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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

FRESNO ROCK TACO, LLC, et al.,

CASE NO. 1:11-cv-00845-SKO

Plaintiffs,

v.

**ORDER ON PLAINTIFFS' "MOTION FOR RECONSIDERATION"**

NATIONAL SURETY CORPORATION,

(Doc. 209)

Defendant.

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**I. INTRODUCTION**

Currently before the Court is Plaintiffs' "Motion for Reconsideration" that seeks relief from the Court's exclusion of Plaintiffs' trial exhibits as a sanction for failure to comply with the Court's pretrial order deadlines. The Court construes this motion as one seeking a modification to the pretrial order to prevent "manifest injustice." For the reasons set forth below, Plaintiffs' motion is DENIED.

**II. PROCEDURAL HISTORY**

Pursuant to the U.S. District Court for the Eastern District of California's Local Rule 281 ("Local Rule"), the parties submitted a joint pretrial statement on September 4, 2012, to presiding

1 District Court Judge Lawrence J. O'Neill. (Doc. 116.) On September 11, 2012, Judge O'Neill issued  
2 a pretrial order. As it pertained to exhibit lists, the pretrial order expressly provided the following:

3 No later than **October 10, 2012**, the parties shall exchange their proposed exhibits  
4 to the extent they have not done so already. The parties' counsel shall meet and  
5 conduct an exhibit conference no later than **October 15, 2012**, to pre-mark and  
6 examine trial exhibits and to prepare exhibit lists to the extent that they have not done  
7 so already. No later than **October 19, 2012**, the parties shall file and serve their final  
8 lists of respective pre-marked exhibits. Only those exhibits that are listed in this  
9 pretrial order may appear on the final exhibit list. **Further, no exhibit, other than  
those listed in the final exhibit list, may be admitted at trial unless the parties  
stipulate or upon a showing that this order should be modified to prevent  
"manifest injustice."** Fed. R. Civ. P. 16(e). No later than **October 26, 2012**, the  
parties shall submit to the clerk's office all pre-marked trial exhibits, including all  
originals and one copy. Joint exhibits, if any, shall be admitted into evidence for all  
purposes.

10 (Doc. 127, 26:18-27:2 (emphasis in original).)

11 Similarly, with respect to witness lists, the pretrial order provided as follows:

12 No later than **October 19, 2012**, each party shall file and serve a final witness list,  
13 including the name of each witness along with the business or home address of each  
14 witness, to the extent known, and omitting witnesses listed in the joint pretrial  
15 statement which the parties no longer intend to call. Only witnesses who are listed  
16 in this pretrial order may appear on the final witness list. **Further, no witness, other  
than those listed in the final witness list, may be called at trial unless the parties  
stipulate or upon a showing that this order should be modified to prevent  
"manifest injustice."** Fed. R. Civ. P. 16(e).

17 (Doc. 127, 23:25-24:3.)

18 The parties filed final exhibit and witness lists on October 19, 2012.<sup>1</sup> (Docs. 157, 159, 165,  
19 166, 169, 170, 171.) On October 22, 2012, Judge O'Neill issued an order regarding defense counsel's  
20 potential trial unavailability and required that a joint verdict form be submitted. (Doc. 173.) On  
21 October 23, 2012, defense counsel, Mr. Hager, filed a declaration stating that he was unavailable for  
22 trial on October 30, 2012. (Doc. 174.) Therefore, on October 23, 2012, the Court issued an order  
23 resetting the trial to April 23, 2013. As all prior deadlines in the pretrial order had passed, and  
24 ostensibly the parties had complied with the pretrial order to exchange exhibits no later than October  
25 10, 2012, and conduct an exhibit conference no later than October 15, 2012, the Court issued an

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27 <sup>1</sup> At no time prior to Judge O'Neill resetting the trial on October 23, 2012, did the parties indicate to the Court  
28 that the exhibits had not been exchanged or that the exhibit conference had not occurred. Further, there was no reason  
to suspect that the parties had not complied with the pretrial order in this regard because they did in fact file final exhibit  
lists.

1 order resetting the **only** remaining deadline in the case to April 18, 2013: submission to the Court  
2 of the documents for use during trial. (Doc. 177.)

3 On February 6, 2013, Judge O'Neill issued an order vacating the April 23, 2013, trial date  
4 as his official duties precluded him from conducting the trial on that date. (Doc. 178.) Judge O'Neill  
5 ordered that the parties contact the U.S. Magistrate Judge to set a conference to reset the trial date.  
6 The Court further instructed the parties to reconsider whether to consent to a Magistrate Judge to  
7 conduct all further proceedings. (Doc. 178.) A conference was held before the undersigned  
8 Magistrate Judge, and an order setting trial for May 7, 2013, was issued. (Doc. 183.) In its order,  
9 the Court also reset the deadline to lodge trial submissions with the Court:

10 The court notes that a pre-trial conference in this matter was previously held before  
11 District Judge Lawrence J. O'Neill, and a pretrial order was issued on September 11,  
12 2012. (Doc. 127.) Judge O'Neill has resolved and decided all outstanding issues and  
13 has ruled on the parties' motions in limine. The **only** filings or trial submissions to  
14 be submitted by the parties are the remaining trial documents, which are *limited to*  
15 *exhibits, discovery documents, and deposition transcripts.* (See Doc. 177.) These  
16 documents shall be submitted to the Court by **no later than Monday, April 29,**  
17 **2013.**

18 (Doc. 183, 1:25-2:3.)

19 On March 6, 2013, Defendant consented to the jurisdiction of the U.S. Magistrate Judge, and  
20 the case was reassigned for all purposes to the undersigned.<sup>2</sup> (Doc. 184, 186.) On April 12, 2013,  
21 the Court issued an order setting a training session for use of the courtroom technology during trial.  
22 (Doc. 195.) This order reiterated the deadline to lodge trial submissions with the Court: "Finally,  
23 as previously ordered on March 1, 2013, all trial submissions, which are limited to exhibits,  
24 discovery documents, and deposition transcripts, are to be submitted to the Court by **no later than**  
25 **Monday, April 29, 2013.**" (See Doc. 188.)

26 On April 29, 2013, Defendant submitted its trial exhibits and the parties' joint trial exhibits.  
27 On April 30, 2013, Defendant submitted deposition transcripts. Also on April 30, 2013, Plaintiffs  
28 filed an amended exhibit list. (Doc. 196.) Plaintiffs, however, failed to submit any trial exhibits to  
the Court on the April 29, 2013, deadline. Because there were untimely trial submissions, on May

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<sup>2</sup> Plaintiffs consented to the jurisdiction of the Magistrate Judge on September 7, 2012. (Doc. 120.)

1 2, 2013, the Court issued a minute order informing the parties that to the extent they had violated the  
2 pretrial order by untimely submission of trial documents, those documents were excluded:

3 Pursuant to the Court's March 1, 2013, order resetting the trial (Doc. 183) and as  
4 reiterated in the Court's April 12, 2013, order, all trial submissions, which were  
5 limited to exhibits, discovery documents, and deposition transcripts, were to be  
6 submitted to the Court no later than Monday, April 29, 2013. As of the April 29,  
7 2013, deadline, Defendant's trial exhibits, the parties' joint trial exhibits, and  
8 Plaintiff[s]' deposition transcripts were timely received. Defendant's submission of  
9 deposition transcripts on April 30, 2013, was untimely and those documents shall be  
EXCLUDED. Additionally, although Plaintiffs have filed an amended exhibit list  
(Doc. 196), Plaintiffs have not submitted any trial exhibits to the Court other than  
deposition transcripts. The parties are informed that any trial submissions received  
by the Court following the April 29, 2013, deadline are hereby deemed UNTIMELY  
and shall be EXCLUDED from trial. *See* Fed. Civ. P. 16(f)(1)(C); *Galdamez v.*  
*Potter*, 415 F.3d 1015, 1020 (9th Cir. 2005); *see also* Local Rule 283(c).

10 (Doc. 197.) Neither party moved for relief nor for an order modifying the pretrial order with respect  
11 to the submission of trial documents.<sup>3</sup>

12 On the last day of Plaintiffs' case-in-chief, the Court inquired out of the presence of the jury  
13 whether the issue of *Brandt* attorney's fees would be presented to the Court by stipulation or whether  
14 it would be presented to the jury. Belatedly realizing that their exhibits relevant to *Brandt* fees were  
15 excluded, on May 15, 2013, Plaintiffs were permitted to file a motion for relief from the Court's  
16 order excluding their exhibits, seeking to admit Plaintiffs' counsel's billing invoice.<sup>4</sup> The Court  
17 permitted Plaintiffs until 6:00 a.m. on May 16, 2013, to file the motion. The motion seeking  
18 admission of Exhibits P-218 (counsel's billing invoice) and P-221 (purporting to be Defendant's  
19 financial statement) was not filed until 8:25 a.m. on May 16, 2013. (*See* Doc. 209.) Defendant was  
20 permitted to file an opposition by 6:00 a.m. on May 17, 2013. (Doc. 212.)

21 Defendant argues that while these documents were listed on Plaintiffs' final exhibit list,  
22 neither the billing invoice nor the financial statement was listed in the Court's September 11, 2012,  
23 pretrial order and, pursuant to the pretrial order, cannot be part of the final exhibit list or admitted  
24 at trial absent a stipulation or a showing of manifest injustice. Defendant further maintains that  
25 there are no witnesses who can authenticate the documents, and asserts that it would be unfairly  
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27 <sup>3</sup> Despite their exclusion, Plaintiffs provided the Court with their exhibits on May 6, 2013, the day before trial.  
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<sup>4</sup> On May 15, 2013, Plaintiffs' case-in-chief was concluded.

1 prejudiced if Plaintiffs were permitted to introduce the documents at trial because it would be  
2 deprived of a fair opportunity to challenge the exhibits with its own evidence.

### 3 III. DISCUSSION

4 Plaintiffs' motion essentially seeks to modify the September 11, 2012, pretrial order and  
5 allow them to present two exhibits that were not included in the parties' joint pretrial statement or  
6 in the Court's September 11, 2012, pretrial order. Before reaching the question whether the Court  
7 should modify its May 2, 2013, sanction excluding Plaintiffs' exhibits for failure to comply with the  
8 submission deadline in the pretrial order, the Court considers whether the pretrial order may be  
9 modified to include documents not identified by Plaintiffs at the time of the pretrial conference, and  
10 thus not included in the September 11, 2012, pretrial order.

11 The pretrial order was unambiguous: *only exhibits listed in the pretrial order were to be*  
12 *included in the final exhibit lists, and only those exhibits listed on the final exhibit lists would be*  
13 *admitted at trial.* (Doc. 127.) As such, Plaintiffs must establish that manifest injustice will result  
14 if the pretrial order is not amended to include these exhibits. In evaluating whether manifest  
15 injustice will result, a district court should consider four factors: (1) the degree of prejudice or  
16 surprise to the defendants if the order is modified; (2) the ability of the defendants to cure the  
17 prejudice; (3) any impact of modification on the orderly and efficient conduct of the trial; and (4) any  
18 willfulness or bad faith by the party seeking modification. *Galdamez v. Potter*, 415 F.3d 1015, 1017  
19 (9th Cir. 2005.)

20 Plaintiffs argue that Defendant will suffer no prejudice from their failure to identify the  
21 documents as potential exhibits in the joint pretrial statement or the pretrial order. According to  
22 Plaintiffs, Defendant had fair notice of their intent to use P-218 and P-221 because these documents  
23 were listed in the final exhibit list, and were provided to Defendant in October 2012 when the parties  
24 were required to exchange exhibits. Defendant maintains that it did not receive the exhibits and that,  
25 even to the extent Plaintiffs are not precluded from use of the exhibits due to violation of the pretrial  
26 orders, there are no witnesses on Plaintiffs' witness list who could lay a proper foundation and  
27 authenticate the documents; as such, the exhibits are not admissible. Moreover, even if the  
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1 documents were admissible, Defendant would be deprived of a fair opportunity to challenge the  
2 exhibits with its own evidence due to the untimeliness of Plaintiffs' request for relief.

3 **1. Amendment of the Pretrial Order to Include Plaintiffs' Exhibit P-218**

4 Plaintiffs' Exhibit P-218 is an "invoice" for "Brandt fees" and contains time entries for work  
5 Plaintiffs' counsel performed from August 16, 2010, to May 25, 2012. Plaintiffs wish to offer this  
6 document as evidence of their damages for Defendant's alleged breach of the covenant of good faith  
7 and fair dealing (bad faith). Pursuant to *Brandt v. Superior Court*, 37 Cal. 3d 813, 817 (1985),  
8 attorney's fees are considered an economic loss – damages – proximately caused by an insurer's bad  
9 faith in wrongful denial of insurance policy benefits.<sup>5</sup> "Since the attorney's fees are recoverable as  
10 damages, the determination of the recoverable fees must be made by the trier of fact unless the  
11 parties stipulated otherwise." *Brandt*, 37 Cal. 3d at 819. Here, there is no stipulation by the parties  
12 to have the issue presented to the Court sitting as trier of fact, thus evidence of these damages are  
13 to be submitted to the jury. To determine whether the pretrial order should be amended, the Court  
14 considers the *Galdamez* factors in turn below.

15 **a. Degree of Prejudice or Surprise to Defendant if the Pretrial Order is Not**  
16 **Modified**

17 With regard to prejudice or surprise to Defendant, Plaintiffs have known that their exhibits  
18 were excluded as untimely submitted since May 2, 2013, prior to the start of trial. Moreover,  
19 Plaintiffs have also been aware since September 2012 that counsel's billing invoice was not disclosed  
20 in the joint pretrial statement (Doc. 116) or included as an exhibit in the pretrial order (Doc. 127.)  
21 Yet, Plaintiffs did not raise the issue of admission of Plaintiffs' Exhibit P-218 until after the Court  
22 questioned the proposed jury instruction which referred to *Brandt* fees, and the issue was not briefed  
23 to the Court until May 16, 2013, after Plaintiffs had rested their case.

24 Plaintiffs' counsel stated on the record that he did not identify the billing invoice at the time  
25 of the pretrial conference because it would not have been a complete document reflecting all his  
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27 <sup>5</sup> Recoverable attorney's fees under *Brandt* are limited to those fees incurred to obtain the policy benefits  
28 wrongfully denied. Attorney's fees expended to obtain damages exceeding the policy limit or to recover other types of  
damages are not recoverable as *Brandt* fees. *Brandt*, 37 Cal. 3d at 819.

1 work through trial. This is a non-sequitur; the completeness of the billing invoice has no bearing on  
2 why it was not identified as an exhibit. And, inexplicably, Exhibit P-218 that Plaintiffs now proffer  
3 only provides billing entries through May 2012. This excuse for failing to identify the document at  
4 the time of the pretrial conference in September 2012 rings hollow.

5 While the Court permitted Plaintiffs to file a motion for relief from the Court's order  
6 excluding untimely submissions, the degree of prejudice or surprise of modifying the pretrial order  
7 at this stage of the trial is substantial. Plaintiffs' case-in-chief has concluded, and Defendant is  
8 scheduled to close its case only hours after the issuance of this order; thus, Exhibit P-218 would  
9 necessarily be presented to the jury after the close of Defendant's case, i.e., in Plaintiffs' rebuttal case.  
10 Defendant asserts that the timing of the presentation of the evidence is disadvantageous to Defendant  
11 because it would be offered to the jury out of sequence. As *Brandt* attorneys fees are considered  
12 damages, they constitute an element of Plaintiffs' prima facie case and should have been offered  
13 during Plaintiffs' case-in-chief.

14 Federal Rule of Evidence 611(a) provides the Court discretion to "exercise reasonable control  
15 over the mode and order of examining witnesses and presenting evidence so as to: (1) make those  
16 procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from  
17 harassment or undue embarrassment." As such, the Court may allow a plaintiff to present evidence  
18 in a rebuttal case that *could* have been presented during the case-in-chief. See *U.S. v. Chrzanowski*,  
19 502 F.2d 573, 576 (3d Cir. 1974) ("Even though the testimony could or should have been offered  
20 as part of the government's case in chief, the trial court's decision to allow it as rebuttal is not  
21 reviewable in the absence of gross abuse of discretion." [citations omitted]). The necessity of  
22 presenting this evidence during Plaintiffs' rebuttal case appears predicated solely on the belated  
23 realization that the evidence was necessary to Plaintiffs' request for damages. It is also worth noting  
24 that, although Plaintiffs' managing members testified during the case-in-chief, no testimony was  
25 solicited as to the fee agreement with counsel or the amount of fees paid to counsel.

26 While Plaintiffs maintain that Defendant has known that *Brandt* fees were at issue since the  
27 complaint was filed, Plaintiffs have known this as well and yet somehow failed to identify the billing  
28 invoice as an exhibit at the pretrial conference, failed to amend the pretrial order, and *even after their*

1 *exhibits were excluded prior to trial, failed to seek any relief to present this evidence.* The Court  
2 agrees that the timing of the presentation of the evidence would be disadvantageous to Defendant,  
3 and the need to present the evidence during rebuttal is solely due to Plaintiffs' lack of diligence.

4 More importantly, the manner of presentation of the evidence will be prejudicial to  
5 Defendant. Counsel's billing invoice must be authenticated, as it constitutes hearsay under Federal  
6 Rule of Evidence 803. Even to the extent that Plaintiffs themselves could authenticate the invoice,  
7 they cannot provide the testimony necessary to establish an applicable hearsay exception. As counsel  
8 himself was not designated as a witness, he cannot testify. Moreover, even if the Court were to  
9 allow further amendment of the pretrial order to allow counsel to testify – an amendment that  
10 Plaintiffs themselves have not requested – and counsel were permitted to provide testimony about  
11 his billing invoice, Defendant has not had an adequate opportunity to prepare to cross-examine  
12 counsel. Due to the progression of the trial, Defendant's counsel would have mere hours to prepare  
13 its cross-examination. Additionally, as Defendant notes, the billing invoice in Exhibit P-218 is  
14 incomplete.<sup>6</sup> Plaintiffs' counsel has only presented a billing invoice for what he considered work  
15 recoverable under *Brandt* and has not provided complete billing statements of all the work  
16 performed in relation to the case. To properly cross-examine Plaintiffs' counsel, Defendant's counsel  
17 would need to review complete billing records. Defendant is subject to a high degree of prejudice  
18 should the pretrial order be amended at this juncture to include not only a new exhibit, but also a  
19 previously unidentified witness to testify with regard to that document and whom Defendant has  
20 insufficient time to prepare for cross examination. Accordingly, amendment of pretrial order would  
21 be highly prejudicial to Defendant.

22 **b. Ability of Defendant to Cure the Prejudice**

23 As to the second *Galdamez* factor, Defendant will not have an adequate opportunity to cure  
24 the prejudice without severely disrupting the course of the trial. To sufficiently overcome the  
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26 <sup>6</sup> The incompleteness of the billing records implicates additional admissibility concerns about the document.  
27 Without complete billing records, it is impossible to determine how apportionment between work performed to obtain  
28 policy benefits and work performed on elements non-compensable under *Brandt* was made. In this way, the probative  
value of the document is outweighed by the potential for prejudice that the jury would award *Brandt* fees without any  
basis to determine whether there was proper apportionment of the fees. Fed. R. Evid. 403.



1 prejudice, Defendant would require additional time to review counsel's complete billing records and  
2 prepare for cross-examination. As there is only one witness left to provide testimony in Defendant's  
3 case, and Plaintiffs have identified no rebuttal witnesses, the trial would be significantly delayed  
4 while these tasks were accomplished. Given that Plaintiffs could have attempted to modify the  
5 pretrial order at any time after it was issued in September 2012 or even upon issuance of the Court's  
6 May 2, 2013, order excluding untimely trial submissions, seeking amendment at this juncture is  
7 highly prejudicial to Defendant and leaves Defendant with no adequate way to remedy the prejudice.  
8 This factor does not weigh in favor of amendment of the pretrial order.

9 **c. Impact of Modification on the Orderly and Efficient Course of Trial**

10 With regard to the third *Galdamez* factor, as noted above, allowing amendment of the pretrial  
11 order to permit the use of Exhibit P-218 would impact the orderly and efficient course of the trial.  
12 Plaintiffs' case-in-chief has closed, and the evidence and testimony would be offered during  
13 Plaintiffs' rebuttal case, which unfairly precludes Defendant from mounting a defense against it other  
14 than by way of cross examination.<sup>7</sup> Additionally, the only way to adequately cure the prejudice to  
15 Defendant is to allow Defendant time to review the complete billing records and prepare for cross-  
16 examination of counsel who was not listed as a witness in this case. The time necessary for these  
17 curative measures would place an undue burden on the efficient course of the trial. This factor also  
18 weighs against amendment of the pretrial order.

19 Finally, the Court has no evidence that Plaintiffs' attempt to amend is willful, in bad faith,  
20 or a purposeful attempt to sandbag Defendant. Thus, this factor does not weigh against amendment  
21 of the pretrial order.

22 In sum, pretrial orders are meant to improve the quality of trial through more thorough  
23 preparation, and are designed to level the playing field to prevent unfair surprise and prejudice. Fed.  
24 R. Civ. P. 16(a). Plaintiffs' failure to abide by the pretrial order is problematic, but the timing of  
25 Plaintiffs' request to amend is particularly troublesome to a fair presentation of the evidence at trial  
26 and the administration of justice. In balancing the relevant factors, the Court finds that Plaintiffs

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28 <sup>7</sup> Although hypothetically Defendant could be permitted to make a sur-rebuttal case, as Defendant has noted,  
it has no witness identified or prepared to rebut Plaintiffs' counsel's testimony or the billing invoice.

1 have not carried their burden to establish manifest injustice will occur if the Court does not permit  
2 amendment to the pretrial order to add exhibit P-218.

3 **2. Amending the Pretrial Order to Include Plaintiffs' Exhibit P-221**

4 Plaintiffs also seek to amend the pretrial order to include Exhibit P-221. Plaintiffs' Exhibit  
5 P-221 purports to be Defendant's financial statement. Like counsel's billing invoice, this document  
6 was not identified to the Court or Defendant as a potential trial exhibit in the joint pretrial statement  
7 or in the Court's pretrial order. The Court expressly limited the parties from attempting to admit  
8 evidence that was not listed in the Court's pretrial order. Plaintiffs maintain that the document was  
9 nonetheless included in their final exhibit list and provided to Defendants at the time the parties were  
10 required to exchange exhibits in October 2012.

11 As with Exhibit P-218, modifying the pretrial order to allow Plaintiffs to attempt to admit  
12 this document would be prejudicial to Defendant. Defendant claims it relied on Plaintiffs' exhibits  
13 listed in their joint pretrial statement and in the pretrial order, and did not prepare a defense as to  
14 Exhibit P-221. Defendant also maintains that it is too late now to mount an adequate defense due  
15 to Plaintiffs' extremely late request to amend the pretrial order. The Court agrees.

16 With only one witness remaining in Defendant's case and no rebuttal witnesses identified by  
17 Plaintiffs, the evidence would have to be presented immediately by Plaintiffs to avoid further delay  
18 of the trial. There is simply no way to cure the prejudice without severely disrupting the course of  
19 the trial. Moreover, Plaintiffs have not identified a witness who could testify as to P-221, and thus  
20 there is no way for Defendant to prepare for cross-examination. Allowing Plaintiffs to further amend  
21 the pretrial order to identify a witness to authenticate the document would provide Defendant no time  
22 to prepare for cross examination.

1 Finally, P-221 suffers insurmountable admissibility issues.<sup>8</sup> The document contains hearsay,  
2 and without an applicable exception, it cannot be offered as evidence. Fed. R. Evid. 803. Moreover,  
3 the document itself lacks legal relevance pursuant to Federal Rule of Evidence 401. As Defendant  
4 notes, Exhibit P-221 purports to be a financial statement for Fireman's Fund, ostensibly Defendant's  
5 parent company, and Fireman's Fund's group of subsidiaries.

6 There has been no evidence that Defendant and Fireman's Fund are alter egos or that  
7 Fireman's Fund's financial statement is evidence of Defendant's wealth. *Tomaselli v. Transamerica*  
8 *Ins., Co.*, 25 Cal. App. 4th 1269, 1283-86 (1994) (consolidated financial statement for the parent  
9 company and its many subsidiaries not evidence as to the financial condition of one of the  
10 subsidiaries). The document also purports to be a financial statement from 2010 to 2011, and  
11 therefore has little relevance as to any *current* financial status. Finally, even to the extent the  
12 document was marginally relevant for some purpose – which it is not – under the Rule 403 balancing  
13 test, any probative value attributable to the financial statement is significantly outweighed by the  
14 danger of unfair prejudice in that it could entice a jury to award punitive damages based on the  
15 wealth of Fireman's Fund's group of companies and not that of Defendant. Fed. R. Evid. 403.

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19 <sup>8</sup> Perhaps anticipating these admissibility issues, on May 17, 2013, Plaintiffs filed a request for judicial notice  
20 pursuant to Federal Rule of Evidence 201 of a "Report of Examination of the Fireman's Fund Insurance Company as of  
21 December 31, 2010." (Doc. 214.) Plaintiffs assert the document is a twenty-nine page report including financial  
22 statements reprinted from the public website of the California Department of Insurance. However, a "court may not take  
23 judicial notice of a fact that is 'subject to reasonable dispute.'" *Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001)  
24 (quoting Fed. R. Evid. 201(b)). "When a court takes judicial notice of a document in the public record for which the  
25 underlying facts may reasonably be subject to dispute – such as a judicial opinion or an administrative report – it may  
26 do so not for the truth of the facts contained in the document but only for the existence of the document, which is not  
27 subject to reasonable dispute over its authenticity." *Fund Raising, Inc. v. Alaskans for Clean Water, Inc.*, No. CV 09-  
28 4106-AHM (VBKx), 2009 WL 3672518, at \*4 n.4 (C.D. Cal. Oct. 29, 2009). Judicial notice of adjudicative facts must  
be approached with caution because it dispenses "with traditional methods of proof" and removes the fact noticed from  
the province of the jury. See Fed. R. Evid. 201, *advisory committee notes to subdivision (b)*. Judicial notice is  
appropriate only when the matter is established "beyond reasonable controversy." *Id.* Even assuming that the document  
were admissible pursuant to a hearsay exception, the facts contained within the document are not beyond dispute.  
Moreover, the document itself is not relevant to Defendant as it relates to Fireman's Fund, which is ostensibly Defendant's  
parent company. Also, the document is not *current*, but is from December 2010. Finally, even to the extent it has some  
marginal relevance, it would be precluded under Federal Rule of Evidence 403 because on balance the document's  
probative value is significantly outweighed by the risk of unfair prejudice in allowing the jury to award punitive damages  
based on a parent company's financial statement, rather than that of Defendant.

