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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

CLEAR CONNECTION CORPORATION, a California corporation, CLEAR CONNECTION, LLC, an Arizona limited liability company, and KURK MOODY, an individual,

Plaintiff/Counter-Defendant.

v.

COMCAST CABLE COMMUNICATIONS MANAGEMENT, LLC, a Delaware limited liability company,

Defendant/Counterclaimant.

No. 2:12-cv-02910-TLN-DB

**ORDER**

This matter is before the Court pursuant to Counter-Claimant Comcast Cable Communications Management, LLC’s (“Comcast”) Motion for Summary Judgment. (ECF No. 103.) Counter-Defendants Clear Connection Corporation (“Clear”), Clear Connection, LLC (“Clear LLC”), and Kurk Moody (“Moody”) filed an opposition (ECF No. 117), and Comcast filed a reply (ECF No. 143). For the reasons set forth below, the Court DENIES Comcast’s motion.

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1           **I.       FACTUAL AND PROCEDURAL BACKGROUND**

2           On January 1, 2009, Comcast and Clear entered into a Preferred Vendor Agreement  
3 (“PVA”). (ECF No. 117-1 at ¶ 1.) The 2009 PVA was effective from January 1, 2009, to  
4 December 31, 2009. (Id. at ¶ 7.) Thereafter, on November 20, 2009, Comcast and Clear entered  
5 into a First Amendment to the 2009 PVA that modified the 2009 PVA to continue beyond  
6 December 31 on a month-to-month basis. (Id. at ¶ 9.) The 2009 PVA continued in effect until  
7 April 30, 2010, and Comcast and Clear entered into the 2010 PVA on May 1, 2010. (Id. at ¶¶ 8–  
8 9.) On January 31, 2011, the 2010 PVA was terminated. (Id. at ¶ 16.)

9           The 2009 and 2010 PVAs both contained an identical indemnification provision. (Id. at ¶  
10 3.) Paragraph 17 of the PVAs stated:

11           [Clear] shall indemnify and hold harmless, and at [Comcast’s] election, defend  
12 [Comcast] . . . from and against . . . all claims, . . . losses, . . . lawsuits, . . . and  
13 costs (including but not limited to attorneys’ fees and court costs) arising out of or  
in connection with . . . [a]ny claims by third parties for acts or omissions committed  
by [Clear] or its Sub-Contractor as an alleged agent of [Comcast] . . . .

14 (Id. at ¶¶ 3, 11; ECF No. 106-1 at 23.) The PVAs stated the indemnification provisions  
15 would survive for a period of five years after the termination of the respective PVA. (ECF  
16 No 117-1 at ¶¶ 4, 13.)

17           On March 26, 2010, former Clear employees filed a putative class action against Clear and  
18 Comcast in San Francisco County Superior Court, entitled Delgado, et al. v. Clear Connection  
19 Corp., et al., No. CGC-10-498150 (“the Delgado action”). (Id. at ¶ 17.) In the action, the  
20 plaintiffs alleged state and federal wage and hour law violations. (Id. at ¶ 18.) The Delgado  
21 plaintiffs also claimed Comcast was their joint employer and thus jointly liable for Clear’s alleged  
22 wage and hour violations.<sup>1</sup> (Id. at ¶ 19.)

23           On April 1, 2010, Andrew Topping, who was Comcast’s Vice President, Deputy General  
24 Counsel, and Co-Chief Compliance Officer, sent a letter to Moody requesting Clear confirm it

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25  
26 <sup>1</sup> After filing the Delgado action, the parties stipulated to transfer venue to Sacramento  
27 County Superior Court. (ECF No. 104 at 9.) As a result, Delgado re-filed his complaint against  
28 Clear and Comcast in Sacramento Superior Court, entitled Delgado v. Clear Connection Corp., et  
al., Case No. 34-2010-00079614. (ECF No. 117-1 ¶ 22.) The re-filed Delgado action contained  
the same allegations of wage and hour violations and joint employer liability. (Id. at ¶ 23.)

1 would indemnify Comcast for any liability associated with the Delgado action and for Comcast's  
2 legal expenses in defending the action. (Id. at ¶ 20.) On May 3, 2010, Clear's counsel responded  
3 and offered only to defend Comcast through Clear's own counsel. (Id. at ¶ 21.) However,  
4 Comcast rejected Clear's offer and defended itself through its own counsel. (See id. at ¶ 35.)

5 In November 2011, Clear settled with the Delgado plaintiffs resulting in the dismissal of  
6 the claims against Clear. (Id. at ¶ 27.) On January 6, 2012, the state court granted the Delgado  
7 plaintiffs' request to dismiss all claims against Clear without prejudice. (Id. at ¶ 28.) In support  
8 of the dismissal, Moody submitted a declaration stating Clear did not have the financial resources  
9 to either participate in the monetary settlement or to continue to defend itself in the action. (Id. at  
10 ¶ 29.) On October 18, 2013, January 9, 2014, and January 16, 2014, the named Delgado plaintiffs  
11 signed settlement agreements with Comcast. (Id. at ¶ 32.) On April 18, 2014, the state court  
12 dismissed the Delgado action in its entirety. (Id. at ¶ 34.)

13 Clear filed a complaint against Comcast in the Sacramento County Superior Court on  
14 August 6, 2012, bringing various claims related to Comcast's contractor realignment plan and  
15 subsequent termination of Clear. (ECF No. 1-1.) On November 30, 2012, Comcast removed the  
16 action to this Court on the basis of diversity jurisdiction. (ECF No. 1 at ¶¶ 6–11.) On January 18,  
17 2013, Comcast filed an answer to Clear's complaint and alleged counterclaims against Clear,  
18 Clear LLC, Moody, and Eugene Stanley.<sup>2</sup> (ECF No. 9.) On December 24, 2013, Clear filed its  
19 First Amended Complaint ("FAC") against Comcast. (ECF No. 42.) On March 7, 2014, Comcast  
20 filed an answer to Clear's FAC and re-alleged its counterclaims. (ECF No. 50.)

21 On January 12, 2017, Comcast moved for summary judgment on its counterclaims: (1)  
22 breach of written contract; (2) indemnification; and (3) declaratory relief. (ECF No. 103.)  
23 Comcast also moves for summary judgment as to alter ego liability.<sup>3</sup> (Id.)

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24  
25 <sup>2</sup> On June 7, 2013, Comcast agreed to dismiss its counterclaims against Eugene Stanley  
(ECF No. 28), and the Court approved (ECF No. 29).

26  
27 <sup>3</sup> In support of their respective briefings, the parties seek judicial notice of several filings  
28 from the Delgado action, the State Bar profiles from two of Comcast's attorneys in the Delgado  
action, and a related case, *Evans, et al. v. Clear Connection Corp., et al.*, Case No. 34-2010-  
00074902. (ECF Nos. 109, 122.) The Court GRANTS the requests. *Bias v. Moynihan*, 508 F.3d

1           **II.     STANDARD OF LAW**

2           Summary judgment is appropriate when the moving party demonstrates no genuine issue  
3 as to any material fact exists and the moving party is entitled to judgment as a matter of law. Fed.  
4 R. Civ. P. 56(a); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Under summary  
5 judgment practice, the moving party always bears the initial responsibility of informing the  
6 district court of the basis of its motion, and identifying those portions of “the pleadings,  
7 depositions, answers to interrogatories, and admissions on file together with affidavits, if any,”  
8 which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v.*  
9 *Catrett*, 477 U.S. 317, 323 (1986). “[W]here the nonmoving party will bear the burden of proof  
10 at trial on a dispositive issue, a summary judgment motion may properly be made in reliance  
11 solely on the pleadings, depositions, answers to interrogatories, and admissions on file.” *Id.* at  
12 324 (internal quotations omitted). Indeed, summary judgment should be entered against a party  
13 who does not make a showing sufficient to establish the existence of an element essential to that  
14 party’s case, and on which that party will bear the burden of proof at trial.

15           If the moving party meets its initial responsibility, the burden then shifts to the opposing  
16 party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec.*  
17 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–87 (1986); *First Nat’l Bank of Ariz. v. Cities*  
18 *Serv. Co.*, 391 U.S. 253, 288–89 (1968). In attempting to establish the existence of this factual  
19 dispute, the opposing party may not rely upon the denials of its pleadings, but is required to  
20 tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in  
21 support of its contention that the dispute exists. Fed. R. Civ. P. 56(c). The opposing party must  
22 demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the  
23 suit under the governing law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), and that  
24 the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for  
25 the nonmoving party. *Id.* at 251–52.

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1212, 1225 (9th Cir. 2007); Fed. R. Evid. 201.

1           In the endeavor to establish the existence of a factual dispute, the opposing party need not  
2 establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed factual  
3 dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at  
4 trial.” *First Nat’l Bank*, 391 U.S. at 288–89. Thus, the “purpose of summary judgment is to  
5 ‘pierce the pleadings and to assess the proof in order to see whether there is a genuine need for  
6 trial.’” *Matsushita*, 475 U.S. at 587 (quoting Rule 56(e) advisory committee’s note on 1963  
7 amendments).

8           In resolving the summary judgment motion, the court examines the pleadings, depositions,  
9 answers to interrogatories, and admissions on file, together with any applicable affidavits. Fed.  
10 R. Civ. P. 56(c); *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1305–06 (9th Cir. 1982). The evidence  
11 of the opposing party is to be believed, and all reasonable inferences that may be drawn from the  
12 facts pleaded before the court must be drawn in favor of the opposing party. *Anderson*, 477 U.S.  
13 at 255. Nevertheless, inferences are not drawn out of the air, and it is the opposing party’s  
14 obligation to produce a factual predicate from which the inference may be drawn. *Richards v.*  
15 *Nielsen Freight Lines*, 602 F. Supp. 1224, 1244–45 (E.D. Cal. 1985), *aff’d*, 810 F.2d 898 (9th Cir.  
16 1987). Finally, to demonstrate a genuine issue that necessitates a jury trial, the opposing party  
17 “must do more than simply show that there is some metaphysical doubt as to the material facts.”  
18 *Matsushita*, 475 U.S. at 586. “Where the record taken as a whole could not lead a rational trier of  
19 fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” *Id.* at 587.

### 20           **III. ANALYSIS**

#### 21           A. Comcast’s Breach of Contract and Indemnification Claims

22           “[T]he elements of a cause of action for breach of contract are (1) the existence of the  
23 contract, (2) plaintiff’s performance or excuse for nonperformance, (3) defendant’s breach, and  
24 (4) the resulting damages to the plaintiff.” *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811,  
25 821 (2011). To recover under an indemnification agreement, the indemnitee must establish: (1)  
26 the parties’ contractual relationship; (2) the indemnitee’s performance of that portion of the  
27 contract which gives rise to the indemnification claim; (3) the facts showing a loss within the  
28 meaning of the parties’ indemnification agreement; and (4) the amount of damages sustained.

1 Four Star Elec., Inc. v. F & H Constr., 7 Cal. App. 4th 1375, 1380 (1992).

2 Comcast moves for summary judgment as to its breach of contract and indemnification  
3 claims, arguing it has established all elements of those claims as a matter of law. Because the  
4 elements of Comcast’s breach of contract claim and indemnification claim mirror each other, and  
5 because Clear opposes summary judgment as to both claims for identical reasons, the Court  
6 addresses the claims together. See Crawford v. Weather Shield Mfg., Inc., 44 Cal. 4th 541, 552  
7 (2008) (“[A]n [indemnity] agreement is construed under the same rules as govern the  
8 interpretation of other contracts.”); see also Reichert v. Gen. Ins. Co. of Am., 68 Cal. 2d 822, 830  
9 (1968) (addressing indemnity and breach of contract claims together because the gravamen of  
10 each claim involved rights of action arising from the same contract).

11 i. The Existence of a Contract

12 At the outset, Clear does not dispute the existence of a valid contract. The evidence  
13 shows that Comcast and Clear entered into two contracts — the 2009 PVA and the 2010 PVA.  
14 (ECF No. 117-1 ¶¶ 1, 9.) The PVAs provided in relevant part that Clear would indemnify  
15 Comcast for all claims, losses, lawsuits, and costs arising out of or in connection with any claims  
16 by third parties for acts or omissions committed by Clear or Clear’s subcontractor as an alleged  
17 agent of Comcast. (Id. ¶¶ 3, 11.) Neither party has provided any evidence or argument to suggest  
18 the contracts were somehow invalid. Therefore, the Court presumes the existence of enforceable  
19 contractual obligations between the parties for the purposes of ruling on the instant motion.

20 ii. Performance of the Contract

21 Clear argues the evidence does not demonstrate Comcast fully performed its obligation  
22 under the PVAs by paying Clear for all the work Clear performed. Clear emphasizes that Moody  
23 discussed the amount Comcast owed Clear for work performed and stated Comcast paid “[m]aybe  
24 not all of it, but some of it.” (ECF No. 106-2 at 7; see also ECF No 106-5 at 14.) However, as  
25 Comcast correctly notes, Comcast’s lack of full performance does not bar indemnification.  
26 Indeed, Clear provides no legal authority requiring Comcast pay in full in order to enforce Clear’s  
27 indemnification obligations, nor does Clear provide any evidence to suggest Comcast’s partial  
28 performance was insufficient.

1 “An indemnitee seeking to recover on an agreement for indemnification must allege . . .  
2 the indemnitee’s performance of that portion of the contract which gives rise to the  
3 indemnification claim.” *Four Star Elec.*, 7 Cal. App. 4th at 1380. In other words, an  
4 indemnification provision indicating an ongoing indemnity obligation does not require the  
5 indemnitee’s full performance of the contract. *Id.* at 1382 (holding the indemnitee’s full  
6 performance of the contract not necessary to assert indemnification clause when the clause  
7 required indemnity for liabilities which “accrue” during the life of the agreement).

8 Here, the PVAs show an ongoing obligation to indemnify. The relevant provision  
9 provides Clear would indemnify Comcast for claims, losses, lawsuits, and costs “arising out of or  
10 in connection with” any claims by third parties for acts or omissions by Clear or its subcontractor  
11 as an alleged agent of Comcast. (ECF No. 117-1 ¶¶ 3, 11.) This language does not require  
12 Comcast’s complete performance of the contract, nor does it require Comcast wait until the  
13 conclusion of the contract before it may invoke the indemnification provision. Therefore, while  
14 Comcast may not have fully performed under the PVAs, its partial performance is sufficient to  
15 invoke the indemnification provision. See *Four Star Elec.*, 7 Cal. App. 4th at 1382.

16 iii. Breach of the Contract

17 The evidence shows Clear breached the contract by not indemnifying Comcast for  
18 Comcast’s losses and costs arising from the Delgado action. The Delgado action claimed Clear  
19 violated wage and hour laws and alleged Comcast was jointly liable as a joint employer. (ECF  
20 No. 117-1 ¶¶ 18–19, 23.) Thus, the indemnity provisions apply because Comcast’s losses and  
21 costs were incurred in connection with claims in Delgado for acts or omissions by Clear. Further,  
22 the PVAs stated the indemnification provisions would survive the PVAs’ termination for five  
23 years. (*Id.* at ¶¶ 4, 13.) With the termination of the 2010 PVA on January 31, 2011 (*id.* at ¶ 16),  
24 the indemnification obligation continued until January 31, 2016. Comcast incurred attorneys’  
25 fees and costs in the Delgado action from April 2010 until April 2014, and Comcast made the  
26 Delgado settlement payments in April 2014. (*Id.* at ¶¶ 33, 35.) As such, Comcast’s attorneys’  
27 fees, costs, and settlement payments fall within the indemnification time period.

28 Although it is undisputed that Clear has not indemnified Comcast for the losses, Clear

1 contends Comcast is not entitled to indemnification because Comcast rejected Clear’s offer of  
2 defense. (ECF No. 117 at 12.) During the Delgado action, Clear offered to defend Comcast  
3 through Clear’s own counsel, but Comcast declined the offer and defended the lawsuit through its  
4 own counsel. (See ECF No. 117-1 ¶¶ 21, 35.)

5 The PVAs stated Clear “shall indemnify and hold harmless, and at [Comcast’s] election  
6 defend, [Comcast].” (ECF No. 106-1 at 23 (emphasis added).) Thus, the PVAs provided  
7 Comcast two separate rights: the right to indemnification by Clear, and if Comcast elected, the  
8 right to defense by Clear. See Crawford, 44 Cal. 4th at 551 (stating parties may contract, in the  
9 event of third-party claims, for one party to indemnify the other, and may also assign one party  
10 responsibility for the other’s legal defense).

11 Clear relies on Buchalter v. Levin, wherein the court stated, “absent some contractual  
12 privilege so to do or some showing of sufficient justification or need therefor, an indemnitee  
13 ordinarily may not refuse to join in or cooperate with the indemnitor’s proffered defense and still  
14 recover his separate and redundant attorneys’ fees and costs.” 252 Cal. App. 2d 367, 371 (1967).  
15 But Buchalter is distinguishable because, unlike this case, it did not involve a contract that  
16 expressly provided both the right to indemnification and the separate right to defense at the  
17 indemnitee’s election. Id. at 370. The Buchalter court also emphasized that the contract at issue  
18 expressly stated the indemnitees had “no desire to become involved” in potential litigation, which  
19 manifested the indemnities’ intent to accept the indemnitor’s legal representation. Id. at 375.  
20 Here, the contract expressly contemplates Comcast might elect not to be defended and still be  
21 separately entitled to indemnification. Thus, unlike Buchalter, Comcast’s rejection of Clear’s  
22 offer of defense did not impact Comcast’s right to indemnification.

23 Because Comcast still had the right to indemnification even after rejecting Clear’s offer of  
24 defense, Clear breached the contract by not indemnifying Comcast for Comcast’s losses and costs  
25 stemming from the Delgado action.

26 iv. Damages

27 Clear argues even if Comcast is entitled to indemnification, there is a triable issue as to the  
28 amount of damages, specifically attorneys’ fees incurred in the Delgado action.



1            “[A] promise of indemnity against claims, demands, or liability ‘embraces the costs of  
2 defense against such claims, demands, or liability’ insofar as such costs are incurred reasonably  
3 and in good faith.” Crawford, 44 Cal. 4th at 553 (quoting Cal. Civ. Code § 2778(3)). In the  
4 Ninth Circuit, “[d]istrict courts must calculate awards for attorneys’ fees using the ‘lodestar  
5 method.’” Camacho v. Bridgeport Fin., Inc., 523 F.3d 973, 978 (9th Cir. 2008) (quoting Ferland  
6 v. Conrad Credit Corp., 244 F.3d 1145, 1149 n.4 (9th Cir. 2001) (internal quotation marks  
7 omitted). “The ‘lodestar’ is calculated by multiplying the number of hours the prevailing party  
8 reasonably expended on the litigation by a reasonable hourly rate.” Id. (quoting Ferland, 244  
9 F.3d at 1149 n.4) (internal quotation marks omitted). Further, the lodestar is also used when  
10 determining the reasonableness of attorneys’ fees owed pursuant to an indemnification  
11 agreement. See ConsumerTrack, Inc. v. Blue Ocean Ads, LLC, No. CV 17-2404 PA (FFMx),  
12 2017 WL 7369117, at \*2 (C.D. Cal. Oct. 24, 2017).

13            The party seeking the attorneys’ fees bears the burden of producing documentary evidence  
14 demonstrating the number of hours spent on and rates in the litigation. McCown v. City of  
15 Fontana, 565 F.3d 1097, 1102 (9th Cir. 2009). Further, the party seeking attorneys’ fees must  
16 also produce satisfactory evidence that its rates are in line with those in “the community for  
17 similar services by lawyers of reasonably comparable skill, experience, and reputation.”  
18 Camacho, 523 F.3d at 980. Once the party seeking attorneys’ fees has met its burden, the burden  
19 then shifts to the opposing party to submit evidence challenging the accuracy and reasonableness  
20 of the hours charged, the facts of the affidavit, and calculations. Ruff v. County of Kings, 700 F.  
21 Supp. 2d 1225, 1228 (E.D. Cal. 2010).

22            Here, Clear argues Comcast has not met its burden to demonstrate that the attorneys’ fees  
23 it requests indemnification for are in line with those in the community for similar services by  
24 lawyers of reasonably comparable skill, experience, and reputation. The Court agrees. In support  
25 of its motion, Comcast has provided evidence of the amount it spent in defending itself in the  
26 Delgado action. (ECF No. 114.) Comcast has also produced an invoice from its counsel in  
27 Delgado detailing the services counsel rendered, the hours worked, and the hourly rates. (ECF  
28 No. 114-1.) Comcast summarily argues that it “incurred these expenses . . . in good faith and in

1 the exercise of reasonable discretion.” (ECF No. 104 at 16.) Yet Comcast has not produced any  
2 evidence, by affidavits from its attorneys or otherwise, as to how the attorneys’ fees incurred  
3 defending itself in the Delgado action are reasonable. See *Camacho*, 523 F.3d at 980. Thus,  
4 Comcast has not established damages as a matter of law. Because Comcast has not established an  
5 element of its breach of contract and indemnification claims, the Court DENIES Comcast’s  
6 motion for summary judgment as to those claims.

7 B. Alter Ego Theory

8 In addition to seeking indemnification from Clear, Comcast also advances an alter ego  
9 argument in which it seeks to pierce the corporate veil and obtain relief directly from Clear LLC  
10 and Moody. “Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its  
11 stockholders, officers and directors, with separate and distinct liabilities and obligations.”  
12 *Turman v. Superior Court*, 17 Cal. App. 5th 969, 980 (2017) (internal quotation marks and  
13 citations omitted). Under California law, “[a]lter ego is an extreme remedy, sparingly used.”  
14 *Conde v. Sensa*, 259 F. Supp. 3d 1064, 1069 (S.D. Cal. 2017) (quoting *Sonora Diamond Corp. v.*  
15 *Superior Court*, 83 Cal. App. 4th 523, 539 (2000)). Thus, a “heavy burden rests on the shoulders  
16 of the party seeking to pierce the corporate veil.” *Santa Clarita Org. for Planning & Env’t v.*  
17 *Castaic Lake Water Agency*, 1 Cal. App. 5th 1084, 1105 (2016) (citation omitted).

18 “Two requirements must be met to invoke the alter ego doctrine: (1) ‘there must be such a  
19 unity of interest and ownership between the corporation and its equitable owner that the separate  
20 personalities of the corporation and the shareholder do not in reality exist’; and (2) ‘there must be  
21 an inequitable result if the acts in question are treated as those of the corporation alone.’”  
22 *Turman*, 17 Cal. App. 5th at 980–81 (quoting *Sonora Diamond Corp.*, 83 Cal. App. 4th at 538).  
23 Further, “the determination of whether a corporation is an alter ego of an individual is ordinarily a  
24 question of fact.” *Misik v. D’Arco*, 197 Cal. App. 4th 1065, 1072 (2011); see also *TransFresh*  
25 *Corp. v. Ganzerla & Assoc., Inc.*, 862 F. Supp. 2d 1009, 1020 (N.D. Cal. 2012).

26 i. Exclusion of Evidence Under Rule 37(c)(1)

27 As a preliminary matter, Clear argues Comcast’s alter ego arguments should be limited to  
28 the facts set forth in Comcast’s written discovery responses because Comcast did not supplement

1 an interrogatory response with the additional facts it now uses to support its alter ego theory.  
2 (ECF No. 117 at 20.)

3 Rule 26(e) provides that a party who has responded to an interrogatory must supplement  
4 its response “if the party learns that in some material respect the . . . response is incomplete or  
5 incorrect, and if the additional or corrective information has not otherwise been made known to  
6 the other parties during the discovery process or in writing.” Fed. R. Civ. P. 26(e). Under Rule  
7 37(c)(1), “[i]f a party fails to provide information . . . as required by Rule 26(a) or (e), the party is  
8 not allowed to use that information . . . to supply evidence on a motion . . . unless the failure was  
9 substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1).

10 Here, Clear was aware of the additional facts Comcast seeks to use in arguing its alter ego  
11 theory. The additional facts stem from sources Clear had knowledge of, such as Clear’s expert  
12 witness report and depositions of Moody and former Clear LLC employees that Clear’s counsel  
13 defended. (See, e.g., ECF Nos. 90-1, 106-9, 106-19, 106-21.) Because Clear had been made  
14 aware of these additional facts during the discovery process, Comcast was not required to  
15 supplement its interrogatory response under Rule 26(e). Accordingly, the additional facts are not  
16 excluded under Rule 37(c)(1).

17 ii. Inequitable Result

18 Assuming Comcast will be able to establish the unity of interest and ownership  
19 requirement, there still exists a genuine issue of material fact as to whether there would be an  
20 inequitable result if the corporate veil is not pierced. Comcast argues injustice will result  
21 because: (1) recovery from Clear may be impossible due to Clear’s lack of sufficient financial  
22 resources; and (2) Moody and Clear LLC reaped the benefits Clear received from Comcast  
23 without sharing in Clear’s responsibilities. (ECF No. 104 at 19–20; ECF No. 143 at 12–13.)

24 Comcast’s arguments are unpersuasive. As indicated, California courts have consistently  
25 held that difficulty in enforcing a judgment alone is insufficient to justify piercing the corporate  
26 veil. E.g., *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 677 (9th Cir. 2017); *Hub City Solid*  
27 *Waste Servs., Inc. v. City of Compton*, 186 Cal. App. 4th 1114, 1123 (2010); *Associated Vendors,*  
28 *Inc. v. Oakland Meat Co.*, 210 Cal. App. 2d 825, 842 (1962). “There must be some conduct

1 amounting to bad faith that makes it inequitable for [the defendant] to hide behind the corporate  
2 form.” *Leek v. Cooper*, 194 Cal. App. 4th 399, 418 (2011).

3 Turning to Comcast’s argument that an inequitable result arises from Moody and Clear  
4 LLC’s reaping the benefits of Comcast’s relationship with Clear while avoiding Clear’s  
5 responsibilities, the Court finds Clear raises a genuine issue of material fact. One assertion  
6 underlying the alleged inequitable result focuses on Moody hiding Clear’s profits by  
7 overcompensating himself. (ECF No. 143 at 13.) In its statement of facts, Comcast cites to  
8 testimony in Clear’s expert report that Moody was paid above market levels. (ECF No. 105 ¶  
9 41.) Moody’s annual compensation as the owner and CEO of Clear was roughly \$1,000,000 per  
10 year from 2006 to 2009. (ECF No. 117-1 ¶ 40.) In analyzing Moody’s compensation, Clear’s  
11 expert calculated an annual fair market compensation for Moody was \$200,000. (ECF No. 90-1  
12 at 23.) The expert derived this figure from examining compensation rates for CEOs of non-  
13 manufacturing companies. (*Id.*) However, as Clear notes in disputing Comcast’s statement of  
14 facts, Moody was also the owner of Clear, not merely the CEO. (ECF No. 117-1 ¶¶ 41–42.)  
15 Because the expert compared Moody’s compensation to that of CEOs and not individuals who are  
16 both owner and CEO, there exists a genuine issue of material fact as to whether Moody was in  
17 fact overcompensating himself and thereby hiding Clear’s profits.<sup>4</sup>

18 Alternatively, Comcast argues an inequitable result arises from Clear’s breach of contract  
19 with Comcast by “refus[ing] and fail[ing] to honor its indemnity obligations.” (ECF No. 143 at  
20 13.) However, breach of contract alone is insufficient to establish inequitable result for purposes  
21 of an alter ego claim — the breach must be willful. See *Pac. Mar. Freight, Inc. v. Foster*, No. 10-  
22 CV-0578-BTM-BLM, 2010 WL 3339432, at \*7 (S.D. Cal. Aug. 24, 2010) (recognizing willful  
23 breach as bad-faith conduct in the context of alter ego liability). Here, Comcast contends Clear  
24 refused to honor its indemnification agreement, but it has not argued Clear’s breach was willful or  
25 intentional. (See ECF Nos. 104, 143.) Consequently, it is uncertain whether an inequitable result  
26 will occur absent piercing the corporate veil.

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27 <sup>4</sup> Comcast argues Clear cannot create a dispute with Clear’s own damages expert. (ECF  
28 No. 144 ¶¶ 41–42.) However, Comcast provides no support or legal authority for this argument.

1 In sum, Comcast has not met its heavy burden to pierce the corporate veil because it has  
2 not established the inequitable result necessary to support its alter ego theory. Accordingly, the  
3 Court DENIES Comcast’s motion for summary judgment as to its alter ego theory.

4 C. Declaratory Relief

5 To qualify for declaratory relief, a party must demonstrate its action presents: “(1) a  
6 proper subject for declaratory relief, and (2) an actual controversy involving justiciable questions  
7 relating to the rights or obligations of a party.” *Lee v. Silveira*, 6 Cal. App. 5th 527, 546 (2016)  
8 (citation and internal quotation marks omitted). “[D]eclaratory relief ‘operates prospectively to  
9 declare future rights, rather than to redress past wrongs.’” *Pub. Serv. Mut. Ins. Co. v. Liberty*  
10 *Surplus Ins. Corp.*, 51 F. Supp. 3d 937, 950 (E.D. Cal. 2014) (quoting *Canova v. Trustees of*  
11 *Imperial Irrigation Dist. Employee Pension Plan*, 150 Cal. App. 4th 1487, 1497 (2007)). Thus,  
12 “where there is an accrued cause of action for an actual breach of contract or other wrongful act,  
13 declaratory relief may be denied.” *Osseous Techs. of Am., Inc. v. DiscoveryOrtho Partners LLC*,  
14 191 Cal. App. 4th 357, 366 (2010) (emphasis in original).

15 Here, Comcast seeks declaratory relief relating to Clear, Clear LLC, and Moody’s failure  
16 to indemnify Comcast for legal expenses in the Delgado action. (ECF No. 50 ¶ 45.) As such,  
17 Comcast’s counterclaim for declaratory relief is redundant of its other counterclaims for breach of  
18 contract and indemnification because they all stem from Clear not indemnifying Comcast for  
19 Comcast’s legal expenses in Delgado. Because Comcast is seeking damages representing a total  
20 of its fees, costs, and settlement costs in Delgado, (ECF No. 113 at 20), the Court observes no  
21 reason why money damages — which remain to be determined — would not be an adequate  
22 remedy. Thus, declaratory relief may be denied. *Jolley v. Chase Home Fin., LLC*, 213 Cal. App.  
23 4th 872, 909 (2013), *as modified on denial of reh’g* (Mar. 7, 2013) (affirming summary  
24 adjudication on declaratory judgment claim where plaintiff could pursue relief under alternative  
25 causes of action and claim sought primarily to adjudicate the legality of past conduct); see also  
26 *Mangindin v. Washington Mut. Bank*, 637 F. Supp. 2d 700, 707 (N.D. Cal. 2009) (“A claim for  
27 declaratory relief is unnecessary where an adequate remedy exists under some other cause of  
28 action”). Further, Comcast has already fully incurred all legal expenses in defending the Delgado

1 action because the Delgado action was settled and dismissed in 2014. Therefore, declaratory  
2 relief is inappropriate because the record clearly reflects Comcast seeks to redress past wrongs,  
3 not declare future rights. See Pub. Serv. Mut. Ins. Co., 51 F. Supp. 3d at 950. Finally, in light of  
4 the Court's rejection of Comcast's alter ego arguments against Clear LLC and Moody, Comcast is  
5 not entitled to declaratory relief relating to Clear LLC and Moody indemnifying Comcast.

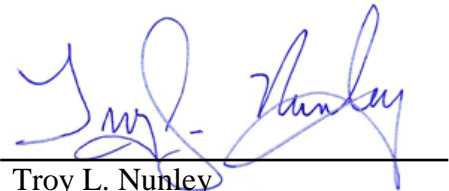
6 Accordingly, the Court DENIES Comcast's motion for summary judgment with respect to  
7 its claim for declaratory relief.

8 **IV. CONCLUSION**

9 For the foregoing reasons, the Court hereby DENIES Comcast's Motion for Summary  
10 Judgment as to its counterclaims. (ECF No. 103.) The parties are hereby ordered to file a Joint  
11 Notice of Trial Readiness within thirty (30) days of electronic filing of this Order indicating their  
12 readiness to proceed to trial and proposing trial dates.

13 IT IS SO ORDERED.

14 DATED: November 16, 2020



Troy L. Nunley  
United States District Judge

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