The following tentative ruling is issued by Judge James LaPorte (ret), assigned for all purposes.

Prasad, et. al vs Department of Transportation (DOT,Caltrans) Case Number. 17 CV 10752

T**entative ruling on the Plaintiff's Motion to Compel Depositions of Ronald Nelson and Eric Rossetter (Nelson and or Rossetter) and Production of Documents**

The court denies, without prejudice, the Plaintiffs Motion to Compel the early depositions of Ronald Nelson and Eric Rossetter and Production requests. These Defendant Department of Transportation experts have not been designated under CCP section 2034.010, but are declarants in Defendants Summary judgment/Summary Adjudication Motion.

The court notes, infra, that the Plaintiffs Consolidated Declarations in support of the Motion to Compel are not specific as to the page or paragraph of the Defendant's expert's declarations that are "factually incorrect". Further, the court declines to search through the declarations of Nelson and Rossetter to determine where the plaintiffs allegations regarding the "disconcerting issues" lack of candor" and "suspect opinions" are located. The law limits the deposition of undesignated experts to specific topics regarding the foundation of the opinions that arise from their alleged "factually incorrect" statements. The plaintiffs request for production is denied without prejudice, as it is not narrowly targeted to obtain documents for a deposition regarding factually incorrect statements and inquire about the foundational basis for the statements. The allowance for an early deposition of experts under St. Mary (infra**)** is not to be a duplication of an expert witness deposition under CCP Section 4023.010 et seq. as are these 17 requests. However, under a renewed request based upon CCP Section 437c(h) Plaintiffs may, consistent with this ruling, move to compel the Depositions of Nelson and Rossetter.

History of the Motions to Compel Depositions of Nelson and Rossetter and Summary Judgment

The court is cognizant that the Defendant Department of Transportation filed its yet unscheduled and considered Motion for Summary Judgment/ Summary Adjudication (SJ/SA) on or about August 27, 2019. The motion for summary judgment was initially set to be heard on November 15, 2019 but was reset for January 24, 2020; however Plaintiffs served their notice of taking deposition of Ronald Nelson Eric Rossetter on December 10, 2019. Defendant Caltrans served their objections to the notice of taking these depositions on December 13, 2019. Plaintiff's Motion to compel the depositions of Ronald Nelson and Eric Rossetter and the accompanying production requests was filed on January 10, 2020; And set for February 7, 2020. The Motion for Summary Judgment was also to be heard January 24, 2020 and was then continued by ex party order to March 6, 2020. The parties' trial date was initially set to begin on July 7, 2020. The

Summary Judgment Motion hearing was moved to March 6, 2020 by the Plaintiffs unopposed ex parte application of 12/16/19 and the Court Order of 12/17/19. In the intervening 22 months since Defendant Caltrans filed its Summary Judgment motion, the initial trial date has been vacated and has now been set to commence on January 18th 2022. The Defendants Summary judgment hearing remains unset pending a ruling on these motions to compel depositions of Nelson and Rossetter. Due in part to multiple judicial officer changes, and Covid-19 Judicial Council, Governor and Chief Justice of California Orders, all initial motion dates and the initial trial dates have been vacated as selected in order of importance by the parties, various motion dates have been reset for hearing, and ruled upon by the court. Some discovery orders have also been ruled on and the parties seem to be still in the process of serving tens of thousands of pages of discovery responses. This is in addition to the tens of thousands of pages noted as received by Plaintiffs in the ex party application of 12/16/19.
Although this hearing was recently set by the parties, the Court notes that the last document that the Court was asked to review and rule upon in Plaintiff's motion was filed January 31, 2020. In the Nowakowski declaration there is a reference to Exhibit P which was an order purported based upon CCP Section 437(c)(h). Neither the Court file nor the courtesy copy sent to the court contains an exhibit "P" .The only Order the Court was able to locate was the 12/17/19 Order that continued the Defendant's Summary Judgment/ Summary Adjudication hearing from January 24, 2020 to March 6 ,2020.

The court is hopeful that the parties can meet and confer after Plaintiffs file a current subsequent Declaration consistent with this ruling. The court is also suggesting the parties meet and agree to an early mutual exchange date for expert discovery in light of the reality of a statutory expert demand date in early November 2021 before the current trial date of January 18, 2022.The parties in good faith could have had a mutual expert exchange date from July 2019 triggered by the original trial date, to anytime up to this hearing date or thereafter. That could have mooted the necessity of this Motion. As the parties are aware, deadlines earlier than those set by statute can ease the burden and stress of trial preparation, and last day Summary judgment motion hearings. Further, motion practice within the 10 day period of CCP 2024.030 may be difficult. And even in complex cases, absent stipulation, a judge does not have the authority to modify deadlines unilaterally. (Hernandez vs Superior Court (infra) 112 Cal App.4th 285, 299-300.)

Plaintiffs Motion

The court notes more fully infra that it finds Plaintiffs declarations under the case law and secondary authorities cited, to be insufficient to require early unilateral disclosure and the early taking of depositions of the Defendants tacitly disclosed expert witnesses, Nelson and Rossetter.
The Court is uninformed whether subsequent discovery orders and responses have resulted in the separate production of the aerial photographs, or the manuals and directories mentioned in declarations of Nelson and Rossetter that were attached as exhibit B of Rossetter's declaration contained in the Summary Judgment/ Summary

Adjudication Motion filed in August 2019. However, it is clear that plaintiffs have had the aerial Photos contained in the summary summary judgment motion for almost 22 months. And that various manuals and directories and “as builts” should have been produced by defendants to plaintiffs in discovery over the last year and several months. The court has herein noted infra, at this late date, that Plaintiffs own experts, should have formulated responses to the Summary Judgment/Summary Adjudication motion of Defendant without requiring early unilateral non simultaneous disclosure and depositions of these probable defendant experts. Plaintiff’s counsel articulated in her ex party application of 12/16/19 the basis for defeating the Defendant’s SJ/SA.motion “ in several ways” It strains credulity to believe that plaintiff's own experts have not been consulted over the past 22 months, based upon available aerial photographs contained in the Summary Judgment itself and all the other discovery to date, to formulate their own theories and develop facts as to the existence of a triable issue of fact regarding the issue of the dangerous condition of SR 16.

Summary judgment is properly granted only if the moving party’s evidence establishes that there is no issue of material fact to be tried”. (Lipson v. Superior Court (1982) 31 C3d 362,374); “A judge may not grant summary judgment when any material factual issue is disputed”. (O’Riordan v Federal Kemper Life Assur. (2005) 36 Cal.4th 281,289.)
Summary judgment is a drastic remedy ordered with caution, because it denies the adverse party right to trial. Doubts as to propriety of summary judgment should be resolved against granting the motion. (Huynh v. Ingersol-Rand (1993) 16 Cal.4th 825,830.)
Summary judgment law turns on issue finding rather than issue determination. (Diep v. California Fair Plan Association 15 Cal.4th 1205,1207); The judge does not decide the merits of the issues, but, discovers, through the medium of affidavits or declarations whether there are issues to be tried and whether the parties possess evidence that demands the analysis of a trial. (Melamed v. City of Long Beach (1993) 15 Cal.4th 70, 76; California Civil Proceedings Before Trial. Summary judgment and Summary Adjudication Motions. Sections 13.46;13.48.)

Plaintiffs have known of this motion since August 2019, have obtained one continuance under CCP 437c(h) (on December 16, 2019), and have received tens of thousands of relevant requested documents. Plaintiff’s counsel in December 2019 has articulated various responses to Defendant’s claim of design immunity and how it “can be defeated” (Ex parte Application to Continue Hearing on Defendant’s Motion For Summary Adjudication/Judgment; Memorandum of Points and Authorities; Declaration of Wendy C. York filed December 16, 2019.) Plaintiffs should not need to take unfair advantage of Defendant’s early Summary Judgment Motion to obtain unilateral expert depositions that “in fairness demands adherence to the statutory procedures” in simultaneous mutual exchange and does not permit a unilateral exchange, “to place the parties in roughly equal footing”. (Kalaba v. Gray (2002) 95 Cal.App.4th 1416, 1422.)

Disclosure and Depositions of Experts in Accordance with CCP Section 2034.410

The parties are not required to utilize the procedure under CCP section 2034.010 for disclosure of experts and subsequent depositions. Under CCP section 2034.010, as noted in the secondary authority California Expert Witness by San Francisco Superior court Judge Curtis E.A Karnow (revised November 20, 2020 " Expert discovery takes place within the last few months before trial. It is triggered by a written demand, without which there is no statutory procedures for expert discovery and any expert may be able to testify at trial. However if there is a written demand expert discovery is then tightly regulated: The demand Is followed by simultaneous disclosure of experts; then a supplemental disclosure of experts in areas selected by opposing parties as to which a party has not yet designated an expert. An expert declaration with certain information is required, usually an exchange of relevant documents. Then depositions take place, then testimony at trial. All these events occur simultaneously for the parties; I.e. There is a simultaneous exchange information, relevant reports, and so on,, as opposed to a staggered process , for example, with plaintiff disclosing before a defendant. The parties may stipulate to a staggered schedule and stipulate to other modifications of this procedure. Most of the documents prepared in the course of the expert discovery are not filed unless and until the court sees them in the context of a motion. CRC section 3.250 (a)(12)-(16)" at Page 8.
The court assumes that expert disclosure in this case will be in accordance with Section 2034.010 based upon counsel's motions filed in this matter.

Secondary authority Weil & Brown, Cal Practice.Guide. Procedure before trial (Rutter group) at sections10.66.1; 8.467.10-12.

Both parties cite Weil & Browns sections on Expert Witness Discovery Before Time for Designation of Experts. The full section is as follows:
"An expert who supplies a declaration in support or opposition to a motion for summary judgment may be subject to deposition regarding the basis for opinions expressed in the declaration. Such depositions may be allowed before the time for designation of expert witnesses under CCP section 2034. 010 et. seq. (see section 8.467.11) (St. Mary Medical Center v. Superior Court); Mennella (1996) 50 Cal.4th 1531,1538-1539—abuse of discretion to deny motion to depose experts where a "serious question" whether experts declaration is "factually incorrect".
Section 8:467.10-11 Compare-deposing expert witnesses: depositions of expert witnesses normally are governed by CCP section 2034.010 et. seq., which provides a detailed procedure for the exchange of expert witness information shortly before trial and deposing experts so disclosed (citation omitted);
8:467.11 On summary judgment motions: The section 2034.010 et. seq**.** procedure for deposing expert witnesses does not bar earlier deposition of experts whose opinions are filed in support of or in opposition to a motion for summary judgment or summary adjudication. If an opposing party presents facts raising a legitimate question regarding the foundation of the experts opinion, a deposition limited to that subject may be allowed (St. Mary supra 50 Cal.4th 1531,1539)"
8.467.12 Discretionary: Unlike deposing nonparty witnesses generally (8.464) such discovery is discretionary with the trial court: "It would defeat the purpose of the

summary judgment procedure were we to recognize an absolute right … to depose any person who provides evidence in support of or in opposition to the preceding" St. Mary supra 50 Cal.4th at 1538,1540 -"we caution that the process should not be utilized to turn summary proceedings into mini trials"

In citing the St. Mary decision, the Weil & Brown text shows it is not merely any expert foundational fact, but shows what type of incorrect fact justified the early deposition of an undesignated opposing expert. The necessary type of "facts raising a legitimate question regarding the foundation of the moving parties' experts opinion" has to be a "*serious question"* whether the expert declaration is *factually incorrect*. (St. Mary, 50 CA4th at 1540.) As noted in the St. Mary case the Defendant's opposition experts raised a legitimate factual issue based upon the fact that the Plaintiffs only medical expert's declaration opined that there was a triable issue of fact of medical malpractice based upon alleged negligence of a doctor (in the St. Mary case-Dr Waider) who was not at all involved in the medical procedure involving the plaintiff. (St. Mary at 1540)

Plaintiffs Contentions

The Consolidated Declaration of John G. Nowakowski dated January 10, 2020 states "There are several *disconcerting issues* with the declarations of Nelson and Rossetter regarding their foundation. First, both rely on aerial photographs of the roadway that was never produced to plaintiffs during discovery (i.e. before January 10, 2020.) Questions by Plaintiffs attorney concerned "where did he (Rossetter) get the photographs; did Caltrans give them to him or did he take the photographs himself; Or did he get the photographs from somewhere else; what about the photographs is important to support the opinion he renders; why did he think the photographs were necessary". The court agrees that all of these questions are important and can be asked during normal expert depositions after a written demand and mutual disclosure exchange. And the Plaintiff's extensive production request items could be necessary for preparation for cross examination of these two experts during trial. Normally what an expert relied upon is a legitimate foundation question as part of any cross examination. However, Plaintiff's questions do not raise to a level of a "serious question whether the expert's declaration here is factually incorrect" As an additional observation unlike in St. Mary, Plaintiff has yet to designate any expert nor file any expert declaration regarding this motion to compel issue nor regarding the summary judgment.
Similarly the Plaintiff's "disconcerting issues" regarding the "vague language in reference to foundational issues "such as applicable Manuals and Directives etc. "leaves open serious questions as to what the expert reviewed when forming their opinions" does not raise to the type of "serious question whether the expert declaration is factually incorrect"
Finally, the seemingly contradictory testimony of Caltrans employee Troy Bucko and the methodology of the monitoring programs is not a factual dispute of Defendant's experts, unless Plaintiff's expert shows how it is. Mr. Nelsons opinion and analysis of post mile 2.5 to 2.7 which Plaintiff allege is the location of the accident, and where its alleged the road was a dangerous condition, is not an incorrect factual statement. The deposition

statements by Troy Bucko is according to Defendant a statement how Caltrans generally analyzes and monitors its roadways; and Nelson mentioned the two and three lane monitoring program and the RDSIP in various paragraphs of his declaration. These declarations of Defendant's experts may be insufficient for a grant of summary judgment purposes depending on what facts Plaintiff's experts' show. However they are not, without more, showing a serious question whether the Defendant's expert's declarations are *factually incorrect*.

The Consolidated Reply Declaration of Wendy York filed January 31, 2020 similarly raises concerns about Defendant experts "lack of candor" as the Defendant Department of Transportation failed to conduct important run off the road monitoring for several years based upon the deposition testimony of Dean Samuelson. The contention is that foundation for their opinions is "suspect". The court agrees that the deposition of these experts is important and it is standard for the basis or foundation of an expert's opinion to be questioned in cross examination at trial. However, the court won't guess based upon the excerpt of the deposition transcript of Dean Samuelson what portion of the expert declaration is factually incorrect. Similarly the cited portions from the Garibay's deposition noting that there were several additional projects on State route 16 during the relevant timeframe that were not mentioned or discussed by Defendants experts. But the York declaration does not point out based upon that, what specific portions of the Defendant's expert's declaration is factually incorrect. And the failure of the Defendants expert to mention an approved (but unfunded?) project for rumble strips that could have been installed at the accident site before the accident doesn't specify in the York declaration what is specifically factually incorrect about the experts declarations. Finally the York declaration about the Duper Tong deposition portions regarding other accidents on the roadway fails to specifically cite the Court to portions of the Defendant's expert declarations which are factually incorrect or had no basis in science nor commonly relied upon by similar experts in the field.

The Parties both cited the cases of: St. Mary Medical Center v. Superior Court (supra); Hernandez v. Superior Court (infra) and Sanchez v. Hillerich & Bradsby Co (infra) on Expert discovery before Expert Designation.

St. Mary Medical Center v. Superior Court (supra) was a unique case authorizing the early taking of expert depositions. St. Mary's was a medical malpractice action where the defendant doctors brought a motion for summary judgment. Plaintiff's in their opposition to a summary moment motion relied solely upon the expert declaration of Medical Doctor Eber. Defendants noticed the deposition of Dr. Eber and plaintiffs declined to produce him for early deposition. Defendants own experts declared they found Dr. Ebers" conclusions to be "untenable" This was, in no small part, due to the declaration of Dr. Eber who claimed that defendant Dr. Waider committed medical malpractice even though Dr. Waider "was not involved in the medical procedure of May 13"
The appellate court in St. Mary carefully distinguished its own earlier decision in County

of Los Angeles v. Superior Court (1990) 224 Cal.3d 1446 which prohibited any early deposition of expert witnesses." We based our reasoning (in County of Los Angeles) on section 2034: as we have seen…section 2034 is expressly applicable to the expert opinion of parties to a lawsuit. We have no reason to disrupt a carefully crafted legislative scheme for the regulation of discovery of the identity, qualifications and opinion's of expert witnesses. The trial court order that the physician defendants testify at deposition about their present opinions of the medical propriety of their acts, even though they have not been designated as expert witnesses would have that effect, It is for that reason we direct that it be set aside" (County of Los Angeles 224 Cal.App.3d at pg. 457, (quoted in St Mary's) 50 Cal.App.4th 1540.) The St. Mary's court distinguished its earlier County Los Angeles decision on the basis that "no summary judgment was pending in that case and the discovery was sought during depositions of the physicians as parties to the litigation. Here, (in St. Mary's) there has been a form of designation of experts, those identified in the motion for summary judgment and the opposition. We are not dealing with the carefully crafted legislative scheme of section 2034. In fact no trial date has been assigned in this situation. Instead, we are dealing with the right of a party to challenge the litigation by means of summary judgment… We believe under the proper circumstances, the parties should be allowed to depose an expert who supplies a declaration or affidavit in support of or in opposition to summary judgment or summary adjudication where there is a legitimate question regarding the foundation of the opinion of the expert'

In their declaration, Plaintiffs here have not stated what specific factual statements were incorrect in Defendant's declarant's statements. A disagreement about the opinions contained in these experts' declarations is not a showing of an incorrect statement of fact. What these witnesses reviewed in forming their opinion is not the type of serious question whether the declarations are factually incorrect-unless Plaintiffs own experts can show the scientific community wouldn't rely on the so far unidentified Manuals and Directives for an opinion. A general question that certain items were unknown in January 2020, or even now are unknown, cannot be the basis for a demand that these witnesses be unilaterally deposed before mutual disclosure under St. Mary. Although the limitations contained in the Defendant's expert declarations regarding specific post miles where the accident occurred may or may not be sufficient for summary judgment, plaintiffs did not state what statement was factually incorrect in the declaration. Accordingly, Plaintiff failed to show how an early deposition of Defendants declarants is justified by the exceptions to the normal expert depositions rules of CCP Section 2034.010.

The other unique case cited by the parties is Hernandez v. Superior Court (2003) 112 Cal.App.4th 285; In Hernandez, Plaintiffs in a wrongful death action filed two petitions for writ of mandate to review Discovery orders. The original Plaintiff's action included approximately 80 defendants, with more than 40 remaining defendants at the time that the Writ petitions were filed. The action arose out of toxic tort wrongful death causes of action. The trial judge in the exercise of management responsibilities for the complex litigation, determined to require petitioners (the Plaintiffs) to make a prima facie showing of exposure and causation in order to 'narrow the roster' of defendants. The court

ordered petitioners to serve a declaration on all defendants, separately setting forth with reference to each defendant, “the name of each product, or equipment, or substance that caused injury to decedent, the nature of such injury, the date of exposure to the product or substance, the manner of exposure, all facts upon which petitioners intended to rely to establish that such exposure was a substantial factor in bringing about the injury, and the identity of each medical expert who would support petitioners claims.” In addition the court ordered petitioners to serve defendants with a declaration from one or more qualified experts with regard to each product or equipment… stating to a reasonable degree of medical and scientific probability whether the decedents exposure to the specified product or equipment was a cause in fact and a substantial factor in the cause of decedents injuries and resulting death”. The trial court stated it was intended provide the parties with enough information to determine whether motions for summary judgment were warranted. The trial court recognized that a simultaneous expert witness exchange was required by statute, but found that a non-simultaneous exchange would facilitate resolutions of this case by allowing an orderly presentation of CCP section 437c motions”.
The appellate court found that the trial court management order of the complex litigation was is in conflict with procedures specified by statute and just established rules of law so far as is it required early unilateral disclosure of each medical expert and opinion…”. The legislature has required that the exchange (of experts) be mutual and simultaneous” (citation omitted) “This appellate court interpreted St. Mary's as follows: where a party has submitted the opinion of the expert in opposition to a motion for summary judgment, brought prior to designation and there is a legitimate question regarding the foundation of the opinion, reasonable discovery may be allowed”. In its disposition the appellate court directed the trial court “to vacate the case management order of March 27, 2003…only insofar as it required the unilateral disclosure of experts, their opinions and their curricula vitae”.

Thus, the Hernandez case holds that mutual and simultaneous exchange of experts is required, unless in a summary judgment context, the opinion of an expert in opposition to a motion for summary judgment brought prior to designation may be deposed if there is a legitimate question regarding the foundation of the opinion, (of that expert). (St. Mary Medical Center v. Superior Court at 1540, Hernandez, 112 Cal.App.4th at 299.)

The Hernandez explanation of the St. Mary decision was very true to the actual reason for that unique situation in St. Mary-Defendant counsel there is specifically quoted complaining about an earlier Long Beach case where malpractice defendants had to spend $10,000 because of a fraudulent declaration filed by Plaintiff expert.
Defendant’s counsel’s motion for summary judgment was denied in the case in Long Beach where an earlier Plaintiff expert deposition would have made subsequent discovery in that earlier case unnecessary (and less costly).
Here, Plaintiff seeks to obtain a unilateral disclosure and depositions of Defendants experts without having disclosed nor submitted its own expert’s declaration in opposition to the motion for summary judgment. Clearly the Hernandez case is inapposite to the situation in this Motion to Compel by Plaintiffs. The appellate court in Hernandez held

CCP Section 2034 provides for an earlier simultaneous mutual exchange but does this not permit an order for a unilateral exchange (citation omitted).

Sanchez vs. Hillerich & Bradsby Co**.** et.al (2002) 104Cal.App.4th 703: In Sanchez**,** the appellant was a college baseball pitcher who was seriously injured when struck by a line drive hit by an aluminum bat, the Air Attack 2. He contended that the bat manufacturer, designer and others, significantly increased the inherent risk in the sport of baseball that the pitcher would be hit and injured by a line drive. The trial court granted the summary judgment, when it concluded that appellate would be unable to prove that his injuries resulted from the alleged increased risk the particular bat posed to pitchers. The judgment was reversed on the basis that a plaintiff expert Dr. Kent, a clinical Kinesiologist's declaration was sufficient to opine that the speed of the baseball hit by the Air Attack 2 bat was faster than the NCAA safety standards allowed for the time that can reasonably be expected for a pitcher to deflect a baseball as it travels from a bat strike towards the pitcher's post delivery fielding position. The objecting respondents position was that Dr. Kants declaration was deficient because it failed to explain the nature and type up calculations used to determine the speed of the ball and whether the type of calculations he performed were accepted by the scientific community at large. The appellate court determined that it was not deficient for opposition for Summary judgment purposes." If Respondents had desired to do so they could have deposed Dr Kent in an attempt to demonstrate his opinions had no basis in fact or science (Citing St. Mary Medical Center at 1538-1539 supra, Sanchez. Id at 718. The appellate court concluded that evidence presented by appellant was "sufficient to create a triable issue of fact regarding causation." (Citation omitted) Again, this case is not similar to the situation in this Motion. Plaintiffs here are not contending that Caltrans experts applied a sophisticated biomechanical analysis without spelling out the actual calculations. Although the appellate courts suggestion to a depose Dr. Kent may have been dicta, that court was not faced with the inherently unfair situation where respondents failed to file their own expert declarations and yet wanted to unilaterally depose plaintiffs experts before mutual disclosure under CCP section 2034.010 et.seq. Further, both parties in Sanchez filed expert declarations, whereas Plaintiff here has neither designated any experts nor filed any expert declarations in the summary judgment motion, nor in this Motion. Plaintiff has raised questions but has failed to raise the type of specific "serious question" whether Defendant's experts declarations are factually incorrect, or had no basis in science.

The unpublished California Supreme Court decision in Shabsis v. Regents of the University of California 2017 Cal Super Lexis 8941 is instructive.
The Court is aware that the Shabsis case is not precedent but is only for example, The Supreme Court's order is printed in full so this court can make a case management suggestion and to avoid the unnecessary delays occasioned by the next series of motions normally connected with a summary judgment /Summary adjudication motion and hearing under CCP Section437(c)(h).

"California Courts have held that "the parties should be allowed to depose an expert

who supplies a declaration or affidavit in support of or in opposition to summary judgment or summary adjudication where there is a legitimate question regarding the foundation of the opinion of the expert." *(St. Mary Med. Ctr. v. Superior Court* (1996) 50 Cal.App.4th 1531, 1540 (*St Mary*).)

Code of Civil Procedure, section 437c, subdivision (h) provides, in relevant part:

(h) If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just.

In the case at hand, Plaintiff contends that many of facts on which Paster's opinions are based appear to be mistaken, including the claim that Plaintiff has a history of violence. (Opp. 8-9.) Based on the record presented in this case, the court finds that Plaintiff has demonstrated a need for a *limited* deposition in order to discover facts concerning the foundation of DR. Begel's declaration. Plaintiff, however, is only entitled to discovery limited to foundational issues concerning the deponent's testimony. (*St. Mary, supra*, 50 Cal.App.4th at pp. 1540-1541.)

Accordingly, the court ORDERS Begel to appear at a properly noticed deposition to be set for within 30 days of this ruling. The court ENTERS a protective order limiting the length of Begel's deposition to 4 hours and limiting the scope of the deposition to foundational issues relating to the opinions rendered by Begel in his declaration in support of Defendant the Regents' motion for summary judgment.”

Footnotes omitted, Shabsis v. Regents of the Univ. of Cal.

The California Supreme Court ordered depositions of an expert regarding summary judgment stating “many of the facts on which the expert opinions appear to be mistaken including the claims that plaintiff has a history of violence”. The request for deposition was based upon a specific statement as to what was factually mistaken in the foundation of (Dr.) Begel’s opinion upon which the Summary Judgment was based.

The parties here have had the Defendants summary judgment motion pending for almost 2 years. The court assumes that Plaintiffs have continued with this litigation on the basis that they believe the there is a triable issue of fact they will assert against the summary judgment motion presumably that is based upon CACI instructions 1100-1124.

As a case management matter the court, in order to avoid the motion for further discovery under CCP Section 437c(h), proposes that if Plaintiff believes that Plaintiff can file a specific supplemental declaration that states specifically what they believe is factually mistaken in the expert opinions; and designate where the mistaken statement occurs by paragraph number or page number and lines, of the experts statement; and then propose a time limitation on these depositions based upon a deposition of those

issues only and a precise production request limited to the issues identified, the court would entertain at a hearing such a supplemental filing after opportunity for a response by the Defendant. The Defendant, in their pleadings, implied a willingness to allow depositions under specific circumstances. The court would encourage the parties to meet and confer and set a schedule and hour limitation for the necessary depositions, hopefully without further court involvement. The parties can then set the hearing on the Motion for Summary Judgment and Summary Adjudication. In lieu of this proposal, the court would suggest that the parties simply agree to an early simultaneous mutual exchange of experts under CCP Section 2034.010 and complete the expert depositions before the SJ/SA motion is heard.

Production Requests

The Plaintiffs Request for Production of Documents is denied without prejudice as it is not narrowly targeted to obtain documents for a deposition regarding factually incorrect statements of Defendant's expert declarants, and inquire about the foundational basis for the statements. The allowance for an early deposition of experts under St. Mary (supra) is not to be a duplication of an expert witness deposition under CCP Section 4023.010 et seq. as are these 17 Requests:

Request # 1 "Copies of any and all writings… contained in files compiled by deponent for the purpose of evaluating the evidence in this litigation"
Plaintiff failed to make any showing how this request is specifically limited to producing foundational categories regarding factually incorrect statements of defendants experts contained in their declarations. This type of request for all documents for " any and all writings evaluating the evidence in this litigation" Is generally made for the discovery of documents after a written request and simultaneous mutual disclosure for expert witness depositions under CCP section 2034 et. seq. Plaintiff is seeking premature depositions of expert, as the parties haven't yet agreed to early mutual expert disclosures.

Request # 2 to #17: None of these requests for production are narrowly targeted to obtain documents for a deposition regarding factually incorrect statements of Defendant's expert declarants and inquire about the foundational basis for those statements. Accordingly these Requests are denied without prejudice. Each production Request appears to be the type generally made for expert discovery after written demand under CCP 2034.010.

Request # 2: all documents, writings, reports, depositions and/ or data provided to you before or while forming any opinions you the deponent may render/ have rendered in the subject case.

Request # 3: Any and all exhibits to be used as a summary of or support for opinions to be rendered by the deponent in this subject case.

Request # 4: Any and all correspondence between the deponent and defense counsel concerning the deponents' testimony or opinions to be rendered in this case.

Request # 5: Any and all discovery and/or investigative materials provided by the deponent or the deponents agents concerning this case.

Request # 6: Any and all billing statements from the deponent for work prepared in connection with this case.

Request # 7: Copies of all checks paid to deponent for services rendered in this case.

Request # 8: The entire file maintained by deponent concerning this case.

Request # 9: Any and all correspondence with any other consultants about this case.

Request # 10: Any and all medical records sent to deponent for his or her review on this case.

Request # 11: Any and all documents or materials that was sent to the deponent for review on this case.

Request #12: Any and all photos taken or reviewed in this matter.

Request # 13: Any and all emails, memos, correspondence, reports to or from defense counsel in this matter.

Request # 14: Any and all emails, memos, correspondence, reports to or from Caltrans in this matter.

Request # 15: Any and all versions (drafts with edits) of your declaration submitted in this case.

Request # 16: Any and all publications which discuss the same or similar subject matter as subject matter in which the deponent Will render an opinion on this case authored by the deponent within the preceding 10 years.

Request # 17: A list of all other cases in which the deponent has testified as an expert (either at trial or deposition) in the past four years.

To make it clear the court is not now ruling directly or by implication on any issue regarding the Defendants Motion for Summary Judgment.

Accordingly the court denies without prejudice Plaintiff's Motion to Compel the depositions of experts Nelson and Rossetter (before mutual and simultaneous disclosure); Denies without prejudice the Request for Production of Documents in this

motion; and the Plaintiffs Request for Sanctions. The court further denies Plaintiff's request to deny Caltrans Motion for Summary Judgment in this Motion.

It is so ordered.

Dated 6/22/21

Judge James LaPorte (ret)
Judge of the Superior Court