith and fair dealing by terminating the agreement. This is so even if Takeya terminated to avoid paying certain commissions. Like in Gerdlund, the breach at issue related directly to the express

termination provision. And when a breach of the implied covenant of good faith and fair dealing is duplicative of the breach of contract claim, the breach of the covenant should be dismissed. See Careau & Co. v. Sec. Pac. Bus. Credit, Inc., 222 Cal. App. 3d 1371, 1393 (1990); see, e.g., Innovate1 Servs. v. First Bridge Merch. Sols., 2021 U.S. Dist. LEXIS 193310, at *12 (C.D. Cal. Mar. 19, 2021).

Notwithstanding the verdict and as a matter of law, the jury could not have found in favor of PowerPlay on its claim that Takeya breached the implied covenant of good faith and fair dealing.

Accordingly, the Court **GRANTS** Takeya's renewed motion for judgment as a matter of law and directs entry of judgment in favor of Takeya on PowerPlay's claim for breach of the implied covenant of good faith and fair dealing. Because the Court grants the motion on these grounds, the Court need not address the remainder of Takeya's renewed motion for judgment as a matter of law, or alternative requests.

B. Motion for Attorneys' Fees

Takeya and PowerPlay both move for attorneys' fees and costs pursuant to the Agreement. The Agreement provides:

. . . In the event that litigation results from or arises out of this Agreement or the performance thereof, the Parties agree to reimburse the prevailing party's reasonable attorney's fees, court costs, and all other expenses, whether or not taxable by the court as costs, in addition to any other relief to which the prevailing party may be entitled. . . .

(FAC Ex. 1, ¶ 26.)

1. Prevailing party

Federal courts apply state law in determining whether to award attorney fees in an action on a contract. In re Baroff, 105 F.3d 439, 442 (9th Cir. 1997). California Civil Code section 1717 ("Section 1717") provides, in pertinent part:

In any action on a contract, where the contract specifically provides that

attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

Cal. Civ. Code § 1717(a).

Section 1717 further provides that “the party prevailing on the contract shall be the party who recovered greater relief in the action on the contract.” Id. § 1717(b)(1). “The court may also determine that there is no party prevailing on the contract for purposes of this section.” Id. The California Supreme Court has provided the following guidance in applying Section 1717:

[I]n deciding whether there is a “party prevailing on the contract,” the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, and similar sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by a “comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.”

Hsu v. Abbara, 9 Cal. 4th 863, 876 (1995) (alteration in original) (quoting Bank of Idaho v. Pine Ave. Assocs., 137 Cal. App. 3d 5, 15 (1982)). “[I]n determining litigation success, courts should respect substance rather than form, and to this extent should be guided by ‘equitable considerations.’” Id. at 877. “If neither party achieves a complete victory on all the contract claims, it is within the discretion of the trial court to determine which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees.” Scott Co. of Cal. v. Blount, Inc., 20 Cal. 4th 1103, 1109 (1999).

Takeya filed the Complaint bringing a cause of action for declaratory judgment and claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and fraudulent inducement. (Notice of Removal, Dkt. 1-1.) PowerPlay filed counterclaims for violation of the Minnesota Termination of Sales Representative Act (“MTSRA”), breach of contract, breach of the implied

covenant of good faith and fair dealing, and unjust enrichment. (Answer, Dkt. No. 17.) PowerPlay sought monetary damages. (Id.) Takeya filed a First Amended Complaint (“FAC”), retaining the claims and adding allegations regarding Petschl and the MTSRA. (FAC, Dkt. No. 72.)

Both parties moved for partial summary judgment on some of the claims. On PowerPlay’s motion, the Court granted summary judgment on Takeya’s claim for breach of the implied covenant of good faith and fair dealing and fraud in the inducement, and denied summary judgment on Takeya’s declaratory judgment and breach of contract claims. (Order, Dkt. No. 90.) On Takeya’s motion, the Court granted summary judgment on PowerPlay’s claims based on violation of the MTSRA, breach of contract as sections 2 and 9 of the Agreement, breach of the implied covenant of good faith and fair dealing based on an alleged threat to withhold commissions, and unjust enrichment. (Id.) The Court denied summary judgment on PowerPlay’s claims of breach of contract based on sharing POS reports, and breach of the implied covenant of good faith and fair dealing based on pre-termination commissions. (Id.)

At trial, Takeya proceeded with its breach of contract claim. The jury found PowerPlay did not fail to do something that the contract required it to do. (Special Verdict, Dkt. No. 146, at § A.) PowerPlay proceeded on a breach of contract claim and a breach of the implied covenant of good faith and fair dealing claim. On the breach of contract claim, the jury found Takeya did not fail to do something that the contract required it to do. (Id. § B.) Instead, the jury found Takeya did something the contract prohibited it from doing. (Id.) But the jury also found PowerPlay was not harmed by Takeya’s breach of contract. (Id.) On the claim for breach of the implied covenant of good faith and fair dealing, the jury found Takeya unfairly interfered with PowerPlay’s right to receive benefits of the contract. (Id. § C.) Accordingly, the jury awarded PowerPlay \$83,000 in damages. (Id.)

This Court partially granted Takeya’s Rule 50(a) motion as to post-termination fees relating to the breach of the implied covenant of good faith and fair dealing. As discussed above, this Court also grants Takeya’s Rule 50(b) motion as to the PowerPlay’s entire claim for breach of the implied covenant of good faith and fair dealing. Accordingly, PowerPlay’s damages are zero dollars.

Takeya contends its primary litigation objective was to prove the MTSRA did not apply and that it properly terminated the agreement. (Takeya Mot. at 17.) Takeya's First Amended Complaint states "Takeya file[d] this suit to protect its contracted for-rights and recover the damages that Defendant has forced Takeya to take via its failures as sales representative." (FAC ¶ 26.) Takeya's Prayer for Relief primarily focuses on a declaration that Takeya properly terminated PowerPlay pursuant to Agreement and that the MTSRA does not apply or was satisfied. (*Id.* ¶ A.) PowerPlay contends its primary litigation objective was monetary relief. (PowerPlay Mot. at 22.) PowerPlay's Answer and Counterclaims focuses on PowerPlay's "success in securing and growing the placement of Takeya's products with major national retailers," and Takeya's "brazen attempt to reap the benefits of Powerplay's hard work, while avoiding the significant commissions owed to Powerplay as a result of its efforts." (Answer ¶¶ 10, 12.) PowerPlay's Prayer for Relief requested dismissal of Takeya's Complaint, a declaration that Takeya violated the MTSRA, and certain specific monetary damages. (*Id.* ¶ 117.) PowerPlay points out that at trial Takeya told the jury "why we're here" is to recover damages based on PowerPlay's alleged "dismal performance." (PowerPlay Mot. at 21.) But that belies the fact that the Court already resolved the MTSRA issue at summary judgment, and all that was left for trial was the Takeya's breach of contract claim and PowerPlay's remaining counterclaims. Based on the parties pleadings, the Court agrees that the stated litigation objectives in the present motions were in fact the parties' litigation objectives.

On summary judgment, the Court conducted a choice-of-law analysis and ultimately concluded California, and not Minnesota, law governed. (Order at 10–20.) Accordingly, the Court held "[t]o the extent that this determination is consistent with Takeya's declaratory judgment claim, that claim is [granted]." (*Id.* at 20.) The Court may consider Takeya's success on its cause of action for declaratory relief in determining the prevailing party. See Mitchell Land & Improvement Co. v. Ristorante Ferrantelli, Inc., 158 Cal. App. 4th 479, 489 (2007) ("[W]hen in a declaratory relief action the parties seek a determination of their respective rights and duties under a contract such as a lease, the action is on a contract for purposes of section 1717." (internal quotation marks omitted)). As such, Takeya argues it prevailed on its primary litigation objective.

PowerPlay disagrees, and attempts to distinguish two cases Takeya relies

on: Silver Creek, LLC v. BlackRock Realty Advisors, Inc., 173 Cal. App. 4th 1533 (2009), and First City Pacific, Inc. v. Home Depot, U.S.A., Inc., 2019 WL 1715479 (C.D. Cal. Mar. 4, 2019). The court's holding in Silver Creek further affirms what is already known: declaratory relief seeking to establish a party's right under a contract is an action to enforce the contract and may be considered in determining the prevailing party. 173 Cal. App. 4th at 1538. Further, the court reversed the lower court for failing to properly determine which party "obtained greater relief on the contract." Id. at 1541. There, the court held that a party who simply won on all of the issues is not necessarily the prevailing party. Id. at 1539. In fact, determining the prevailing party requires "evaluating the parties' comparative litigation success." Id. at 1540. In First City Pacific, on a declaratory relief action, the court held in favor of Home Depot on summary judgment on an issue where \$10 million was at stake. 2019 WL 1715479, at *4. This left only \$100,000 in dispute. Id. Accordingly, the Court held Home Depot was the prevailing party. Id. PowerPlay correctly points out First City Pacific dealt with a declaratory relief action and no other additional claims. Whereas here, Takeya brought three claims in addition to the declaratory relief action. Nonetheless, what's clear and consistent with the above cases is Takeya did prevail on its declaratory relief action which was also its primary litigation objective.

Based on the jury verdict, Takeya did not succeed on its breach of contract claim. The jury did find in favor of PowerPlay on its breach of contract claim, but also found PowerPlay was not harmed. Accordingly, the jury did not award PowerPlay any damages on the breach of contract claim. The jury did award damages on the breach of the implied covenant of good faith and fair dealing claim. But pursuant to this Order, the court enters judgment in favor of Takeya on the breach of implied covenant of good faith and fair dealing. Thus, PowerPlay has not recovered any monetary relief in this action.

PowerPlay contends it is the prevailing party even if it did not recover the full amount sought in its Counterclaims. (PowerPlay Mot. at 20.) PowerPlay did not achieve its litigation objective of "monetary relief" because it did not recover any damages. Even taking into account the \$83,000 the jury awarded to PowerPlay, it represents as little as 2% and at most 8% of the total damages sought by PowerPlay. (See Takeya Mot. at 14; PowerPlay Opp'n at 4.)

Takeya argues, and PowerPlay does not dispute, that Berkla v. Corel

Corporation is instructive. 302 F.3d 909 (9th Cir. 2002). There, the Ninth Circuit upheld a district court's denial of attorney's fees to Berkla because Berkla recovered only \$23,502 of the \$1.2 million sought on the breach of contract claim, or approximately 2%. Instead, PowerPlay relies on United States of America ex rel. Nasatka Barrier, Inc. v. International Fidelity Insurance Company, et al. 2019 U.S. Dist. LEXIS 231741 (C.D. Cal. Dec. 19, 2019). There, the court found Nasatka as the prevailing party because it prevailed on its breach of contract claim and defended the breach of contract counterclaim. While Nasataka Barrier is relevant, the additional rub in this case is Takeya prevailed on its declaratory relief action. The Court finds PowerPlay's reliance on Buck v. Barb, 147 Cal. App. 3d 920 (1983) and Sukut-Coulson, Inc. v. Allied Canon Co., 85 Cal. App. 3d 648 (1978) unhelpful as they predate Hsu.

PowerPlay relies on three additional cases which the Court will discuss in turn.¹ In Ajaxo Inc. v. E*Trade Group Inc., the court affirmed the lower court's decision in finding Ajaxo the prevailing party. 135 Cal. App. 4th 21, 59 (2005). The lower court's decision was based on Ajaxo's award of \$1.29 million in damages even though E*Trade defeated four of Ajaxo's theories of liability and defended against Ajaxo's request for a permanent injunction. Nonetheless, the lower court found Ajaxo "won a simple, unqualified verdict on the breach of contract claim and established monetary damages in excess of \$1 million." Here, PowerPlay recovered no monetary damages. Even if the Court considered the original \$83,000 awarded to Powerplay, it must be compared to Takeya's success in securing declaratory relief. In Scott Co. of California v. Blount, Inc., the court affirmed the lower court's decision to hold the plaintiff as the prevailing party for recovering \$440,000 of the more than \$2 million sought. From a pure numbers standpoint, the plaintiff's recovery compared to the amount sought is much more significant than PowerPlay's monetary relief. And again, that must be compared to the relief awarded based on the litigation objectives. In de la Cuesta v. Benham, the landlord was found to be the prevailing party after being awarded \$69,500 of the \$103,000 sought. 193 Cal. App. 4th 1287, 1291, 1299 (2011). The landlord obtained the "greater" of its litigation objectives, which warranted holding it the prevailing party. Id. at 1299. Each of these cases are distinguishable because the amount awarded compared to the amount sought is much more substantial than the amount PowerPlay received compared to the amount sought. And more

¹ The Court assumes, arguendo, the jury's award of \$83,000 to PowerPlay stands.

importantly, none of the cases are factually similar to the way Takeya achieved its primary litigation objective through declaratory relief.

Each party undoubtedly succeeded on some claims and on defending against other claims. Here, there was no “unqualified” win by either side or “disparity in positions.” See de la Cuesta, 193 Cal. App. at 1299. Takeya prevailed on its cause of action for declaratory relief, its primary litigation objective. Takeya did not prevail on its remaining claims and recovered zero dollars in damages. PowerPlay prevailed on its breach of contract claim, but recovered zero damages because there was no harm. PowerPlay did not prevail on its remaining claims. PowerPlay recovered no monetary damages, which was its litigation objective. On balance, Takeya secured greater relief on its litigation objectives compared to PowerPlay. Accordingly, under the Agreement, Takeya is entitled to reasonable attorneys’ fees and costs.

2. Reasonableness of Fees and Costs Requested

To determine a reasonable attorneys' fee award, the Court multiplies the number of hours reasonably expended on the litigation by the reasonable hourly rate. PLCM Grp. v. Drexler, 22 Cal. 4th 1084, 1095 (2000), as modified (June 2, 2000). The party seeking attorneys' fees may submit evidence substantiating and documenting the hours worked and hourly rates charged. Ketchum, 24 Cal. 4th at 1132. Factors to be considered in adjusting the lodestar include “the nature and difficulty of the litigation, the amount of money involved, the skill required and employed to handle the case, the attention given, the success or failure, and other circumstances in the case.” EnPalm, 162 Cal. App. 4th at 774 (citation omitted) (emphasis in original). For example, the Court may reduce an attorneys' fee award where the documentation is lacking or where the hours billed were excessive, redundant, otherwise unnecessary, or not reasonably expended. Id. at 775 n.5.

Takeya seeks \$793,816.10 in attorneys’ fees and \$145,114.87 in costs. (Takeya Mot. at 8.) PowerPlay does not dispute the reasonableness of Takeya’s attorneys’ fees and costs.

a. **Rates Charged**

Based on the evidence presented and the Court's knowledge of the market

rates for attorneys of similar skill and experience practicing commercial and business litigation in the Los Angeles and Orange County markets, the rates charged were reasonable. The effective rates charged ranged from \$400.50 an hour to \$607.50 an hour. (See Takeya Mot., Declaration of Stephen Ram (“Ram Decl.”), ¶ 20.) Additionally, the rates were discounted. Stephen L. Ram’s rate was \$800 in 2021 and \$850 in 2022, and was discounted to \$675. (Id. ¶ 21.) The rates for all the attorneys were discounted by ten percent. (Id.) The attorneys on the matter included: Stephen L. Ram (shareholder with 17 years experience), Lisa M. Northrup (ninth-year associate), Amhad S. Takouche (fourth-year associate), Tucker Atkins (first-year associate), and Katherine Hammersly (counsel focusing on e-discovery and litigation support). (Id. ¶¶ 15–19.) The attorneys have substantial experience in complex commercial and business litigation. Furthermore, a review of similar cases indicates the rates charged were reasonable. See, e.g., Martaugh v. Star Sci. Ltd., 2018 WL 6137138, at *4 (C.D. Cal. July 2, 2018); Schonbrun v. SNAP, Inc., 2022 WL 2903127, at *4 (C.D. Cal. May 17, 2022). Accordingly, the rates charged are reasonable.

b. Hours Worked

Takeya seeks a fee recovery for hours worked based on two phases of the litigation: 1) the start of the matter to the summary judgment order (“First Phase”), and 2) after the summary judgment order through the end of trial (“Second Phase”). (Ram Decl. ¶ 24.) Takeya does not seek fee recovery for hours worked related to the present motions. In the First Phase, Takeya seeks a fee recovery of \$567,029.34 out of \$945,657.25 in total fees. (Id. ¶ 25.) In the Second Phase, Takeya seeks a fee recovery of \$226,786.70 out of \$473,977.80 in total fees. (Id. ¶ 36.) In both phases, Takeya deducted billing entries for unsuccessful claims or matters. (Id. ¶¶ 25, 36.)

The Court finds the hours of work for which Takeya seeks a fee recovery were reasonable based on the billing statements showing when and how fees were incurred. Particularly, the Court finds the amount of hours reasonable in light of the detailed time records submitted by Takeya. (See id. Exs. 18–28.) Furthermore, the Court does not find that a reduction in the number of hours billed is warranted due to any “padding” in the form of excessive, redundant, or unnecessary hours billed. EnPalm, 162 Cal. App. 4th at 775 n.5. Upon review of the time entries submitted, the Court finds that all were necessary and related to

Takeya's pursuit of the instant litigation. Moreover, the hours were narrowed because the fee amount sought in the motion reflects only successful matters. Therefore, a total award for attorneys' fees amounting to \$793,816.10 is justified.

c. Lodestar Adjustment

Neither party seeks a lodestar modification. Accordingly, the Court awards Takeya attorneys' fees in the amount of \$793,816.10.

d. Costs

Takeya seeks \$145,114.87 in non-taxable costs. (Ram Decl. ¶ 41.) The First Phase incurred \$105,449.62 in costs and the Second Phase incurred \$39,665.25 in costs. (*Id.*) The costs include: deposition fees, trial exhibits, experts, mediation, transcripts, electronic discovery, FedEx shipping, use of Lexis Nexis, and transportation and lodging. (*Id.* ¶¶ 42–52.) The costs sought by Takeya are traditional litigation expenses and costs, and do not appear to be excessive. Accordingly the Court awards \$145,114.87 in costs.

3. Application to the Clerk to Tax Costs

Both parties also submitted an application to the clerk to tax costs pursuant to Local Rule 54-2 and Federal Rule of Civil Procedure 54(d). Both parties opposed the other parties' application. Takeya's Application to the Clerk to Tax Costs shall be reviewed by the Clerk in accordance with Local Rule 54-2 and pursuant to the Courts' determination of Takeya as the prevailing party.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the motion for renewed judgment as a matter of law, **GRANTS** Takeya's motion for attorneys' fees, and **DENIES** PowerPlay's motion for attorneys' fees.

IT IS SO ORDERED.

The Court vacated the December 5, 2022, hearing. Any party may file a request for hearing of no more than five pages no later than 5:00 p.m. on Tuesday,

December 13, 2022, stating why oral argument is necessary. If no request is submitted, the matter will be deemed submitted on the papers and the tentative will become the order of the Court. If the request is granted, the Court will advise the parties when and how the hearing will be conducted.