

1 HON. PATRICK M. BRODERICK
2 JUDGE OF THE SUPERIOR COURT
3 Courtroom 16
4 3035 Cleveland Avenue
5 Santa Rosa, CA 95403
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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SONOMA

APR 16 2019
BY *Cindy Agel*
Deputy Clerk

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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF SONOMA**
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12 SONOMA LAND TRUST, a California
13 Public Benefit Corporation,

14 Plaintiff,

15 v.

16 PETER THOMPSON, an individual;
17 TONI THOMPSON, an individual;
18 HENSTOOTH RANCH, LLC, a California
19 Limited Liability Company; and DOES 1
through X, inclusive,

Defendants.

Case No. SCV-258010

FINAL STATEMENT OF DECISION
(Code of Civil Procedure Section 632)

20 Plaintiff Sonoma Land Trust ("Trust") filed this action to enforce a conservation
21 easement that protects and restricts activities on land owned by Toni and Peter Thompson
22 ("Easement" and "Easement Property"). The issues remaining in controversy for trial were (1)
23 defendants' liability for Easement violations pursuant to Civil Code section 815.7; (2)
24 affirmative defenses of failure to state a claim (First), comparative fault (Second), failure to
25 mitigate damages (Fourth), estoppel (Fifth), release of liability (Sixth), waiver (Seventh),
26 approval and ratification (Eleventh), and Settlement (Twelfth); and (3) remedy. At trial call,
27 defendants waived their right to a jury. The Court conducted a bench trial for 19 court days
28 between July 27 and September 14, 2018. Andrew Schwartz, Sarah Sigman, and Marlene

1 Dehlinger of Shute, Mihaly & Weinberg, LLP appeared on behalf of Trust. Gary Gorski of the
2 Law Offices of Gary Gorski appeared on behalf of defendants. The Court heard an opening
3 statement by Trust (defendants waived an opening statement), evidence, defendants' motion for
4 judgment under Code of Civil Procedure section 631.8, and closing arguments, and also
5 received substantial briefing before, during, and after trial.

6 BACKGROUND FACTS

7 The evidence presented at trial established the following facts. Other material facts are
8 recited in the Analysis section below.

9 Trust holds a conservation easement over property owned in fee by Peter and Toni
10 Thompson as trustees of the Amended and Restated Thompson Family Living Trust (1998)
11 ("Thompson Living Trust"). Trial Exhibit ("Ex.") 5. The Easement permanently protects the
12 natural, open space, ecological, and scenic values of the Easement Property (collectively, the
13 "Conservation Values"), which include an exceptionally intact ecosystem dominated by largely
14 undisturbed native vegetation. *See, e.g.*, Ex. 4 Recitals C-H. To this end, the Easement prohibits
15 or significantly restricts most activities on the Easement Property, including building of roads,
16 cutting of vegetation, grading or recontouring of soils, dumping of waste, alteration of drainage,
17 and planting new vegetation. It also gives Trust the right to enter the Easement Property as
18 necessary to enforce the Easement. Ex. 4 § 3.2.

19 In the fall of 2014, Toni and Peter Thompson contracted with Hess Landscape
20 Construction, Inc. ("Hess") to relocate three mature oak trees from the southern end of the
21 Easement Property to the neighboring parcel adjacent to the northern boundary of the Easement
22 Property, which they own through defendant Henstooth Ranch, LLC ("Henstooth Property" and
23 "Henstooth"). Ex. 61. Between September and November 2014, Hess uprooted, encapsulated or
24 "rootballed," and dragged one oak tree to a location adjacent to the new home that the
25 Thompsons were building on the Henstooth Property. *See* Exs. 51, 61, 66. That tree, referred to
26 as the "Dead Tree," did not survive relocation and was promptly cut up and hauled away. Hess
27 attempted to uproot and relocate a second tree on the Easement Property (the "Boulder Tree"),
28 but was unable to do so due to large boulders entangled in its root system. *Id.* Hess uprooted and

1 moved a third large oak tree (the “Driveway Tree”) from the Easement Property and replanted it
2 in the middle of the driveway in front of the Thompsons’ new home on the Henstooth Property.
3 *Id.* Both Peter Thompson and Trust’s arborist, John Meserve, testified that the Boulder Tree and
4 Driveway Tree have since died.

5 Pacific Gas and Electric (“PG&E”) holds an easement for electric utility lines along the
6 western boundary of the Easement Property, which preexisted and overlaps with a portion of,
7 and is senior to, Trust’s conservation easement. Testimony showed that the Driveway Tree
8 originally stood at the edge of PG&E’s easement but the Dead and Boulder Trees were located
9 on portions of the Easement outside of PG&E’s utility easement.

10 To drag the three oak trees from the far end of the Easement Property to the Henstooth
11 Property, Hess bulldozed a haul road that Trust staff testified to measuring as approximately 1/3
12 mile long. *See* Ex. 50. Hess—assisted on some occasions by Lunny Engineering (“Lunny”), a
13 contractor working for defendants primarily on construction of the new home on the Henstooth
14 Property—also removed an estimated twelve additional, smaller trees in the process of creating
15 this haul road, and cleared other vegetation and naturally occurring rocks and boulders from its
16 route. Ex. 51. Evidence shows that Erik Hess and Mr. Thompson were in regular contact about
17 the status and decisions related to this work, and that Toni Thompson also participated in
18 decisions regarding the work. *E.g.*, Exs. 51-64.

19 At Peter Thompson’s direction, Lunny also removed sediments dredged from a pond on
20 the Henstooth Property and dumped them near the northwestern corner of the Easement
21 Property, without seeking or obtaining county permits and without consulting with a qualified
22 geotechnical engineer or keying the deposited sediments into the slope on which it was dumped
23 to ensure stability. Lunny also regraded and cleaned up disturbed portions of the Easement
24 Property on at least two occasions, to minimize and disguise the extent of defendants’ activities.
25 Ex. 98. He also installed a culvert where the haul road approached the Henstooth Property, to
26 restore flow where construction of the road had blocked a natural drainage swale. At Peter
27 Thompson’s direction, Lunny reseeded disturbed areas of the Easement Property on two
28 occasions with an unknown seed mix.

1 Trust first learned of possible Easement violations in late October 2014. Staff
2 immediately began attempts to contact Toni Thompson, who was the designated point of
3 contact, according to Trust files. *See* Ex. 9. Both Toni and Peter Thompson corresponded with
4 Crystal Simons, Trust's Conservation Easement Program Manager, in the following days,
5 culminating in a site visit to the Easement Property by Ms. Simons and Robert Neale, Trust's
6 Stewardship Director, on October 28, 2014. Prior to and during that site visit, first Toni and then
7 Peter Thompson informed Ms. Simons and Mr. Neale that they were acting to save the
8 Driveway Tree from planned pruning by PG&E. Ex. 9. This was a lie. Testimony, text
9 messages, and emails showed that Greg Wheeldon, PG&E's contractor in charge of vegetation
10 management on the Easement Property, informed Mr. Thompson that, because the crown of the
11 Driveway Tree was 55 feet below the PG&E power lines and the 180-year-old tree was growing
12 only a few inches per year, PG&E was unlikely to need to trim the Driveway Tree during its
13 lifetime. Instead, defendants told Trust this story—and asked others to repeat this story—to
14 obscure their own violations of the Easement and obstruct Trust's investigation of those
15 violations.

16 Defendants also sought to minimize and affirmatively hide the extent of their activities on
17 the Easement Property during the October 28, 2014 site visit by hiding the fact that they had
18 already relocated, cut up, and hauled away the Dead Tree and uprooted but been unable to move
19 the Boulder Tree. Defendants also limited Ms. Simons' and Mr. Neale's access to portions of the
20 Easement Property, including the location of the pond sediments, to conceal their violations of
21 the Easement. Following that site visit, defendants repeatedly rescheduled and cancelled a
22 requested follow up visit (Exs. 10, 12-16), placed unreasonable demands on that visit to further
23 delay it (Ex. 18), caused their attorney to write Trust staff threatening letters (Exs. 17, 113A),
24 and falsely told Trust staff that they had not cut down or relocated other trees from the Easement
25 Property beyond the Driveway Tree.

26 Trust sent defendants a formal notice of violation on December 9, 2014, in which Ms.
27 Simons identified the Easement Violations known to Trust at that time and steps required for
28 defendants to remedy those violations. Ex. 23. Over the following months, defendants initially

1 stated that they would work with Trust to restore the harm to the Easement Property but then
2 repeatedly refused to engage in serious or good faith efforts toward that end. *See* Exs. 113A-
3 113G, 32.

4 In July 2015, defendants ultimately engaged a qualified restoration contractor
5 recommended by Trust, Michael Jensen of Prunuske Chatham, Inc., to provide
6 recommendations regarding steps needed to restore the Easement Property. At defendants'
7 direction, Mr. Jensen prepared and revised a memorandum describing the general steps he
8 would recommend to repair the sloping hillside damaged by the haul road, remove the culvert,
9 and restore the area covered by dredged pond sediments. *See* Ex. 75. Trust staff reviewed but
10 did not approve all of Mr. Jensen's recommendations. Instead, on November 5, 2015, Trust
11 wrote defendants a letter conditionally approving the steps described by Mr. Jensen to restore
12 the Easement Property, subject to additional requirements set forth in that letter. Exs. 113KK,
13 113LL. Mr. Thompson responded, "You have to be kidding with this???" Ex. 113MM.
14 Defendants refused to restore the Property in conformance with Trust's conditional approval.
15 Trust filed this litigation five days later.

16 Percipient and expert testimony at trial, supported by extensive photographs, maps, and
17 contemporaneous documentation (e.g., Exs. 11, 19, 21, 22, 28-30, 33, 80, 86) demonstrate the
18 truly extraordinary nature and extent of harm to the Easement Property. As set forth in detail in
19 Section III below, the Easement Property was an exceptionally intact ecosystem of
20 predominantly native plants and long-established soils that had evolved over thousands of years
21 with minimal disturbance. Defendants' uprooting and dragging of mature, heavy oak trees along
22 a roughly constructed haul road scraped away these fragile plant and soil systems, cutting down
23 to bedrock in several locations. *See* Exs. 19, 86. This disturbance created the conditions for
24 erosion to create gullies and remove additional soil from the disturbed slope and for invasive
25 species to out-compete the preexisting, native perennial plants. Dredged sediments on the
26 Easement Property also introduced and fostered growth of invasive and noxious weeds.

27 Despite the severe harm that clearly resulted from their activities, in knowing violation of
28 the Easement, defendants continued to object up to and throughout trial that conditions on the

1 Easement Property appeared to them to be largely recovered and aesthetically fine. They refused
2 to acknowledge the ecological values of the pre-violation physical conditions of the Easement
3 Property or the protections that the Easement provides to those undisturbed conservation values.

4 ANALYSIS

5 The Court finds that Trust has carried its burden to establish each defendant's joint and
6 several liability for numerous and extensive violations of the Easement pursuant to the terms of
7 the Easement and Civil Code 815 et seq. Defendants have not carried their burden to establish
8 the factual or legal basis for any defense.

9 For defendants' extensive violations, the Easement and the California Civil Code require
10 defendants to pay (1) the cost to prepare and implement a plan to restore the Easement Property
11 to its condition prior to the damage, (2) Trust's staff costs to enforce the Easement, and (3) the
12 cost of Trust's experts to develop a restoration plan. At trial, Trust submitted largely
13 uncontroverted evidence that the cost to restore the Easement Property is \$392,670, staff costs
14 are \$92,286, and expert costs are \$90,943, for a total of \$575,899. The Court finds that the
15 evidence presented at trial fully supported the entire amount of requested damages.

16 The Easement also entitles Trust to injunctive relief to implement the restoration plan.
17 The Court finds that such relief is appropriate and necessary here, where defendants have a
18 documented history of obstructing access to the Easement Property and where they continued to
19 reject the Easement's requirements and enforceability during trial.

20 I. Defendants violated the Easement.

21 Defendants violated the Easement despite knowledge of its restrictions, with destructive
22 results to the Easement Property and its protected conservation values, on numerous occasions
23 over the course of more than a year. The evidence at trial demonstrated that defendants had
24 notice of the terms of the Easement and knew that their actions violated those terms. See Ex. 8.
25 Nonetheless, they hired contractors to remove mature oak trees from and dump dredged
26 sediment on the Easement Property for the benefit of Henstooth and the Henstooth Property on
27 which they were building a new home. They sought on numerous occasions to hide their actions
28 to avoid discovery by Trust and, once Trust learned of the violations, fabricated excuses to

1 obstruct Trust's investigation and avoid enforcement of the Easement against them. *E.g.*, Ex. 9.
2 Each action taken on the Easement Property that violated the Easement benefitted Henstooth
3 and the Henstooth Property at the direct and corresponding expense of the Easement Property
4 and harm to the conservation values protected by the Easement. Testimony and documentary
5 evidence both demonstrated that both Peter and Toni Thompson acted intentionally in both their
6 individual capacities and as members of Henstooth. Accordingly, all three defendants are jointly
7 and severally liable for the remedies set forth in Section III below.

8 **A. Peter Thompson violated the Easement.**

9 The Easement binds Peter and Toni Thompson. Ex. 4 §§ 11, 18. They purchased the
10 Easement Property in 2013 and are its sole owners. Ex. 5. Evidence and testimony demonstrate
11 that both Peter and Toni Thompson had notice of the Easement's restrictions and provisions. *See*
12 Exs. 8, 51. Photographs (e.g., Exs. 11, 19, 50), texts (Ex. 51), and emails (e.g., Exs. 52-69) that
13 Trust put in evidence, as well as defendants' own admissions, establish defendants' extensive
14 violations of the Easement.

15 The Court finds, based on photographs, emails, texts, and testimony by both Mr. Splitter
16 and Mr. Jensen regarding contemporaneous photographs, that defendants caused the grading of a
17 new haul road approximately 1/3-mile down the length of the Easement Property in violation of
18 sections 4.2, 4.3, 5.5.3, 5.7, 5.8, 5.13, and 7.2 of the Easement.¹ Creation of the haul road caused
19 the movement of more than 3,000 cubic yards of dirt and boulders to create the haul road,
20 without a grading permit or required Stormwater Pollution Prevention Plan ("SWPPP").
21 Testimony by Mr. Thompson and Erik Hess, as well as photographs and correspondence, show
22

23 ¹ Key to Sections of Easement:
24 3.2 – Property Inspections
25 4.2 – Protection of Conservation Values
26 4.3 – Compliance with Laws
27 5.5.3 – Roads
28 5.7 – Motorized Vehicles
5.8 – Soil Degradation
5.12 – Storage/Dumping
5.13 – Surface Alteration or Excavation
5.14 – Tree Removal
7.2 – Written Approval of Vegetation Management

1 that Mr. Thompson caused the pruning and then dragging of two large, mature oak trees, both of
2 which died, the length of the haul road to plant near the house defendants were building on the
3 adjoining Henstooth Property. Mr. Thompson also testified at trial that he caused the excavation
4 of another oak tree on the Easement Property in an unsuccessful and ultimately fatal attempt to
5 move it to the Henstooth Property. These tree relocation activities violated sections 4.2, 5.14,
6 7.2, 5.7, and 7.2 of the Easement. The weight of evidence—including both Mr. Thompsons’
7 texts with Mr. Hess and Ms. Simons’ overlay of aerial photographs (Exs. 51, 21)—established
8 that defendants destroyed an additional twelve trees to create the haul road, in violation of the
9 same Easement provisions.

10 Mr. Thompson also caused Lunny to grade an additional section of the haul road to move
11 the pond sediments from the Henstooth to the Easement Property, also without a grading permit
12 or SWPP, and in violation of sections 4.2, 4.3, 5.5.3, 5.7, 5.8, 5.13, and 7.2 of the Easement. Mr.
13 Thompson caused Lunny to dump pond sediments on the Easement Property, in violation of
14 sections 4.2, 4.3, 5.7, 5.8, 5.12, 5.13, and 7.2 of the Easement. Lunny also excavated or graded a
15 berm to contain the pond sediments, without a grading permit or SWPPP, in violation of
16 Easement sections 4.2, 4.3, 5.7, 5.8, 5.13, and 7.2. Mr. Thompson admitted at trial that he
17 caused Lunny to regrade the haul road, backfill the hole left by removal of the Dead Tree, and
18 cover up the area excavated around the Boulder Tree prior to the October 28, 2014 site visit by
19 Trust staff. Defendants did not have a grading permit or SWPPP for this work, which violated
20 sections 4.2, 4.3, 5.7, 5.8, 5.13, and 5.14 of the Easement. At Mr. Thompson’s direction, Lunny
21 regraded and seeded the haul road and disturbed portions of the Easement Property in November
22 2014 and again in November 2015, without a grading permit or SWPPP, in violation of
23 Easement sections 4.2, 4.3, 5.7, 5.8, 5.13, and 7.2 of the Easement. Testimony and
24 correspondence showed that Peter Thompson also interfered with Trust’s proper inspection of
25 the Easement Property on 13 occasions, acting in conjunction with Toni Thompson on several of
26 these occasions. E.g., Ex. 9. This interference violates sections 3.2 and 4.2 of the Easement.

27 The Court finds that Mr. Thompson violated the Easement in each of the instances
28 summarized above. The Court further finds that these violations were knowing and intentional,

1 and that they demonstrated an arrogance and complete disregard for the mandatory terms of the
2 Easement.

3 **B. Toni Thompson violated the Easement.**

4 As set forth above, Toni Thompson is an owner of the Easement Property who had notice
5 of and is bound by the Easement. Defendants contend that Ms. Thompson played no role in the
6 activities that violated the Easement. The Court finds that defendants' testimony is not credible
7 and is contradicted by extensive evidence, as described below. In addition, the Court has
8 previously determined that Ms. Thompson is a necessary party as a fee owner of the Easement
9 Property. And as a party to the Easement she is jointly and severally liable for the violations of
10 others with whom she shares Grantor status. Ex. 4 § 19.5 ("The obligations imposed by this
11 Easement upon Grantor shall be joint and several."). This provision ensures that owners are
12 responsible for the actions of other grantors/owners, as well as any third party hired by a grantor
13 to undertake activities that violate the Easement for their benefit. *See generally* Civil Code
14 section 1431, *Richards v. Owens-Illinois, Inc.* (1997) 14 Cal.4th 985, 993-94. Thus, Toni
15 Thompson is liable for Peter Thompson's admitted violations of the Easement as well as
16 violations committed by Hess and Lunny at the admitted direction of Peter Thompson and based
17 on her own payments of those contractors' invoices. *See* Ex. 46, 48, 100.

18 The trial record contains abundant evidence that Toni Thompson was directly involved in
19 multiple violations of the Easement. On October 24, 2014, when Trust first learned that
20 defendants were removing trees from the Easement Property, Ms. Simons testified that she
21 emailed Toni Thompson because Ms. Thompson was listed as the contact in Trust's records.
22 Both Peter and Toni Thompson wrote to Trust to explain their joint actions in moving the
23 Driveway Tree. Ex. 9-3.

24 In an email on October 26, 2014 (Ex. 9-3), Ms. Thompson affirmatively misled Trust by
25 misrepresenting that defendants were moving the Driveway Tree due to PG&E's actions "to
26 mitigate tree loss." The Court finds that Ms. Thompson knew this statement was false at the
27 time she made it. On October 28, 2014, earlier on the day that Trust staff first gained access to
28 the Easement Property, to delay Trust's inspection of the Property, Ms. Thompson

1 misrepresented to Trust that Mr. Thompson delayed his response to Ms. Simons' October 24
2 email because Mr. Thompson's email was not working, so that he had to use her email account.
3 Ex. 10. The weight of evidence at trial indicated that the Thompsons' representation regarding
4 problems with Mr. Thompson's email account were part of, and consistent with, their effort to
5 delay Trust's inspection while defendants rushed to move the Dead Tree to the Henstooth
6 Property before being observed by Trust staff. *See also* Ex. 51. Ms. Thompson knew that Mr.
7 Thompson's representation was false because she had sent Mr. Thompson four emails the
8 previous day (Ex. 118-2), and Mr. Thompson exchanged emails with Mr. Wheeldon, Hess, and
9 Myrick on October 25, 26, and 27 (Exs. 37, 64, 65).

10 In the October 28, 2014 email to Ms. Simons using Ms. Thompson's account, Mr.
11 Thompson stated:

12 *We personally hired an arborist through our contractor who was retained to*
13 *relocate the tree, . . . We also did testing for Sudden Oak Death Syndrome . . .*
14 *To our knowledge permits are not required when a public utility is involved in*
15 *relocating and/or removing a tree, . . . We are advised this is not a protected oak*
16 *tree, nor was it designated landmark or heritage. . . We agreed to relocate this tree*
17 *in order to save it from being topped [by PG&E] and ruined aesthetically as was*
18 *the case with a number of trees in the easement previously. We understood too that*
19 *our relocating the tree would likely spare it from dying, since topping a tree by 25*
20 *– 30% can result in the tree's dying. It was our intention to preserve this tree in its*
21 *natural form.*

22 Ex. 10 (emphases added). Ms. Thompson's four emails to Mr. Thompson the previous day
23 concerned issues related to the Easement Property or Easement violations, further supporting
24 Mr. Thompson's representation that he and Ms. Thompson were making decisions jointly. Ex.
25 118-2.

26 Two weeks later, Toni Thompson's attorney wrote to Trust: This firm represents *Toni*
27 *and Peter Thompson, Managers of Henstooth, LLC.*" Ex. 17 (emphasis added). According to the
28 attorney, "[t]he Thompsons sought out one of two contractors who specialize in relocating
ancient oak trees, contracted with them, advised them of the limitations imposed by the
Conservation Easement, and placed *their* trust in the contractor to remove the tree in keeping
with the terms of the Conservation Easement." *Id.* Thus, both Mr. Thompson and the
Thompsons' attorney informed Trust from the outset that Toni and Peter Thompson jointly

1 undertook the work that violated the Easement.

2 Confirming these early accounts of Ms. Thompson's role, numerous documents show her
3 direct participation in the Easement violations. She participated in the selection of trees to move
4 to the Henstooth property and then denied doing so during her trial testimony. Ex. 51-7 (text
5 from P. Thompson to E. Hess dated Oct. 14, 2014: "My wife says go for the other one if u think
6 it's a safer bet."). Ms. Thompson helped to hire Erik Hess. Ex. 61. Mr. Hess testified—via a
7 video of his deposition played at trial—that he met Ms. Thompson at the site of the Dead Tree
8 as the tree was being dug up and prepared for moving to Henstooth. The Court finds that Ms.
9 Thompson was evasive and notably and selectively unable to remember events during her trial
10 testimony. The Court does not find Ms. Thompson's testimony credible regarding either her role
11 in selecting trees or her knowledge, participation in, and viewing of the tree relocation activities.

12 Ms. Thompson was directly involved in the landscaping of the Henstooth home, plans for
13 which called for two large oak trees. *See* Exs. 39-43. Tellingly, while defendants' landscape
14 designer, Loretta Murphy, produced her invoice for work done in 2015—after defendants'
15 violations (Ex. 43)—neither Ms. Murphy nor defendants were able to produce her 2014 invoice
16 that might show Toni Thompson's involvement in moving trees from the Easement to Henstooth
17 to implement Ms. Murphy's landscape plan. Ms. Murphy's testimony about her missing
18 invoices and her work with defendants was evasive, grudging, significantly incomplete, and
19 simply not credible. Defendants' and Ms. Murphy's failure to produce Murphy's 2014 invoice
20 raises the presumption that it would contain adverse evidence; namely, Toni Thompson's
21 involvement in stealing trees. *See* CACI Jury Instructions 203, 204.

22 Ms. Thompson also paid Hess and Lunny to perform work that violated the Easement;
23 her signature appears on many checks made out to each. Exs. 46, 48, 100. In each instance, Ms.
24 Thompson signed the check on behalf of CRS, LLC, the entity through which the Thompsons
25 paid for construction of the Henstooth house, and of which Ms. Thompson is a member and
26 owner. *Id.*; Exs. 120, 121. Thus, defendants' own evidence shows that Toni Thompson paid the
27 bills for, and thus participated in, the Easement violations.

28 Each of these contemporaneous communications constitutes evidence that Toni

1 Thompson participated in directing the work that violated the provisions of the Easement
2 identified in Section I.A, above. Independent of her status as an owner of the Easement Property
3 and a necessary party, Ms. Thompson is liable for her own violations of the Easement and her
4 work with contractors in clear violation of its terms.² *See also* Ex. 4 § 9 (“This Easement shall
5 not be construed to preclude Grantor’s right to grant access to the Property to third parties,
6 provided that such access . . . is not inconsistent with the Conservation Purpose of this
7 Easement.”).

8 **C. Henstooth Ranch, LLC is liable for its members’ violations of the Easement.**

9 Mr. and Ms. Thompson testified at trial that they are the sole members of defendant
10 Henstooth Ranch, LLC, through which they own the 48-acre vineyard property adjacent to the
11 Easement Property, which is also the site of their new home. Mr. Thompson also testified—and
12 the Court finds—that relocating the Driveway Tree to the Henstooth Property benefited
13 Henstooth and the Henstooth Property. The Court also finds that disposal of dredged sediment
14 from the Henstooth pond on the Easement Property, out of view of the Thompsons’ home and
15 without the expense of hauling the sediments offsite, benefitted Henstooth.

16 Conservation easements, including the Easement at issue in this litigation, are interests in
17 real property. They are not contracts with associated limits based on privity. Accordingly,
18 conservation easements can be enforced against anyone who violates their terms, whether that is
19 the grantor of the easement, a successor in interest to the grantor, or a third party.

20 The evidence at trial was overwhelming that Peter and Toni Thompson directed and paid
21 for numerous activities that they knew violated the Easement, each of which benefitted
22 Henstooth and the Henstooth Property at the expense of the Easement Property and the
23 conservation values protected by the Easement. In doing so, Peter and Toni Thompson acted
24 both in their individual capacities and as members of Henstooth. Their violations are thus

25
26 ² Defendants challenge any finding of liability for Ms. Thompson based on the actions of Peter
27 Thompson, attributed to her via theories of vicarious liability or agency. Neither provides the
28 basis of the Court’s finding, which rests on credible evidence establishing Ms. Thompson’s own
and direct participation in the activities that violated the Easement, reinforced by the Easement’s
provision for joint and several obligations.

1 attributable to the LLC, which is jointly and severally liable for the violations described in
2 Sections I.A and I.B above.

3
4 **1. Conservation easements are enforceable against violations by third parties.**

5 Civil Code section 816 provides that California's conservation easement statutes should
6 be "liberally construed" to "effectuate the policy and purpose" of the statute, i.e., preserving
7 land in its natural and scenic state and encouraging the creation of conservation easements. *See*
8 *also* Civil Code section 815 ("[P]reservation of land in its natural, scenic, agricultural, historical,
9 forested, or open-space condition is among the most important environmental assets of
10 California."). Prohibiting enforcement against third parties would allow a broad category of
11 easement violations to go unchecked, undercutting the Legislature's stated policy.

12 Conservation easements are interests in real property, rather than contractual rights. *See*
13 *id.* section 815.2. The Civil Code authorizes the easement holder to enforce "the interest
14 intended for protection" by seeking injunctive relief and damages. Civ. Code § 815.7(b). Civil
15 Code section 815.7(c) provides that "the holder of an easement shall be entitled to recover
16 money damages for *any* injury to such easement or to the interest being protected thereby *or* for
17 the violation of the terms of the easement." Emphasis added; *see also* Rest.3d Prop: Servitudes,
18 § 8.5 ("[A] conservation servitude . . . should be vigorously protected by the full panoply of
19 remedies available to protect property interests."). Section 815.7(c) goes on to state "In
20 assessing such damages there may be taken into account, in addition to the cost of restoration
21 and other *usual rules of the law of damages*, the loss of scenic, aesthetic, or environmental value
22 to the real property subject to the easement." Emphasis added. Under the "usual rules of the law
23 of damages," Trust can recover against Henstooth because Henstooth damaged the conservation
24 values of the Easement Property. *Cf. Posey v. Leavitt* (1991) 229 Cal.App.3d 1236, 1252.

25 Holders of all types of easements have authority to enforce their easement rights against
26 third party violators, such as Henstooth. *See id.* (enforcing easement against third party for
27 interference); *Pasadena v. California-Michigan Land & Water Co.* (1941) 17 Cal.2d 576, 577
28 (holder of overlapping, junior easement could not interfere with senior easement); *see also* Civil

1 Code section 809 (“The owner of any estate in a dominant tenement, or the occupant of such
2 tenement, may maintain an action for the enforcement of an easement attached thereto.”). Both
3 the Civil Code provisions that specifically govern conservation easements and a longstanding
4 line of cases and statutory authority governing easements of any type thus direct that Trust is
5 entitled to enforce the Easement, including its full range of remedies, against *any* violator,
6 without regard to privity. A contrary rule would allow grantors of conservation easements or
7 their successors to violate the easement at will by acting through a third party. The Legislature
8 did not permit such a result.

9 Defendants contend that Civil Code section 815.7’s provision that “[n]o conservation
10 easement shall be unenforceable by reason of lack of privity of contract” was intended to
11 override caselaw that limited the rights of easement holders to relief against successors in
12 interest of the original grantors of the easement. This argument does not relieve Henstooth of
13 liability for three reasons. First, section 815.7(c) and caselaw providing that *any* person may be
14 held liable for damage to an easement are controlling, regardless of whether the person or entity
15 damaging the easement property has privity with the original grantor of the easement.

16 Second, defendants rely not on Civil Code section 815.7’s own legislative history, but
17 instead on the 2007 version of the Uniform Conservation Easement Act (“Uniform Act”). The
18 Uniform Act, first approved by the American Bar Association in 1982—several years after
19 California’s conservation easement statutes were enacted in 1979—proposes model language for
20 conservation easement legislation in the United States. However, California’s conservation
21 easement statute provides broader rights to the easement holder to enforce the easement against
22 third parties than the Uniform Act. By providing that conservation easements can be enforced
23 against parties whose land is not benefited (Civ. Code § 815.7(a)), California has indicated that
24 holders of easements may enforce them against parties other than the successor to the grantor.
25 *See also* Civil Code section 816.

26 Third, even if the “privity” language was interpreted as narrowly as defendants allege it
27 should be, it is not a limitation on the enforcement of conservation easements. Rather, it would
28 eliminate one obstacle to enforcing such easements against successors to the original grantor and

1 does nothing to limit the enforceability of conservation easements against parties with no privity
2 provided under section 815.7(c) and longstanding California case law.

3 **2. The Easement is enforceable against violations by third parties.**

4 Defendants also make a variety of arguments—many for the first time after the close of
5 trial, and without relevant authority—that the Easement is unenforceable against third parties
6 who lack notice of its terms. But like other claims for violation of property interests including
7 trespass and nuisance, violation or interference with easements sounds in tort. *See Orange*
8 *County Water Dist. v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 402; *Roth*
9 *v. Cottrell* (1952) 112 Cal.App.2d 621, 624-25; *cf.* Civ. Code § 815.7(c) (“the holder of an
10 easement shall be entitled to recover money damages for *any* injury to such easement or to the
11 interest being protected thereby *or* for the violation of the terms of the easement” [emphasis
12 added]). The owner of the property interest has no obligation to warn a stranger not to violate its
13 right or interfere with its lawful use. *See Cassinos v. Union Oil Co.* (1993) 14 Cal.App.4th 1770,
14 1780 (“one who intentionally enters land in the possession of another without a privilege to do
15 so is liable although he acts under a mistaken belief of law or fact” [quotation omitted]). For the
16 same reason, a trespasser or violator of an easement has no due process right to notice of
17 precisely which property rights and restrictions its unlawful activity might violate. Defendants’
18 citation to *FCC v. Fox TV Stations, Inc.* (2012) 567 U.S. 239, 253, on this point is wholly
19 inapposite. In that case, the Court addressed the need for “fair notice” prior to penalizing a
20 television broadcaster for content that was not clearly encompassed by a regulation. *Id.* Here,
21 Trust is simply enforcing its clearly granted interest in the Easement Property.

22 Regardless of these basic principles, the third party at issue here, Henstooth, was fully
23 aware of the restrictions of the Easement. *E.g.*, Ex. 8 (email from T. Thompson to Trust dated
24 April 29, 2013: “We have had a chance to review the easement and its terms and restrictions.
25 We have also walked the property itself to become familiar with its characteristics.”); Ex. 63
26 (email from E. Hess to P. Thompson dated Sept. 29, 2014: “Is there something I should know
27 about . . . ?” and response from P. Thompson: “No it’s just supposed to be left in its natural
28 state. So the quicker the better.”); Ex. 51-10 (text from P. Thompson to E. Hess dated Oct. 17,

2014: “Or at least get it out of the hole and down a bit so u could backfill it? Then if the preserve people came Monday we could say it was under the power lines?”); Ex. 51-14 (text from P. Thompson to E. Hess dated Oct. 23, 2014: “Is tree set? Someone called land preserve people on me. When is big tree coming down?”); Ex. 51-15 (text from P. Thompson to E. Hess dated Oct. 27, 2014: “If u guys didn’t take so long we would’ve been under the radar!!!”). Henstooth, through its members Peter and Toni Thompson, knew that the Easement protected the Easement Property and that relocation of trees, dumping of dredged sediments, and associated activities violated the Easement. It has no defense to liability based on notice or due process.³

3. Henstooth is liable for the actions of its members.

Trust’s claims for Easement violations lie against Henstooth for the additional reason that “every member is an agent of the limited liability company for the purpose of its business or affairs.” Corporations Code section 17703.01(a). Toni and Peter Thompson testified that they are the sole members of Henstooth Ranch, LLC. Defendants testified that Henstooth owns, manages, grows grapes on, and built a house on the Henstooth Property. Maintaining that property by dredging the pond and landscaping the new home site are entirely consistent with the “business and affairs” that defendants have attributed to Henstooth.⁴

Accordingly, the Court finds that Peter and Toni Thompson acted as members and on behalf of Henstooth when they took action in violation of the Easement to obtain valuable trees

³ Defendants also contend that Trust should have brought its claims under theories of trespass, nuisance, interference with the easement, or conversion. As set forth above, Trust’s claim for violation of Civil Code section 815.7 is for interference with a conservation easement, which sounds in tort. Moreover, an easement holder cannot bring claims for trespass against the fee owner of the eased land. *McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1174 (“The essence of the cause of action for trespass is an unauthorized entry onto the land of another.” [quotation omitted]). And Trust does not own the trees that defendants removed from or killed on the Easement, thus precluding a claim for conversion. See CACI 2100. Rather, the public owns the conservation values on the Easement Property; Sonoma Land Trust holds the Easement as the trustee of those resources for which the public has provided compensation in the form of tax deductions and reduced assessed property values. See *Conservation Easements: Perpetuity and Beyond*, 34 Ecology L.Q. 673, 677 (“donation of a perpetual conservation easement to a municipality or land trust . . . creates a charitable trust relationship”).

⁴ By contrast, no individual owner of a property would tear it up at significant expense and in clear violation of an enforceable restriction for no purpose or benefit (and there was no benefit whatsoever to the Easement Property). It is undisputed that all harms were to the Easement Property and all benefits accrued to the Henstooth Property.

1 for the Henstooth Property and to dispose of Henstooth's dredged sediment on the Easement
2 Property. Their actions are thus attributable to Henstooth for purposes of liability. Corporations
3 Code section 17703.01(a); *cf. Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th
4 992, 1004 ("where the employee is combining his own business with that of his employer, or
5 attending to both at substantially the same time, no nice inquiry will be made as to which
6 business he was actually engaged in at the time of injury, unless it clearly appears that neither
7 directly nor indirectly could he have been serving his employer").

8 **D. Defendants' liability is joint and several.**

9 Section 19.5 of the Easement directs that "[t]he obligations imposed by this Easement
10 upon Grantor shall be joint and several." Ex. 4 § 19.5. This provision ensures that owners are
11 responsible for the actions of other grantor/owners, as well as any third party hired by a grantor
12 to undertake activities that violate the Easement for their benefit. *See generally* Civil Code
13 section 1431, *Richards v. Owens-Illinois, Inc.* (1997) 14 Cal.4th 985, 993-94. Here, the joint and
14 several liability extends to Henstooth because all three defendants are joint tortfeasors whose
15 intentional, wrongful acts caused significant harm to the easement property. *See PMC, Inc. v.*
16 *Kadisha* (2000) 78 Cal.App.4th 1368, 1381; Corp. Code § 17703.01(a); *Western Surety Co.*, 8
17 Cal.App.5th at 131.

18 As set forth above, the Court finds that Peter and Toni Thompson worked together to
19 develop and implement a plan to move mature oak trees from the Easement Property to be
20 planted in front of their shared residence on the Henstooth Property, in knowing violation of the
21 Easement. They each substantially assisted the other in carrying out this common plan, giving
22 them equal liability for the resulting harms to the Easement Property. *Navarrete v. Meyer* (2015)
23 237 Cal.App.4th 1276, 1286. All of their actions were joint and intentional, and resulting
24 damages are indivisible and therefore not subject to apportionment. *I-CA Enterprises, Inc. v.*
25 *Palram Americas, Inc.* (2015) 235 Cal.App.4th 257, 271. The Court further finds that Mr. and
26 Ms. Thompson carried out their Easement violations both as individuals acting together and as
27 members of Henstooth. The roles were indistinguishable based on the evidence at trial because
28 all of the benefits of the violations accrued to Henstooth and all of the harm was to the Easement

1 Property.

2 For example, as set forth above in Section I.B, the court finds that Peter and Toni
3 Thompson worked together to plan for tree relocation. Ex. 10. The Thompsons then jointly
4 engaged contractors Hess and Lunny to carry out work on the Easement Property in clear
5 violation of the Easement. Exs. 17, 61. They jointly chose which trees Hess was to move. Ex 51-
6 7. They further worked in concert to delay Trust's inspection of the Easement Property while
7 hurrying to move the Dead Tree to the Easement Property before a site visit from Trust staff.
8 Exs. 10, 51. While Mr. Thompson admitted at trial to directing Hess and Lunny's actions, Ms.
9 Thompson participated in development of a landscaping plan for the Henstooth Property that
10 called for planting two large oak trees and wrote checks to pay Hess and Lunny for grading the
11 haul road and moving the trees. Exs. 39-43, 46, 48, 100.

12 In sum, the weight of evidence clearly demonstrates that both Peter and Toni took
13 intentional actions that violated the Easement for the benefit of Henstooth and the Henstooth
14 Property. As a result, Peter Thompson, Toni Thompson, and Henstooth Ranch, LLC, are all
15 jointly and severally liable for all harm to the Easement Property.

16 **II. None of defendants' defenses to liability for violating the Easement has merit.**

17 Defendants pled twelve affirmative defenses. The Court rejected four of these defenses—
18 Trust's consent, acceptance of performance, impossibility, and unclean hands (3rd, 8th, 9th, 10th
19 Defenses)—in its August 10, 2017 order partially granting Trust's Motion for Summary
20 Adjudication. The Court found disputed issues of fact regarding PG&E's consent (2nd Defense),
21 Trust staff's failure to object upon discovering the Easement violations (5th, 7th, 11th
22 Defenses), and defendants' claim that they settled the case (12th Defense). The August 10, 2017
23 Order denied Trust's motion as to the 4th and 6th Defenses (failure to mitigate damages and
24 release) without discussion. Defendants also pled an additional 1st defense based on an
25 unspecified failure to state a claim.

26 At the outset of the trial, the Court granted Trust's motions in limine Nos. 2 and 3 to
27 exclude evidence of Trust's staff's failure to object to defendants' violations (5th, 7th, 11th
28 Defenses) and PG&E's alleged consent (2nd Defense) because each of these defenses is legally

1 irrelevant to Trust's claims. The Court invited defendants to submit evidence that Trust released
2 defendants or that the case had been settled (6th and 12th Defenses).

3 Despite these preliminary rulings, the Court took testimony from Mr. Wheeldon
4 regarding communications between PG&E's representatives and defendants. The Court also
5 took testimony and extensive documentary evidence regarding Trust staff's conversations with
6 Mr. Thompson, including Mr. Neale's alleged failure to object to defendants' tree moving
7 activities. The Court also heard testimony from defendants and from Mr. Bannon and Mr.
8 Thompson regarding failed settlement negotiations with Trust.

9 **A. PG&E could not, and did not, excuse defendants' Easement violations.**

10 The Court finds that neither Mr. Wheeldon nor any other representative of PG&E told
11 Mr. Thompson that PG&E planned to trim or remove the Driveway, Boulder, or Dead Tree. Nor
12 did Mr. Wheeldon or any other representative of PG&E give or purport to give Mr. Thompson
13 permission to remove or relocate any tree on the Easement Property.

14 Mr. Wheeldon's testimony regarding his assessment of the Easement Property and his
15 communication of that assessment to Mr. Thompson was specific, consistent, and credible. His
16 demeanor at trial was both honest and direct. Mr. Wheeldon explained how he evaluated trees
17 located in and near the portion of the PG&E utility easement that overlaps with the Easement.
18 Ms. Simons' October 28, 2014 photographs of the Driveway tree in relation to the power lines,
19 while the tree was still in its original location, confirm the veracity of Mr. Wheeldon's account.
20 The photographs show that the crown of the tree is a considerable distance from the lines, likely
21 more than 50 feet. Ex. 11-7, 11-8.

22 Mr. Wheeldon also described his statements to Mr. Thompson explaining that PG&E did
23 not need to cut or remove the Driveway Tree and that the Dead Tree was not in the PG&E
24 easement and thus PG&E was not concerned with that tree. Mr. Wheeldon also described and
25 provided a corroborating voicemail in which Mr. Thompson contacted him to object to Mr.
26 Wheeldon's provision of information to Trust. Ex. 38.

27 In sharp contrast, Mr. Thompson admitted during trial that he had not always provided an
28 honest account of his interactions with Mr. Wheeldon and that his verified response to Trust's

1 interrogatories (Ex. 71-3) was false. In addition, Mr. Thompson's testimony regarding these
2 communications was evasive and incomplete, and at best addressed his own subjective
3 understanding of those conversations. In light of Mr. Thompson's admitted falsehoods and the
4 clear, credible evidence to the contrary provided by Mr. Wheeldon, the Court reiterates its
5 finding that no representative of PG&E told Mr. Thompson or any other defendant that PG&E
6 intended to cut or remove any of the three mature oaks that defendants excavated and attempted
7 to relocate.

8 Moreover, the Court finds that any such plan or statement by PG&E would not excuse
9 defendants' Easement violations even if they had occurred. PG&E cannot authorize others to act
10 outside the scope of its own authority (*Gurnsey v. Northern California Power Co.* (1911) 160
11 Cal. 699, 707) and the Thompsons remain bound by the terms of the Easement, regardless of
12 PG&E's rights under its utility easement (*Pasadena v. California-Michigan Land & Water Co.*
13 (1941) 17 Cal.2d 576, 583). Thus, defendants did not stand in PG&E's shoes; even if PG&E had
14 a right to trim trees in its easement to protect its power lines, PG&E's easement did not grant
15 defendants any rights. As a matter of law, Mr. Wheeldon and PG&E could not have excused
16 defendants' Easement violations of the Easement, even if they had attempted to do so, which
17 they did not.

18 **B. Trust staff could not, and did not, verbally approve or excuse defendants'**
19 **Easement violation.**

20 Likewise, the Court finds that neither Mr. Neale nor any other Trust representative gave
21 defendants written or oral permission to relocate the three mature oak trees or dump dredged
22 sediments. Nor did any such written or oral communication constitute a failure to object to
23 defendants' actions or otherwise provide implicit consent. Mr. Thompson testified that Mr.
24 Neale expressed interest in the tree moving activities during the October 28, 2014 site visit and
25 asked to observe transport of the Driveway Tree to the Henstooth Property. Mr. Neale testified
26 that he told Mr. Thompson that Trust staff never would have given defendants permission to
27 move the tree if they had asked, as the Easement required them to do. The Court finds that, even
28 if Mr. Neale had made the statement attributed to him, it would not rise to the level of a waiver

1 or an approval or an estoppel.

2 Mr. Neale and Ms. Simons testified with specific, consistent, and credible detail
3 regarding their conversations and written communications with Mr. Thompson. In sharp
4 contrast, Mr. Thompson's testimony was evasive, incomplete, and at times plainly false
5 regarding these same communications. In particular, the Court notes that Mr. Thompson's
6 ability to recall details and his willingness to answer questions during trial were starkly different
7 depending on whether the answers were favorable to his account.

8 In addition, defendants are precluded from asserting defenses based on oral statements of
9 Trust staff (and they neither claimed nor proffered any written form of permission at trial).
10 Sections 7 and 7.2 of the Easement require prior written approval before the grantor may engage
11 in many activities, including cutting or moving trees and dumping of sediments (grading roads is
12 strictly prohibited). Section 7.2 provides that

13 Grantor understands that any oral approval or oral representations made by
14 Grantee, its officers, employees or agents, does not meet the requirements of this
15 Section, does not otherwise bind or commit Grantee, and *may not be relied on by*
16 *Grantor. To that end Grantor agrees that no oral approval or oral representation*
17 *made by Grantee, its officers, employees or agents, or understood by Grantor to*
have been made by Grantee, its officers, employees or agents, shall be used by
Grantor to assert that Grantee is, in any way, estopped or has made an election or
has waived any provision of this Easement.

18 (emphases added); *see also* Easement § 10.2 ("No delay or omission by [Trust] in the exercise
19 of any right or remedy upon any breach by [the Thompsons] shall impair such right or remedy
20 or be construed as a waiver.")). Accordingly, any defense based on alleged oral statements by
21 Trust staff or representatives also fails as a matter of law.

22 **C. Trust has stated a valid claim for relief under Civil Code section 815.7 and**
23 **the Terms of the Easement.**

24 Defendants make five arguments in support of their defense of failure to state a claim.
25 First, they argue that Trust is not qualified to hold or enforce the Easement because Trust is not
26 a qualified land trust under Internal Revenue Code section 501(c)(3). Second, defendants ask the
27 Court to reconsider its ruling during trial, that the measure of Trust's damages is not damage to
28 Conservation Values as defined in Recital C of the Easement, but rather the diminution in fair

1 market value of the Easement. According to defendants, damages are an element of liability, the
2 Easement did not lose market value as a result of their violations, and so Trust has no claim for
3 relief. Third, defendants made a new argument for the first time in their closing trial brief that
4 Trust improperly named the Thompsons in the Complaint in their individual capacity, rather
5 than as trustees of the Amended and Restated Thompson Family Living Trust (1998)
6 (“Thompson Living Trust”). In addition, defendants claim that Henstooth and Ms. Thompson
7 cannot be held liable for damage to the Easement Property, which the Court has rejected in
8 sections I.B and I.C above.

9 **1. Trust is qualified to hold and enforce the Easement.**

10 Defendants contend that Trust fails to state a claim on the ground that Trust has not
11 proven that it is qualified to hold and enforce the Easement. To the contrary, Trust is clearly a
12 qualified land trust and has the legal authority to enforce the Easement.

13 Under Civil Code section 815.3(a), only certain organizations may acquire and hold
14 conservation easements, including “A tax-exempt nonprofit organization qualified under Section
15 501(c)(3) of the Internal Revenue Code and qualified to do business in this state which has as its
16 primary purpose the preservation, protection, or enhancement of land in its natural, scenic,
17 historical, agricultural, forested, or open-space condition or use.” Contrary to defendants’
18 unsupported allegations to the contrary, evidence demonstrated that Trust is a nonprofit
19 corporation and qualified to hold the Easement in trust under sections 501(c)(3) and 170(h) of
20 the Internal Revenue Code and the regulations thereunder. The Easement states in Recital B:

21 Grantee is a publicly supported, tax-exempt nonprofit corporation and a qualified
22 organization under Section 501(c)(3) and 170(h) of the Internal Revenue Code, as
23 amended, and the regulations thereunder, whose primary purpose is the
preservation, protection and enhancement of land in its natural, scenic historical,
agricultural, forested and/or open space condition.

24 Ex. 4. Civil Code section 815.2 provides that courts should enforce the terms “specified in the
25 instrument creating . . . the [conservation] easement.” In addition, the Grantors of the Easement,
26 Peter and Katherine Drake, and Trust, as Grantee, signed the Easement on December 18, 2009.
27 The signatures were notarized, and the Easement recorded in the Official Records of Sonoma
28 County on December 22, 2009. Section 19.6 of the Easement provides that “The Recitals to this

1 Easement are integral and operative provisions of this Easement.” Section 11 of the Easement
2 and Civil Code section 815.1 provide that Toni and Peter Thompson, as successors to the
3 Drakes, are bound by the terms of the Easement. *Id.* Thus, the Easement itself defeats
4 defendants’ claim.

5 In addition, Trust’s chief financial officer, Paul DeMarco, testified that Trust is a
6 nonprofit qualified to hold the Easement under the Internal Revenue Code and Civil Code
7 section 815. The grantor of the Easement, Katherine Drake, and Trust Staff further testified that
8 Trust holds the Easement in Trust for the people of Sonoma County, the State of California, and
9 the United States, who granted income and property tax reductions to Ms. Drake and the
10 Thompsons in exchange for donating and effectively terminating development and other rights
11 to use the Easement Property. Trust’s mission is, in part, “stewardship including the restoration
12 of conservation properties.” Ex. 6. As the holder of the Easement, Trust is entitled to seek
13 injunctive relief and damages for violations of the Easement. Civil Code sections 815.7(b), (c),
14 (d). Defendants presented no contrary evidence. For each of these reasons, this defense lacks
15 merit.

16 2. Damages are not an element of liability.

17 Defendants argue that the measure of damages for defendants’ harmful activity on the
18 Easement Property is the diminution in value of the Easement and further contend that there is
19 no evidence that the market value of the Easement declined as a result of their activities.
20 Therefore, defendants contend that Trust has failed to state a claim against them for their
21 violations.

22 Damages are not an element of liability under Civil Code section 815.7. Trust may
23 prevail in this case (and secure injunctive relief) by proving that defendants violated the
24 Easement. *See* Civil Code section 815.7(b) (“violation of [a conservation easement’s] terms may
25 be prohibited or restrained . . . by injunctive relief). The Easement also expressly provides that
26 Trust “shall be entitled to . . . injunctive relief” as well as “specific performance of the terms of
27 this Easement, without the necessity of proving . . . actual damages.” Ex. 4 § 10. That Trust may
28 also recover damages for defendants’ Easement violations under Civil Code section 815.7(c) in

1 no way implies that damages are necessary to establish defendants' liability. Damages are not an
2 element of liability for violating the Trust; they are a remedy.

3 Defendants are also incorrect that diminution in market value provides the proper
4 measure of damage to the Easement, as discussed in Section III.A.1 below.

5
6 **3. Toni and Peter Thompson are personally liable for violating the Easement.**

7 Defendants offered a new argument for the first time in their closing trial brief that Trust
8 improperly named the Thompsons in the Complaint in their individual capacity, rather than as
9 trustees of the Thompson Living Trust.

10 As an initial matter, the Court will not entertain a new defense after the close of evidence.
11 Defendants identify no change in facts or legal theories asserted by Trust. In fact, defendants
12 rely solely on the deed pursuant to which they own the Easement Property, which was recorded
13 on April 1, 2013. Ex. 5. Parties cannot litigate a case all the way through the close of trial and
14 then subsequently assert a new defense.⁵ See *Sealite, Inc. v. Finster* (1957) 149 Cal.App.2d 612,
15 618 (defendant receiver named in the complaint in his individual capacity waived and was
16 estopped from asserting defense that he should have been named as a trustee when that defense
17 was not raised until after trial); cf. *Miller v. Peters* (1951) 37 Cal.2d 89, 93 ("It is settled law that
18 where the parties and the court proceed throughout the trial upon a theory that a certain issue is
19 presented for adjudication, both parties are thereafter estopped from claiming that no such issue
20 was in controversy even though it was not actually raised by the pleadings.").

21 In any event, the defense has no merit. The Thompsons are personally liable for their
22

23 ⁵ Moreover, even if the Thompsons had raised this defense in a timely manner, and even if the
24 defense were valid (the Court finds that it is not), the Court could—and would—have allowed
25 Trust to amend the Complaint to name them as both individuals and trustees of the Thompson
26 Living Trust. See Code Civ. Proc. § 576 ("Any judge, at any time before or after commencement
27 of trial, in the furtherance of justice, and upon such terms as may be proper, may allow the
28 amendment of any pleading or pretrial conference order."); see also *id.* § 473(a)(1); *Singh v.*
Southland Stone, U.S.A., Inc. (2010) 186 Cal.App.4th 338, 354-355 ("Leave to amend to
conform to proof at trial ordinarily is liberally granted unless the opposing party would be
prejudiced by the amendment. . . . [and] is committed to the sound discretion of the trial court.").
There would be no prejudice to defendants from amendment here as it would be allowed to
respond to their own late assertion of a new defense.

1 intentional Easement violations. The Probate Code provides that a trustee is personally liable for
2 “obligations arising from ownership or control of trust property” and “for torts committed in the
3 course of administration of the trust only if the trustee is personally at fault.” Sections 18001,
4 18002. This requirement for personal fault requires “a sufficient showing that the trustee’s
5 conduct was intentional or negligent.” *Haskett v. Villas at Desert Falls* (2001) 90 Cal.App.4th
6 864, 878. There is no dispute that the Thompsons own the Easement Property as trustees of the
7 Thompson Living Trust (*see* Ex. 5) or that the Complaint names them as defendants in their
8 individual capacities. However, it is clear—and the Court has already found in Section I
9 above—that Peter and Toni Thompson both acted knowingly and intentionally when they
10 violated the Easement on numerous occasions. Finally, Peter Thompson testified at the trial that
11 he and Toni Thompson are the owners of the Easement Property. Accordingly, they are
12 individually liable for all violations.⁶

13
14 **D. Trust did not fail to mitigate damages or waive any claims. Nor is Trust
estopped from enforcing the Easement.**

15 Defendants’ primary argument at trial was that Trust cannot enforce the Easement against
16 them because Trust staff did not object with sufficient vigor during the October 28, 2014 site
17 visit and because Trust allegedly did not allow defendants to take actions to restore the
18 Easement Property in a timely manner. They frame these allegations at times as a failure to
19 mitigate damages, waiver, and estoppel.

20 Generally, a plaintiff cannot recover losses it could have avoided through reasonable
21 efforts. *Valle De Oro Bank v. Gamboa* (1994) 26 Cal.App.4th 1686, 1691. However, “[t]he rule
22 of mitigation of damages has no application where its effect would be to require the innocent
23 party to sacrifice and surrender important and valuable rights.” *Id.* The defense of “[w]aiver

24
25 ⁶ In addition, because defendants first offered this defense after the close of trial, they never
26 offered evidence regarding whether the Thompson Living Trust is revocable. If it is, that would
27 provide additional grounds to reject their defense. *See Galdjie v. Darwish* (2003) 113
28 Cal.App.4th 1331, 1350 (“The evidence before us establishes that the Trust is a revocable inter
vivos trust, that appellants are the sole trustees and, that as beneficiaries, they have the power
during their lifetimes to direct the sale of the real property owned by the trust. In view of the
above authorities, their signatures as individuals on the title deed as required by the judgment
entered herein is sufficient to convey good title from the Trust.”).

1 always rests upon intent. Waiver is the intentional relinquishment of a known right after
2 knowledge of the facts.” *Roesch v. De Mota* (1944) 24 Cal.2d 563, 572. To assert a defense of
3 estoppel, the party to be estopped must (1) be apprised of the facts and (2) intend that its conduct
4 be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so
5 intended, and the party asserting estoppel must (3) be ignorant of the true state of facts, and (4)
6 reasonably rely upon the conduct to its injury. *Strong v. County of Santa Cruz* (1975) 15 Cal.3d
7 720, 725; *Phillippe v. Shapell Industries* (1987) 43 Cal.3d 1247, 1262.

8 The overwhelming evidence at trial demonstrated that Trust staff responded promptly
9 upon learning of possible Easement violations, defendants acted to block staff’s access and
10 impede its investigations at every turn, and that defendants refused to follow the clear direction
11 Trust staff provided regarding steps necessary to restore the harm that they had caused in a
12 manner that complied with the Easement.

13 The Court finds that Trust made timely, diligent, and entirely reasonable efforts to inform
14 defendants of how they could correct their violations of the Easement and restore the Easement
15 Property. Defendants persistently rejected these instructions and demanded that Trust forgo
16 substantive and procedural remedies provided under the Easement before defendants would take
17 any voluntary steps to cure their violations.

18 In addition, Trust never waived any rights or remedies under the Easement and never
19 knowingly mislead defendants or acted in any way that caused defendants to rely on Trust to
20 defendants’ detriment. For each of these reasons, and as set forth in greater detail below, the
21 Court finds that defendants’ defenses of failure to mitigate damages, waiver, and estoppel lack
22 merit.

23
24 **1. All damage that Trust discovered on October 28, 2014 was already
done at the time of staff’s site visit.**

25 Defendants assert that they cannot be held liable for damage to the Easement because
26 Trust did not seek a court injunction to stop them. However, defendants had graded the haul
27 road, rootballed the Driveway Tree, shoved metal poles and a plate under it, graded the
28 additional haul road to the pond sediment area, and dumped the sediment *before* Trust

1 discovered these harms in two site visits on October 28 and November 25, 2014. Exs. 11-1, 11-
2 2, 19, 23. Thus, the damage that ultimately killed the Driveway Tree had already been done.
3 Similar steps had already killed the Dead Tree, and the harm to the Boulder Tree and Driveway
4 Tree before Trust's first site visit also proved to be fatal. Trust could not have prevented or
5 mitigated damage that had already occurred before Trust discovered the harm.

6 Defendants' failure to mitigate damages argument fails for the additional reason that
7 defendants are estopped by their own misrepresentations and obstruction of Trust's efforts to
8 learn the full extent of defendants' damage. The Court finds that defendants deliberately delayed
9 Trust's inspection to allow themselves time to complete moving and replanting the Dead Tree
10 on the Henstooth Property to conceal it from Trust. In an email on October 24, 2014, Ms.
11 Simons requested information from defendants in response to reports that defendants were
12 moving trees on the Easement Property. Ex. 9-3. Toni Thompson responded that Mr. Thompson
13 "has been working with PG&E to mitigate tree loss. The tree in question is under the power
14 lines." *Id.* As described above, the evidence at trial showed that Ms. Thompson, and later Mr.
15 Thompson, lied about moving the Driveway Tree to "mitigate tree loss" from PG&E's
16 vegetation management activities. In fact, the following day, Peter Thompson asked Mr.
17 Wheeldon to stop tree cutting on the Henstooth Property for at least a week, to prevent Trust
18 from interacting with Mr. Wheeldon during its site visit and discovering that the Thompsons
19 were lying about PG&E's intent to trim the Driveway Tree. Ex. 37-2.

20 Ms. Simons emailed the Thompsons on October 27, 2014. Ex. 9-2. In the subject line and
21 body of her email, Ms. Simons instructed defendants to "cease activity." *Id.* Defendants
22 admitted at trial that they disregarded that instruction. Texts and emails show that defendants
23 were rushing to complete the move of the Dead Tree before Trust's inspection. Exs. 51-14, 51-
24 15, 64, 65. As noted above, Mr. and Ms. Thompson collaborated to email Ms. Simons on
25 October 28, 2014, misrepresenting that Mr. Thompson was having problems with his email
26 account to justify their slow response. Ex. 10-1.

27 Peter Thompson also lied in the October 28 email to Ms. Simons, in which he stated:
28 "We agreed to relocate this tree to save it from being topped and ruined aesthetically . . . We

1 understood too that our relocating the tree would likely spare it from dying.” Ex. 10-2. He lied
2 again when he said that “he would put a call into the contractor to see where they are at in the
3 process and relay your message” (*id.*), after spending the prior day rushing Hess to complete
4 moving the Dead Tree ahead of Trust’s inspection later that afternoon. Ex. 51-15 (“Can u make
5 sure lower tree is set tomorrow and back filled before 2?”; *id.* (“How about doing the impossible
6 and getting the tree down by 3?”); *id.* (If u guys didn’t take so long we would’ve been under the
7 radar!!!”).

8 Defendants ran out of time to move both the Dead Tree and Driveway Tree to the
9 Henstooth Property before Trust visited the Easement Property. Knowing that the Dead Tree
10 was not in the PG&E utility easement, and realizing that defendants would be without an excuse
11 as to why they relocated the Dead Tree, defendants moved the Dead Tree first, before Trust’s
12 inspection. Unlike the Dead Tree, the Driveway Tree was at least partly in the PG&E utility
13 easement. When Ms. Simons and Mr. Neale inspected the destruction defendants had wrought
14 on the Easement Property at 3:00 pm on October 28, defendants had finished moving the Dead
15 Tree. Mr. Thompson repeated the lie that he and Ms. Thompson had told in earlier emails, that
16 they had to move the Driveway Tree to save it from PG&E. Ms. Simons and Mr. Neale were
17 unaware at that time that Mr. Thompson was lying and were unable to determine the truth until
18 after Trust filed suit. Defendants are thus estopped from claiming that Trust should have
19 prevented them from moving the Driveway Tree immediately, when in fact Trust staff relied on
20 defendants’ own story about the reason for moving the tree.

21 Defendants also prevented Trust from mitigating damage to the Easement by concealing
22 their (ultimately fatal) work on the Dead and Boulder Trees and their removal of 12 trees for the
23 haul road. Mr. Thompson ordered Lunny to “clean up” the Easement to prepare for Trust’s
24 October 28, 2014 inspection. Mr. Lunny testified that his employees backfilled the hole left by
25 the Dead Tree and the excavation around the Boulder Tree and graded around the base of the
26 Boulder Tree to make it appear as if the entire area needed to be graded for staging. Ex. 11-4.
27 When Ms. Simons asked Mr. Thompson on October 28, 2014 why he had graded around the
28 base of the Boulder Tree, he claimed—falsely—that he did not know why it had been graded

1 and that Trust would have to ask Hess for an explanation.

2 Based on the above, the Court finds that Mr. Thompson concealed the true basis for
3 moving the Driveway Tree, and concealed outright the damage to the Dead and Boulder Trees,
4 and removal of 12 additional trees for the haul road. Exs. 21, 59. Trust is not responsible for
5 mitigating damage that defendants misrepresented or concealed from Trust.

6 **2. Defendants interfered with Trust's prompt attempts to restore the**
7 **Easement Property and mitigate damages.**

8 After discovering defendants' damage on October 28, 2014, Trust immediately
9 commenced mitigation, which defendants made every effort to obstruct. The following day, Ms.
10 Simons informed Mr. Thompson that Trust needed to (1) discuss "your restoration plans," (2)
11 further inspect the Easement Property to properly document violations, and (3) obtain contact
12 information for "Greg" at PG&E, whom Peter Thompson had identified to corroborate his story
13 regarding the Driveway Tree. Ex. 12. Defendants refused to agree on a date for the inspection.
14 Ex. 13-2. They blocked access until Trust signed a waiver of liability and assumption of risk that
15 was redundant with and violated the Easement. Ex. 14-1, Ex. 4 § 3.2. And defendants never
16 asked Mr. Lunny or Ms. Murphy to sign such a waiver, even though the services they provided
17 posed greater risk of liability to defendants. The weight of evidence shows that defendants'
18 demand for a waiver and assumption of risk was a pretext to delay and prevent Trust's further
19 inspection of the Easement Property until defendants finished their tree moving project. In
20 addition to the improper demand for a waiver and assumption of risk, defendants also called
21 Trust's inspections "trespassing," and refused to provide Mr. Wheeldon's contact information.
22 Ex. 14-1.

23 After Trust's first inspection on October 28, 2014, defendants continued to delay,
24 cancelling a scheduled inspection on short notice. Ex. 16. When Ms. Simons nonetheless
25 appeared at the Easement Property to complete the inspection, the Thompsons' foreman—
26 apparently with Ms. Thompson's concurrence—physically blocked Ms. Simons' access.
27 Defendants' attorney then wrote to Ms. Simons, repeating the fabricated excuse regarding
28 PG&E's intent to top the Driveway Tree, blaming the haul road on Hess, threatening Trust with

1 a lawsuit for “criminal trespass,” accusing Trust of engaging in threats and dishonesty, requiring
2 Trust to sign an indemnification and assumption of risk, and refusing to allow Trust further
3 inspections. Ex. 17.

4 Mr. Thompson further interfered with Trust’s attempt to mitigate damages when he met
5 Mr. Neale at a coffee shop on November 18, 2014 to discuss activities on the Easement Property
6 and defendants’ obstruction of Trust’s access. During that meeting, Mr. Thompson again lied to
7 Mr. Neale, denying that he had removed trees other than the Driveway Tree.

8 At its second inspection on November 25, 2014, Trust discovered that defendants had
9 regraded and reseeded the haul road since their visit one month earlier, without Trust’s
10 permission or preparation of a vegetation management plan. Ex. 19. Trust staff also discovered
11 the dredged pond sediment that defendants had dumped on the Easement Property. *Id.*
12 Defendants continued to conceal the Dead and Boulder Trees and the 12 haul road trees; Trust
13 only learned of this additional harm to the Easement Property in 2016, after filing this litigation,
14 when it obtained Hess’s invoices, photographs, and texts through discovery. Exs. 20, 50, 51, 66.
15 In addition, despite Trust’s repeated requests, defendants refused to provide Mr. Wheeldon’s
16 contact information, thus continuing to perpetuate their lie about the Driveway Tree.

17 On December 9, 2014, Trust issued a Notice of Violation based on its investigation. Ex.
18 23. The Notice required defendants to develop a remediation plan prepared by a restoration
19 professional; restore the haul road to its prior condition; recontour the road; plant and provide
20 for the survival of Trust-approved native grasses, shrubs, and trees; remove the dredged
21 sediment; conduct long-term weed management of all disturbed areas, including the Driveway
22 Tree site, haul road, and pond sediment; conduct long-term monitoring; and reimburse Trust’s
23 staff costs. Defendants never complied with the Notice of Violation.

24
25 **3. Defendants refused to restore the Easement Property to its condition
prior to defendants’ damage.**

26 Insofar as defendants contend that Trust failed to mitigate damage to the Easement after
27 October 28, 2014, the period relevant to that defense is from October 29, 2014 until November
28 10, 2015, when Trust filed this lawsuit. The period after November 10, 2015 is not relevant to

1 this defense where defendants answered Trust's complaint by denying all Trust's allegations that
2 defendants violated the Easement and denying any obligation to restore the Easement Property.
3 They continued to maintain that position in a take-no-prisoners approach through trial, requiring
4 Trust to prove not only defendants' violations, but also to refute their affirmative defenses and
5 prove the amount required to restore the Property and other damages. Because defendants would
6 not even admit to violating the Easement, Trust could not have mitigated its damages without a
7 court judgment.

8 With respect to the relevant period of October 2014 through November 2015, defendants
9 have the burden to show that Trust failed to take feasible actions that would have reduced the
10 harm defendants caused. *See Valle De Oro Bank*, 26 Cal.App.4th at 1691 (plaintiff cannot
11 recover losses it could have avoided through reasonable efforts). Thus, at a minimum,
12 defendants must show that restoration costs would have been lower if Trust had taken some
13 particular action prior to November 10, 2015. Defendants presented no evidence that the cost to
14 restore the Easement Property would have been less before November 2015.

15 In addition, "[t]he rule of mitigation of damages has no application where its effect would
16 be to require the innocent party to sacrifice and surrender important and valuable rights." *Valle*
17 *De Oro Bank*, 26 Cal.App.4th at 1691. Thus, defendants cannot limit Trust's recovery of
18 damages when they sought to extract concessions from Trust, including modifications to the
19 Easement (Ex. 113G) and release of all claims, even for removal of trees about which Trust did
20 not yet know (Ex. 113FF). Defendants also asserted their right to restore the Easement Property
21 on their own terms, without Trust's prior review and approval of a full restoration plan as
22 required by the Easement. Defendants demanded that Trust waive provisions of the Easement
23 and allow them to move forward unilaterally. For each of these reasons, the defense of failure to
24 mitigate has no application against Trust here.

25 Even if the period after Trust filed its November 10, 2015 Complaint was relevant to
26 defendants' affirmative defense, all evidence at trial indicated that it is not more difficult to
27 restore the Easement Property now or at the time of the original trial call in 2017 than it was in
28 2015. Mike Jensen, defendants' restoration expert, testified that restoration would be no harder

1 in 2017 than 2015, and that the cost to restore the Property in 2017 would be approximately the
2 same as 2015. Trust's geotechnical engineer and restoration expert, Ted Splitter, agreed that
3 restoration costs would be no greater now or in 2017 than in 2015.

4 The defense fails for the additional reason that the evidence shows that defendants' claim
5 that Trust prevented defendants from restoring the Property lacks support and is flatly
6 contradicted by all documentary evidence. Trust's repeated requests that defendants provide an
7 adequate restoration plan prepared by a restoration professional—and approved by Trust as
8 required by section 6.2 of the Easement—went unheeded or affirmatively contradicted for 13
9 months after defendants' initial damage, leaving Trust with no alternative but to sue defendants
10 to enforce the Easement.

11 On October 29, 2014, Ms. Simons asked to discuss defendants' restoration of the
12 Property. Ex. 12. On November 18, 2014, Mr. Neale informed Mr. Thompson that Trust would
13 require defendants to prepare a restoration plan by a restoration professional, subject to approval
14 by Trust. Ms. Simons reiterated this instruction in the December 9, 2014 Notice of Violation,
15 laying out in detail the Easement's requirements, including Trust's approval of a plan prepared
16 by defendants and reimbursement of staff costs. Ex. 23. In her January 8, 2015 letter,
17 defendants' counsel agreed to provide a remediation plan to Trust by March 15, 2015. Ex. 113A.
18 On February 24, 2015, Ms. Simons repeated the detailed requirements for a restoration plan,
19 including the need for Trust's approval. Exs. 25, 113B.

20 On March 23, 2015, Peter Thompson emailed Mr. Neale with his alleged "plan." Ex.
21 113C. Mr. Neale notified Mr. Thompson that his plan was not in the realm of what the Easement
22 required and reiterated the requirements for a professional plan that would restore prior
23 conditions, to be approved by Trust. Ex. 113D, F. On May 4, 2015, Mr. Thompson responded
24 that no restoration was needed, refusing to provide any plan whatsoever. Ex. 113G.

25 In a June 3, 2015 letter, Trust's counsel Robert Perlmutter wrote to defendants' counsel
26 Alexander Bannon, laying out Trust's requirements for a restoration plan, including approval by
27 Trust and reimbursement of staff costs. Ex. 113H. After regular prodding from Trust and Trust
28 threats to sue if defendants did not submit a plan, defendants retained Mr. Jensen to prepare a

1 report. Exs. 113I-113T; Ex. 113U (Sept. 9, 2015 email from Mr. Perlmutter to Mr. Bannon:
2 “Where are we on the remediation report?”). But then on September 9, 2015, defendants refused
3 to provide the plan to Trust. Ex. 113V (“Please advise what legal right you have to this report.”).
4 Trust again threatened to file suit if defendants did not provide the report to Trust for Trust’s
5 approval. Ex. 113W. On September 16, 2015, defendants continued to refuse to provide the
6 report and stated their intent to unilaterally start work to implement the plan without Trust’s
7 approval, in clear violation of the Easement. Ex. 113X (“My client has retained a contractor and
8 intends to meet within the next seven days with the report’s author to go over the plan, with
9 remediation work commencing shortly thereafter.”).

10 Following Trust’s second threat to sue if defendants attempted to restore the Property
11 without Trust’s approval of a complete restoration plan (Ex. 113Y), on September 18, 2015, ten
12 months after defendants’ violations, defendants finally provided Mr. Jensen’s report to Trust.
13 Ex. 113BB. Mr. Jensen’s report was, according to his own testimony at trial, not a restoration
14 plan. It was titled “Erosion Control Recommendations” and omitted key tasks necessary to
15 reestablish the native ecosystems on the Property. Although Mr. Jensen modified the report in
16 response to Trust’s comments (Ex. 76), the report still lacked essential measures required to
17 effectively restore the native soil, drainage, and plant communities on the Property. It also
18 lacked the detail to constitute a complete restoration plan.

19 On October 22, 2015, Trust’s counsel presented Mr. Bannon with a proposed settlement
20 agreement, which Mr. Bannon substantially revised. Exs. 113EE, 113FF. Among other terms,
21 Mr. Bannon added a provision for Trust to release defendants from any further damage claims,
22 even if unknown, at the same time that defendants continued to conceal from Trust that
23 defendants had killed the Dead, Boulder, and 12 haul road trees. *Id.*

24 Without Trust’s knowledge or approval, Mr. Thompson simultaneously instructed Lunny
25 to regrade and reseed the haul road area again, without installing erosion controls, or planting
26 native seeds, contrary to the recommendations of defendant’s own report. Ex. 72-2, 72-3.

27 After Mr. Bannon rejected Trust’s settlement proposal, Trust issued a letter that
28 conditionally approved the revised Jensen report, subject to several substantive conditions such

1 as long-term weeding and monitoring. Ex. 113KK. On November 5, 2015, Mr. Thompson made
2 clear that defendants had no intention of performing or paying for a scope of work that would
3 restore the Easement Property to its prior condition: “You have to be kidding with this??? You
4 guys are turning a relatively simple process into a bureaucratic nightmare! I don’t even
5 understand what half of this means or is trying to convey. I am not going to agree to all of the
6 added conditions listed in this [Nov. 5 conditional approval] letter.” Ex. 113MM.

7 The Court finds that defendants’ course of conduct and communications between October
8 2014 and November 2015 show that defendants had no intention of restoring the Easement
9 Property in accordance with the terms of the Easement.⁷ Throughout the events addressed at
10 trial—from defendants’ initial efforts to engage Hess to relocate trees, through their efforts to
11 avoid discovery by Trust and to obstruct Trust’s investigation and enforcement of the Easement,
12 through their testimony at trial—both Peter and Toni Thompson displayed a marked lack of
13 respect for the terms of the Easement, the conservation values and extraordinary ecosystem that
14 the Easement protects, and for the Trust as steward and trustee of those conservation values.

15 All in all, Trust listed the tasks required to restore the Easement Property for defendants
16 in seven separate communications, each time including the requirement that defendants needed a
17 restoration plan prepared by a restoration professional approved by Trust. *E.g.*, Exs. 12, 23,
18 113B, 113D, 113F, 113H. Defendants’ unyielding resistance to restoring the Property persisted
19 through the trial. Trust, therefore, did not fail to mitigate the damage to the Easement.

20
21 **4. Defendants interfered with Trust’s information gathering necessary to
mitigate harm to the Easement Property.**

22 Testimony and documentary evidence at trial showed that defendants delayed, imposed
23 illegal conditions on, objected to, or physically interfered with Trust’s inspections of the
24

25 ⁷ Defendants have also argued, repeatedly, that Trust’s insistence on being reimbursed for its
26 staff costs to enforce the Easement is improper and that the accumulation of these costs
27 constitutes a further failure to mitigate damages. They are wrong. Staff costs to enforce the
28 Easement are recoverable under sections 7.2 and 10.2 of the Easement. The defense of failure to
mitigate damages has no application where its effect would be to require the innocent party to
surrender important and valuable rights. *Valle De Oro Bank*, 26 Cal.App.4th at 1691. Trust
properly required defendants to pay its staff costs.

1 Easement Property on at least 13 separate occasions. *See* Exs. 9 (delaying initial site visit,
2 providing PG&E excuse), 12 (delaying follow up site visit), 13 (delaying follow up site visit),
3 14 (delaying follow up site visit and demanding release), 16 (twice, delaying follow up site visit
4 and demanding release); 17 (attorney letter threatening Trust and conditioning follow up site
5 visit), 18 (demanding release prior to site visit), 113A (imposing limits on future site visits), 27
6 (imposing conditions on 2016 site visit), 33 (denying access for a noticed 2017 site visit), 34
7 (video of physical confrontation and ejection of Trust during noticed site visit), 35 (imposing
8 conditions on 2018 site visit). In addition to the listed correspondence, defendants blocked Ms.
9 Simons from accessing the Easement Property as noticed on November 12, 2014 and opposed
10 reopening of discovery to update expert evidence regarding the condition and restoration of the
11 Easement Property following wildfires. Trust cannot be held liable for failing to mitigate its
12 damages where defendants consistently impeded the efforts of Trust and Trust's experts to
13 analyze the nature and extent of defendants' damage and develop solutions. *See Green v. Smith*
14 (1968) 261 Cal.App.2d 392, 396-397.

15 **E. Defendants' defenses are further undermined by their persistent failure to tell**
16 **the truth.**

17 Defendants' claims fail for the additional reason that defendants have little credibility and
18 no documentary or photographic support. The vast majority of the testimony on cross-
19 examination of Peter and Toni Thompson, Joseph Lunny, Loretta Murphy, and Alexander
20 Bannon was misleading, evasive, inconsistent with deposition testimony, or outright false.

21 As discussed above, both Peter and Toni Thompson told Trust that PG&E intended to
22 trim the Driveway Tree and defendants had to move it to save it, even though Greg Wheeldon
23 told Mr. Thompson that PG&E would likely never trim the Driveway Tree. Mr. Thompson later
24 contacted Mr. Wheeldon, twice, to ask Mr. Wheeldon to tell Trust a different story and to object
25 when Mr. Wheeldon provided an accurate declaration to Trust. Exs. 38, 95. And defendants
26 continued to allege in Court filings up to the date of trial that they had to move the Driveway
27 Tree to save it. Def. Trial Brief p. 4 (filed June 1, 2017). On the witness stand at trial, Mr.
28 Thompson denied that he asked Mr. Wheeldon to lie to Trust. He also denied telling Ms. Simons

1 and Mr. Neale on October 28, 2014 that he had to move the Driveway Tree to save it from
2 PG&E. The Court finds, based on the weight of evidence and the credibility of the respective
3 witnesses, that both denials were false.

4 Also at trial, Mr. Thompson identified several segments of the area disturbed for the haul
5 road, shown in Exhibit 2, that he claimed were already disturbed for a “ranch road,” implying
6 that defendants should not be required to restore the entire area graded for the haul road area
7 because a significant portion had already been graded when defendants bought the Property. But
8 Exhibit 22 shows that the areas disturbed for the haul road intersects with the “ranch road” at
9 only a single portion of the haul road, near the Boulder Tree. Confronted with these diagrams
10 showing that his testimony was false, Mr. Thompson attempted to evade counsel’s questions by
11 finding himself unable to understand which areas of Exhibit 22 counsel was pointing to.

12 Mr. Thompson also testified that he told Lunny to dump the pond sediment on the
13 Henstooth Property, but Lunny dumped it on the Easement Property instead. Mr. Lunny,
14 however, testified that Mr. Thompson instructed him to dump the sediment on the Easement
15 Property.

16 Mr. Thompson also misrepresented that he hired NESCO to reseed the haul road area and
17 that NESCO used native seeds, in order to claim that restoration of the haul road is now
18 unnecessary. He was unable to produce a single document substantiating his claim. In fact,
19 Lunny testified that *he* reseeded the haul road with seeds from LeBallisters and that he used
20 Sonoma County Mix, without any knowledge as to the species of the seeds in that mix.

21 Mr. Thompson’s trial testimony that he wanted to restore the Easement Property is again
22 belied by the written record. He repeatedly limited the scope of Mr. Jensen’s work to minimize
23 cost, without regard for substance. Exs. 96, 106, 108 (“is all of the stuff in your report really
24 necessary?”), 110-3 (“Looks like minimal work required if any at all.”), 112 (2017 email;
25 “Mike, I want to make sure that you aren’t doing any detailed plans or working drawings for this
26 case. I’m not going to pay for it as its totally unnecessary. Your written [2015] report is
27 perfect.”).

28 Mr. Thompson also asserted that his opinion regarding restoration of the Easement

1 Property should be given extra weight based on his experience as a construction contractor. Ex.
2 258. Mr. Thompson's contractor's license, however, was revoked by the Contractor's State
3 License Board in 2011. Ex. 116. He has not worked as a contractor since.

4 Alexander Bannon testified that Mr. Perlmutter, Trust's counsel, orally represented to
5 him that Trust would not require that it approve a restoration plan prepared by defendants.
6 However, Mr. Bannon's account of this conversation is contradicted by every one of Mr.
7 Perlmutter's letters and emails sent before and immediately after the conversation to which Mr.
8 Bannon testified (e.g., Exs. 113H, 113W, and 113Y), and by every other contemporaneous
9 document. The Court finds that Mr. Bannon's testimony was incomplete, inconclusive, and
10 purposely evasive and that he became upset when the Court prevented him from testifying in the
11 way he wished to regarding his account of an alleged settlement. As a result, Mr. Bannon's
12 testimony was not credible.

13 More broadly, Mr. Thompson and, to a lesser degree, Ms. Thompson consistently
14 answered questions posed by opposing counsel with "I don't recall" or "I don't remember," but
15 then provided new and different responses when asked similar questions by their own attorney.
16 Mr. Thompson in particular stated repeatedly that he could not answer opposing counsel's
17 questions in the way they were phrased, yet never required clarification from his own attorney.
18 Over the course of trial, and especially on the key points on which the parties' claims turn, the
19 Court finds that neither Mr. nor Ms. Thompson were credible or persuasive, nor could they
20 support their version of key events with a single contemporaneous document.

21 **III. Trust is entitled to damages and injunctive relief for defendants' violation of the**
22 **Easement.**

23 Defendants purposefully violated the Easement in multiple ways on multiple occasions.
24 None of defendants' affirmative defenses to liability has merit. Civil Code sections 815.7(b) and
25 (c), several sections of the Easement, and common law authorize damages and injunctive relief
26 and related costs for enforcing the Easement against defendants. The Court finds that Trust is
27 entitled to both money damages and injunctive relief for defendants' truly extraordinary
28 violations of the Easement.

1
2
3 **A. Trust shall recover the cost to restore the Easement Property to its condition**
4 **prior to defendants' destruction of the Property.**

5 In its Complaint, Trust sought damages for the cost to restore the Easement Property to
6 its pre-violation condition and for the value of mature oak trees that cannot be restored. Trust's
7 experts fully supported the Work Plan and valuation of irreplaceable trees, as set forth below.
8 Defendants provided no credible contradictory evidence. Accordingly, the Court awards Trust's
9 full request for damages to restore the Easement Property and for oak trees that cannot be
10 restored.

11 **1. The proper measure of Trust's damages is the cost to restore the**
12 **Easement Property, rather than diminution in the market value of the**
13 **Easement.**

14 Defendants contend that the measure of Trust's damages is the diminution, if any, in the
15 market value of the Easement due to defendants' violations of the Easement, rather than the cost
16 to restore the Easement Property. The Court disagrees. The Court finds three separate bases for
17 Trust's recovery of the cost to restore the Easement Property to its condition prior to the
18 destruction of and damage to the Property caused by defendants.

19 **a. The Easement provides for recovery of restoration costs.**

20 Defendants admit that they are bound by the Easement. The Easement requires that
21 defendants pay to restore the Property to its condition prior to defendants' damage. *See* Ex. 4 §
22 3.4 (Trust reserves rights to "require restoration to the condition that existed prior to [activity
23 inconsistent with the Easement] of such areas or features as may have been damaged by such
24 activities."); § 10 (Trust may bring an action "to recover any damages to which it may be
25 entitled for violation of the terms of this Easement or injury to any Conservation Values
26 protected by this Easement . . . and to require restoration of the Property to the condition that
27 existed prior to any such injury."); § 10.2 ("All direct costs incurred by Grantee in enforcing the
28 terms of this Easement against Grantor, including, without limitation, . . . any costs of
restoration necessitated by Grantor's violation of the terms of this Easement, shall be borne by
Grantor . . ."). The Easement provides no support for defendants' contention that the measure

1 of Trust's damages for a violation of the Easement is the diminution in the market value of the
2 Easement.

3 **b. The Civil Code provides for recovery of restoration costs.**

4 Under Civil Code section 815.7(c), "the holder of a conservation easement shall be
5 entitled to recover money damages . . . for the violation of the terms of such easement," and
6 such damages may include "the cost of restoration" and "the loss of scenic, aesthetic, or
7 environmental value." Nothing in the Civil Code supports lost market value as a measure of
8 damages for violation of a conservation easement. The absence of a limitation on damages to
9 lost market values is consistent with the purpose of conservation easements. The Civil Code
10 recognizes that the purpose of such easements is "to retain land predominantly in its natural . . .
11 condition," and requires that any nonprofit organization holding such an easement have "as its
12 primary purpose the preservation, protection, or enhancement of land in its natural . . . condition
13 or use." Civil Code sections 815.1, 815.3. To promote the conservation purposes of such
14 easements, the statute expressly broadens, rather than limits, the holder's ability to recover
15 damages beyond default rules governing easements and other real property interests.

16 Moreover, diminution in value has little meaning in the context of conservation
17 easements because the very purpose of such easements effectively negates any "market value"
18 in the easement (or underlying property). Conservation easements are held by land trusts or
19 public agencies for the benefit of the public and, while transferable under limited circumstances,
20 are not sold or traded based on their market value. By restricting what a landowner can do with
21 his or her property, a conservation easement itself typically diminishes the fair market value of
22 the property subject to the easement. The easement's purpose is thus clearly to protect the
23 conservation values—not the market value—of that property.

24 Defendants' argument that damages are limited to the lesser of restoration costs or
25 diminution in value of the easement would shield violators from the consequences of their
26 actions, severely limit a land trust's or public agency's ability to protect the conservation values
27 for which the easement was granted, and wholly contradict the express purpose of the
28 conservation easement statute. Defendants offer neither authority nor explanation for such a

1 departure from the legislature's clear policy directive "that the preservation of land in its natural,
2 scenic, agricultural, historical, forested, or open-space condition is among the most important
3 environmental assets of California," including via "the voluntary conveyance of conservation
4 easements to qualified nonprofit organizations." Civ. Code § 815.

5 **c. Restoration costs can provide the appropriate measures of**
6 **damages to real property, even outside the context of**
7 **conservation land.**

8 California caselaw is clear that "[t]here is no fixed, inflexible rule for determining the
9 measure of damages [to real] property; whatever formula is most appropriate to compensate the
10 injured party for the loss sustained in the particular case, will be adopted." *Salazar v. Matejcek*
11 (2016) 245 Cal. App. 4th 634, 643-44 (quoting *Heninger v. Dunn* (1980) 101 Cal.App.3d 858,
12 862); *see also Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 Cal. App.
13 4th 439, 447 ("What is apparent from these cases is the flexibility employed in the approach to
14 measuring damages and the broad scope of alternative theories applied to fit the particular
15 circumstances of a case."). Of particular relevance here, reasonable restoration costs are an
16 appropriate measure of damages, irrespective of any diminution in market value, so long as the
17 injured party has a "personal reason" to restore the property. *See Kelly v. CB&I Constructors,*
18 *Inc.* (2009) 179 Cal.App.4th 442, 450-55 (awarding restoration costs that "vastly exceeded" the
19 market value of the property); *see also, e.g., Salazar*, 245 Cal.App.4th at 643-45; *Kallis v. Sones*
20 (2012) 208 Cal.App.4th 1274, 1278-80; *Orndorff v. Christiana Cmty. Builders* (1990) 217
21 Cal.App.3d 683, 687-91.

22 Here, Trust has more than the requisite "personal reason" to justify an award of
23 restoration costs, irrespective of any diminution in value. Trust's mission is to protect and
24 preserve environmentally significant land in and around Sonoma County. Its reason for holding
25 conservation easements is to protect the conservation values—not market values—of underlying
26 properties in perpetuity. The express purpose of the conservation Easement in this case is to
27 "preserve and protect forever the Conservation Values of the [Easement] Property." Ex. 4 § 2.
28 The Easement also specifically authorizes Trust to bring an action "to recover any damages [for]
injury to any Conservation Values protected by this Easement" and "to require the restoration of

1 the Property to the condition that existed prior to any such injury.” *Id.* § 10. Indeed, under the
2 charitable trust doctrine, Trust has a fiduciary duty to do so. *See generally*, Melanie B. Leslie,
3 Conservation Easements as Charitable Property: Fiduciary Duties and the Limits of Charitable
4 Self-Regulation, 33 Utah Envtl. L. Rev. 163 (2013).

5 The objective of protecting the Conservation Values of the Easement thus provides an
6 even stronger justification for an award of restoration costs that exceed any diminution in value
7 than the “personal reasons” deemed sufficient to justify restoration costs. *See, e.g., Salazar*, 245
8 Cal.App.4th at 643-45 (affirming damages award to restore trees because “Plaintiffs clearly
9 valued the property in its natural state”); *Kallis*, 208 Cal.App.4th 1274 (affirming damages
10 award to restore tree where the plaintiffs valued a tree for its broad canopy). Accordingly,
11 “diminution in the value of the easement in a situation like this is not a proper measure of
12 damages” because Trust is “required to” restore the property to the conditions that existed before
13 defendants’ violations. *Pac. Gas & Elec. Co. v. Cty. of San Mateo* (1965) 233 Cal. App. 2d 268,
14 274-75.⁸

15 Further, California courts have repeatedly recognized that restoration costs are the
16 appropriate measure of damages in cases where, as here, “there was no evidence of diminution
17 of the property’s value.” *Salazar*, 245 Cal.App.4th at 643-45; *Kallis*, 208 Cal.App.4th at 1278-
18 80. The court’s reasoning in *Dandoy v. Oswald Bros. Paving Co.* (1931) 113 Cal.App. 570 is
19 instructive. The *Dandoy* court held that the remedy for the wrongful dumping of rock, even
20 when the land’s value was not diminished, is the reasonable cost of restoration. 113 Cal.App. at
21 572-73. The court specifically rejected the defendant’s argument that the placement of the debris
22 on the plaintiff’s property actually resulted in an increase in the value of the land and therefore

23 ⁸ The contextual approach described above is particularly important in valuing unique property
24 interests such as conservation easements, whose very purpose is to permanently remove—and
25 thereby protect—conservation values from the market by placing them in trust for the public.
26 *See* Civ Code § 815.7(c); Ex. 4 §§ 3.4, 10, 10.2. This is consistent with the Restatement, which
27 also provides that relief in an action to enforce a conservation easement must be “designed to
28 give full effect to the purpose of the servitude.” Restat. 3d of Prop: Servitudes, § 8.5 (3rd 2000).
The Restatement explains: “The resources protected by conservation servitudes provide
important public benefits, but are often fragile and vulnerable to degradation,” and thus “should
be vigorously protected by the full panoply of remedies available to protect property interests.”
Id. § 8.5, cmt. a.

1 the plaintiff could not recover damages. “To hold that appellant is without remedy merely
2 because the value of the land has not been diminished, would be to decide that by the wrongful
3 act of another, an owner of land may be compelled to accept a change in the physical condition
4 of his property, or else perform the work of restoration at his own expense. This would be a
5 denial of the principle that there is no wrong without a remedy.” *Id.*

6 The same is true here. Indeed, it is especially true in the conservation easement context,
7 where defendants’ proposed rule regarding damages would essentially allow landowners to
8 violate such easements at will, knowing that they can escape any restoration-cost damages
9 award simply by showing that the easement’s (irrelevant) market value has not changed. *See*
10 *also* Restat. 3d of Prop: Servitudes, § 8.5, cmt. a (“Remedies [for violation of a conservation
11 easement] should ... be designed to deter servient owners from conduct that threatens the
12 interests protected by the servitude.”).

13 Defendants rely on *County Sanitation Dist. v. Watson Land Co.* (1993) 17 Cal.App.4th
14 1268, for the claim that the measure of Trust’s damages is the diminution in the fair market
15 value of the Easement as a result of defendants’ damage. *County Sanitation Dist.* was an
16 eminent domain action and has no application here. *See* Code of Civil Procedure section
17 1263.320 (“The measure of . . . compensation [in an eminent domain action] is the fair market
18 value of the property taken.”). Defendants also rely on sections 2.12 and 2.13 of the Easement,
19 which governs Trust’s compensation if a public agency condemns the Easement Property. An
20 eminent domain taking of the Property bears no relation to a damaging of the Easement
21 Property. As indicated above, state statute mandates that the measure of the property owner’s
22 compensation for a taking is the fair market value of the property taken. In sharp contrast,
23 overwhelming authority holds that the measure of damages for violation of a conservation
24 easement is the cost to restore.

25 Defendants also rely on *Fletcher v. Stapleton* (1932) 123 Cal.App.133, 138, for the
26 proposition that the damages for interference with an easement is the difference in the value of
27 the easement before and after the interference. This case has no bearing on the instant action
28 involving a conservation easement. Here, state statute and the Easement prescribe the measure

1 of damages as the cost to restore.

2 The Court also rejects defendants' assertion that Trust cannot recover damages equivalent
3 to the cost to restore the Easement Property because Trust has not yet incurred any costs to
4 restore as of the date of this decision. In *Dandoy v. Oswald Bros. Paving Co.*, *supra*, the court
5 denied the same argument: the "reasonable cost of restoration may be recovered, without regard
6 to the fact that the plaintiff has not yet removed said materials from his land." 113 Cal.App. at
7 573.

8
9 **2. The Court awards Trust \$392,670 for restoration of the Easement
Property and damages for destruction of three large oak trees.**

10 Three expert witnesses testified for Trust at trial regarding the Conservation Values prior
11 to disturbance; steps necessary to restore soil, natural topography, and native vegetation; and
12 long-term monitoring and maintenance necessary to ensure the effectiveness of restoration
13 measures on the Easement Property. Trust's expert witnesses, David Kelley, John Meserve, and
14 Ted Splitter, each demonstrated that he is highly educated, experienced, and qualified to assess
15 harm and design restoration plans for damaged ecosystems. All three demonstrated impressive
16 knowledge of and experience with the scientific and engineering challenges to be addressed in
17 restoring an ecosystem as complex as the Easement Property back to a functioning, stable
18 condition. None of Trust's experts has worked for Trust prior to this litigation. Neither party
19 presented any evidence showing that any Trust expert was biased or has a conflict of interest.
20 The Court finds that each of Trust's three expert witnesses was well qualified, thoughtful, and
21 detailed in his presentation, leading the Court to find each highly credible and persuasive.

22 Trust's experts, particularly Mr. Kelley, testified that the cardinal value of the Easement
23 Property was its undisturbed condition. The plant community of the Property is diverse and
24 complex, marked by perennial native grasses and forbs. The Property had a high ecological
25 value because it was remarkably unaffected by non-native plants. Although there were some
26 weeds growing on the Property, the native vegetation dominated the weeds.

27 All three of Trust's experts testified that the topsoil in the haul road area was particularly
28 unusual. Most of the areas defendants disturbed for the haul road consisted of bedrock covered

1 with a thin layer of volcanic soil, which was very low in nutrients. The native plants in the haul
2 road area had evolved in tandem with the soil, topography, and climate to thrive in these unusual
3 conditions. Defendants' grading of the haul road destroyed this balance by scraping off the
4 native topsoil and plants. Mr. Kelley and Mr. Meserve testified that the disturbance has
5 permitted weedy species to invade, out-compete, and dominate the native plants since
6 defendants' violations. The loss of this topsoil also prevents reestablishment of the native trees
7 and shrubs that were adapted to its particular conditions and then bulldozed during the tree
8 relocations.

9
10 **a. The Court awards Trust \$318,870 to restore the Easement Property.**

11 Trust's experts collaborated to develop a restoration plan that prescribes the steps
12 necessary to restore the Easement Property to the closest possible approximation of its pre-
13 violation conditions. *See* Exs. 84-85, 88-89 (collectively, "Work Plan"). They provided a
14 detailed explanation of each component of the Work Plan, including both the necessity of each
15 step and the reasonable cost of the associated work when performed by a qualified restoration
16 professional in the Sonoma County area.

17 Mr. Splitter testified that proper restoration of the haul road starts with preparation of a
18 Stormwater Pollution Prevention Plan required by the Clean Water Act and the California
19 Construction General Permit ("CGP"), which governs erosion controls on disturbed slopes in
20 California. Mr. Splitter testified to the reasonable cost of the SWPPP and grading permits
21 required for the restoration work.

22 Following the issuance of a grading permit and the preparation of an SWPPP, Trust's
23 Work Plan requires removal of the non-native, invasive plants now growing in the haul road as a
24 result of the disturbance and defendants' improper reseeding. Mr. Meserve, Mr. Kelley, and Mr.
25 Jensen all testified that native, perennial plants adapted to—and removed from—this site will
26 not reestablish in non-native soils with a high nutrient content. The Work Plan then calls for
27 locating native soil pushed to the perimeter of the haul road; moving the native soil and boulders
28 back to the (now predominantly bare) surface of the haul road; recontouring the haul road area

1 to restore original, sustainable topography and drainage patterns that will allow for sheet, rather
2 than concentrated flow of water; scarifying and track walking the restored area; filling rills and
3 gullies; installing erosion controls such as wattles in accordance with the requirements of the
4 CGP; placing bonded fiber matrix on the steeper slopes; and finally hydroseeding with native
5 seeds matched to the baseline report for the Easement Property, all under the supervision of a
6 restoration professional.

7 Mr. Splitter explained that the linear feet of wattles for a slope repair in California is
8 controlled by the CGP formula, which is based on the degree of slope. A Qualified SWPPP
9 Developer ("QSD"), typically a trained engineer, uses a topographical map and a diagram from
10 which to calculate the area to be restored and then applies the CGP formula to determine the
11 linear feet of wattles that must be placed on the hill to control erosion. Mr. Splitter and his
12 colleague, Axel Rieke, a QSD, followed the legally required process to develop their wattle cost
13 of \$25,000. They calculated the disturbed areas using a diagram created by Trust using a GPS
14 system showing the areas of the Easement Property that defendants had disturbed, consulted a
15 topographical map of the disturbed areas, and applied the CGP formula to arrive at the quantity
16 of linear feet for wattles.

17 Mr. Splitter also testified that the haul road area would require maintenance for at least
18 three years to ensure that erosion controls remain in place. Mr. Meserve testified that five years
19 of weed management will be required to allow the restored native plants to become established
20 and able to out-compete noxious and invasive weeds. Notably, Mr. Jensen, defendants' expert
21 witness, concurred with the majority of Mr. Splitter's recommendations.

22 Mr. Splitter also recommended keying and recontouring the sediment deposit to restore
23 the native topography and drainage pattern in that location of the Easement Property and hauling
24 excess sediment off-site. Mr. Meserve recommended removing noxious and invasive weeds
25 from the sediment area and reseeding it with native plants matched to the baseline report for the
26 Easement Property.

27 Mr. Splitter further recommended procedures for removing the culvert and restoring the
28 smaller haul road created to transport the pond sediment across the Easement Property to the

1 dump site. The total cost of the work to which Mr. Splitter testified is \$257,337. The Court finds
2 that Mr. Splitter's recommendations were necessary, reasonable, and highly credible and thus
3 awards Trust \$257,337 for the tasks identified in Exhibit 88.

4 Mr. Meserve testified that it is standard industry practice to replace younger trees such as
5 the 12 trees removed for the haul road at a 3:1 ratio to compensate for the smaller replacements,
6 and to maintain and irrigate the trees so that they survive to a point of self-sufficiency, which
7 generally requires five years. He testified that the cost to perform this work would be \$49,033.
8 Defendants presented no contrary evidence or argument. Mr. Jensen, defendants' expert, agreed
9 that the trees removed for the haul road should be replaced at a 3:1 ratio. The Court finds that
10 Mr. Meserve's testimony was highly credible and therefore awards Trust \$49,033, which is the
11 necessary and reasonable cost to replace the twelve trees.

12 Finally, Mr. Meserve testified that the cost for long-term monitoring and reestablishment
13 of native plants, and long-term control and removal of noxious and invasive plant species in the
14 restored areas would be \$12,500. Defendants presented no contrary evidence or argument. The
15 Court therefore awards \$12,500 to Trust as a necessary and reasonable cost of restoration.

16 Trust's experts provided detailed explanation of both the necessity of each component of
17 the Work Plan and the reasonable cost of the associated work when performed by a qualified
18 restoration professional in the Sonoma County area. The Court finds that Trust's Work Plan and
19 the cost estimates provided by Trust's experts are appropriate, necessary, reasonable, and highly
20 credible. The Court further finds that the labor, equipment, and materials to restore the Property
21 is a direct result of the unique nature of the Property and the magnitude of the damage
22 defendants caused. The total award for restoration costs is therefore $\$257,337 + \$49,033 +$
23 $\$12,500 = \$318,870$.

24
25 **b. Defendants presented no credible evidence to challenge the
restoration costs provided in Trust's Work Plan.**

26 Defendants presented no evidence or argument to contradict Trust's evidence regarding
27 the cost to restore the dredged pond sediment and culvert, and their evidence regarding
28 restoration of the haul road is incomplete and neither credible nor persuasive.

1 The only evidence defendants offered in response to Trust's Work Plan is testimony by
2 Joseph Lunny and Peter Thompson.⁹ In contrast to Trust expert's testimony, the Court finds that
3 defendants' expert witness, Mr. Lunny, was uncertain, unclear, at times evasive, and simply not
4 qualified to provide a plan to restore damaged ecosystems. He attempted to minimize his role in
5 violating the Easement and demonstrated a disregard of legal requirements by repeatedly
6 excavating and grading the Easement Property without Trust's permission, grading permits, or a
7 SWPPP. In addition, Mr. Lunny lacks the education, formal training, and experience restoring
8 complex, native plant communities and fragile soils on damaged slopes demonstrated by Trust's
9 experts. His work is almost exclusively new construction. Defendants qualified Mr. Lunny as an
10 erosion control expert only and Mr. Lunny admitted that he is not qualified to restore native
11 plants to their condition before the haul road was created without supervision by a professional.

12 Defendants submitted a work plan and cost estimate prepared by Mr. Lunny (Ex. 77) that
13 purports to reflect the recommendations that Mr. Jensen provided in a May 2017 memorandum
14 (Ex. 76). Mr. Lunny's Work Plan did not conform to Mr. Jensen's report. Instead, Mr. Lunny
15 testified that he would import high-nutrient soil to place on the haul road. Mr. Meserve, Mr.
16 Kelley, and Mr. Jensen, however, testified that such soils would foster rapid growth of annual,
17 invasive, and noxious plants and would remove any chance of restoration of native conditions.
18 Mr. Lunny also failed to provide sufficient budget for the tasks that he did include in his work
19 plan, and wholly omitted numerous additional tasks. For example, he understated or omitted
20 costs for mobilization, erosion control materials such as wattles, and water for dust control. Mr.
21 Lunny also testified that he estimated quantities of labor and material for his work plan in his
22 head after walking the site, rather than taking measurements, using a topographical map, and
23

24 ⁹ Defendants also point to an email by Mr. Neale in April 2015 suggesting that the cost to
25 restore the Property would likely be only a few thousand dollars. However, according to Mr.
26 Neale's own testimony, Mr. Neale is not a qualified restoration expert, nor did he understand the
27 complexity of the restoration at the time of the cited email. In other statements before and after
28 the statement in question, Trust, including Mr. Neale, made it clear to defendants that Trust
required defendants to prepare a restoration plan by a qualified restoration professional.
Defendants, therefore, could not have reasonably relied on Mr. Neale's opinion. Moreover, at
the time of Mr. Neale's statement in April 2015, defendants had concealed significant portions
of their actions and the resulting harm from Mr. Neale and Trust.

1 obtaining a proper SWPPP.

2 Finally, Mr. Lunny's opinion was incomplete because he did not address repair of
3 damage to areas of the Easement Property other than the haul road area. Mr. Lunny failed to
4 include in his estimate: costs for a grading permit and SWPPP; supervision by a restoration
5 professional; selection of seeds; field supervision; restoration of the pond sediment; restoration
6 of the culvert; restoration of the sediment haul road; restoration of trees removed to build the
7 haul road, including long-term irrigation and maintenance; removal of invasive, non-native, and
8 noxious weeds around the site of the three large oaks defendants killed; long term monitoring of
9 erosion control; and maintenance and weeding of all restored areas. The testimony of Trust's
10 experts as to the cost to restore those areas outside the haul road was uncontradicted.

11 Unlike Mr. Lunny, defendants' expert Mr. Jensen is qualified to develop a restoration
12 plan for the Easement Property. His firm, Prunuske Chatham, Inc., specializes in habitat
13 restoration and routinely designs, provides cost estimates for, and implements restoration plans,
14 including for natural habitats. Mr. Jensen himself testified, however, that the memorandum he
15 prepared for defendants is not a restoration plan. And defendants expressly directed him not to
16 prepare a cost estimate for work described in his memorandum. *E.g.*, Ex. 103, 111-12. Mr.
17 Jensen's testimony was largely consistent with that of Trust's expert witnesses. However, the
18 Court finds that Mr. Jensen's testimony is less persuasive because he was given a narrow scope
19 of work and lacked sufficient information to develop a complete plan equivalent to Trust's Work
20 Plan.

21 The Court also finds that Lunny's opinions lack credibility because he is biased in favor
22 of defendants. By his own account, Mr. Lunny worked with Peter Thompson for 30 years on
23 more than 20 different projects. Defendants paid Lunny \$641,000 for his Henstooth work alone.
24 Lunny repeatedly violated the Easement by creating the sediment haul road, dumping the
25 sediment, grading the haul road, regrading the haul road multiple times, helping defendants
26 conceal work on the Dead and Boulder Trees, assisting in the replanting of the Driveway and
27 Dead Trees on the Henstooth Property, regrading the sediment, reseeding the haul road,
28 operating motorized vehicles on the Easement Property, and procuring motorized vehicles for

1 Erik Hess to help defendants remove trees from the Easement Property. All work was done at
2 Mr. Thompson's instruction, without Trust's knowledge or permission, and without grading
3 permits or SWPPPs, in violation of local and state law. Mr. Lunny's demeanor during trial
4 testimony and every inference indicate both his bias in favor of defendants and the dismissive
5 approach that they have taken to proper restoration.

6 For each of the reasons described above, the Court finds that Mr. Lunny's purported
7 restoration plan and cost estimate are neither credible nor persuasive and gives no weight to his
8 testimony.

9 Peter Thompson also testified that defendants had already restored the haul road area and
10 that it did not require further restoration. He expressed no opinion regarding restoration of the
11 pond sediment area, culvert, and trees removed by defendants. With regard to the haul road area,
12 Mr. Thompson testified that defendants had already regraded and reseeded the area and that
13 grass had been reestablished in that area. The Court finds that defendants regrading and
14 reseeded of the haul road area did not restore that part of the Property to the pre-damage
15 condition. Defendants did not replace the native soil in the haul road area, recontour the area to
16 reestablish native drainage, install erosion controls, or spread native seeds. Defendants' work on
17 the haul road was designed to improve the aesthetic appearance of the Property only, and did not
18 remotely address the destruction of ecological conditions defendants wrought on the Property.

19 Mr. Thompson relied for his opinion, in part, on his experience as a construction
20 contractor. Mr. Thompson conceded that he had no training or expertise in restoring damaged
21 habitat; his experience was in new construction. Throughout the trial, Mr. Thompson displayed a
22 lack of understanding of the complexity of the ecology of the Property, the magnitude of
23 defendants' interference with a relatively stable ecological condition, or the intricacy of the
24 repair necessary to restore the Property. As indicated above, Mr. Thompson's credibility as a
25 contractor is questionable where his contractor's license was revoked by the Contractor's State
26 License Board in 2011. Ex. 116. The Court finds that Mr. Thompson's testimony regarding the
27 tasks necessary to restore the Property was incomplete, self-serving, lacking foundation, and
28 without credibility.

1
2
3 **c. The Court awards Trust \$73,800 for the value of the three large**
4 **oaks killed by defendants.**

5 Defendants admit that Hess removed the Driveway and Dead Trees from the Easement
6 Property. Hess also attempted to move the Boulder Tree to the Henstooth Property at their
7 direction, but was unable to do so. Defendants admit that all three trees are now dead. Mr.
8 Meserve testified that the work performed by Mr. Hess was the cause of mortality. Because this
9 work violated section 5.14 of the Easement and because it is not possible to restore or replace
10 these mature, specimen trees, Trust is entitled to damages for the value of the trees under Civil
11 Code section 815.7(c) and section 10 of the Easement.

12 Trust's expert John Meserve is a certified arborist and tree valuation expert. Mr. Meserve
13 has significant training and experience in appraising trees. He testified that the trunk formula
14 method and the replacement cost method are accepted methods for valuing trees. Mr. Meserve
15 used the trunk formula method to value the Driveway, Dead, and Boulder Trees at a total of
16 \$73,800. Ex. 82. He explained that that figure is conservative because the replacement cost
17 method yielded a much higher figure, based on defendants' actual expenditures to move the
18 Driveway and Dead Trees and attempt to move the Boulder Tree.

19 Defendants submitted no appraisal, did not challenge Trust's appraisal, and submitted no
20 contrary evidence or argument. The Court finds that Mr. Meserve's testimony was highly
21 credible and awards Trust \$73,800, which is a reasonable value for the three large oaks that
22 defendants killed, and which cannot be restored.

23 **B. The Court awards Trust \$92,286 for staff costs to enforce the Easement.**

24 Section 10.2 of the Easement requires that the grantor must reimburse Trust for the costs
25 of enforcement in the event of a violation of the Easement. It defines "costs of enforcement" to
26 include "[a]ll direct costs incurred by Grantee in enforcing the terms of this Easement against
27 Grantor, including, without limitation, costs and expenses of suit and attorneys' fees, and any
28 costs of restoration necessitated by Grantor's violation of the terms of this Easement." Ex. 4 §
10.2. Section 7.2 defines "direct costs" and reiterates this point in the context of vegetation

1 management plans (which include restoration plans): "Grantee shall be fully reimbursed by
2 Grantor for all direct costs, including but not limited to, reasonable professional fees of
3 surveyors, attorneys, consultants, Grantee staff, and accountants."

4 Ms. Simons and Mr. Neale testified that Trust began keeping contemporaneous records of
5 time spent by all staff on enforcement of the Easement as soon as Trust first learned of the
6 violations in October 2014. *See* Ex. 31c. Staff maintained these time records in the regular
7 course of business from October 2014 through the end of the trial. Both Ms. Simons and Mr.
8 Neale testified that the staff time required to enforce the Easement came at the expense of other
9 stewardship and related activities.

10 Mr. Neale testified that the number of hours tracked in Exhibit 31c reflects the enormous
11 effort required by staff to document and investigate defendants' Easement violations, attempt to
12 negotiate a voluntary resolution to the violations, and then participate in this litigation. The
13 evidence also showed that in the 13-month period after learning of defendants' violations, Trust
14 staff made reasonable and good faith efforts to enforce the Easement without litigation, but
15 defendants repeatedly obstructed Trust's investigation of the damage, concealed substantial
16 damage from Trust, and refused to restore the Easement Property or comply with the
17 Easement's other requirements.

18 The Court finds, based on Mr. Neale's testimony and on the totality of evidence
19 presented over 19 trial days, that the number of hours Trust staff spent enforcing the Easement
20 was reasonable, necessary, and a direct result of (a) defendants' misrepresentations and
21 concealment regarding defendants' violations and destruction of the Easement Property; (b)
22 defendants' systematic attempts to obstruct Trust's enforcement of the Easement; (c)
23 defendants' efforts to persuade others to provide false information to Trust concerning
24 defendants' violations of the Easement; (d) the magnitude of the violations, damage, and
25 destruction; (e) defendants' lack of good faith in negotiations regarding voluntary restoration of
26 the Easement Property; and (f) the scope, duration, and intensity of this litigation.

27 Trust's Chief Financial Officer, Paul DeMarco, testified that he calculated a Total Rate
28 for each staff person participated in enforcing the Easement against defendants by totaling the

1 salary, benefits, taxes, workers compensation insurance, and overhead and administration
2 attributable to each staff member, based on records maintained by Trust in the regular course of
3 business. *See* Ex. 80. Defendants presented no contrary evidence or argument. Accordingly, the
4 Court finds that the Total Rates calculated by Mr. DeMarco are the actual out of pocket costs
5 incurred by Trust for each hour of time spent by staff to enforce the Easement and that such
6 Total Rates are reasonable and credible.

7 Mr. Neale multiplied the total hours expended by each staff person by the Total Rate for
8 each staff member to determine the total cost of staff enforcement. Ex. 31c. Defendants
9 presented no contrary evidence or argument. The Court accordingly awards to Trust \$92,286,
10 the amount calculated by Mr. Neale for Trust's staff costs necessarily and reasonably incurred to
11 enforce the Easement against defendants.

12 In awarding Trust's actual staff costs to Trust, the Court specifically finds that Trust's
13 overhead and administration costs ("O&A") is a component of "direct cost" as that term is used
14 in Sections 7.2 and 10.2 of the Easement. In the context of the Easement, "direct costs" means
15 "out-of-pocket" costs, rather than intangible or speculative costs, such as damage to reputation
16 or the ability to attract donations. Mr. DeMarco testified that O&A is considered a direct cost in
17 some contexts and indirect in others. The instant case presents precisely the situation in which
18 O&A should be treated as a direct cost; it is a tangible, quantifiable cost that Trust incurred to
19 enforce the Easement. Trust employees enforcing the Easement need offices, copy machines,
20 computers, electric lights, pens, etc. to conduct enforcement work. As Mr. DeMarco testified,
21 this is the cost to put staff out in the field to conduct stewardship—and here enforcement—
22 work. Recovery of these costs is necessary to make Trust whole. As between defendants, who
23 knowingly violated the Easement and caused the damage that required Trust staff to enforce it,
24 and Trust and its funders, including private residents of Sonoma County and public agencies,
25 both of which had no role in any wrongdoing, defendants should bear this cost.

26 Moreover, section 19.3 of the Easement requires that any ambiguity or uncertainty in the
27 term "direct costs" shall be interpreted to meet the goal referenced in the Recitals, which is to
28 "preserve and protect the Conservation Values in perpetuity." Placing a portion of the cost of

1 enforcement on Trust would contravene this directive. If Trust is not made whole in this
2 proceeding, then it will diminish Trust's ability to protect the Easement Property and other land
3 subject to conservation easements in the future. Defendants presented no evidence or argument
4 to challenge Trust's recovery of O&A for each hour its employees were compelled to spend
5 enforcing the Easement against defendants.

6 **C. The Court awards Trust \$90,943 for its expert witness costs.**

7 Section 7.2 of the Easement provides that Trust shall be reimbursed by the grantor for
8 consultants' costs to prepare a vegetation management plan. Section 10.2 of the Easement
9 mandates Trust's recovery of expert witness fees to enforce the Easement.

10 The invoices submitted by Trust's experts for their investigation, research, and analysis
11 of defendants' damage to the Easement Property, and the cost to prepare both the Work Plan and
12 an appraisal of the three large oaks defendants killed, totals \$90,943. The Court finds that
13 Trust's expert costs are directly related to the unique and complex nature of the ecosystem
14 destroyed by defendants, the magnitude of defendants' destruction of that ecosystem, and the
15 complexity of the restoration plan necessary to restore the Property. The Court further finds that
16 defendants' obstruction of site investigations by Trust experts contributed to Trust's expert
17 costs. In particular, Mr. Thompson physically ejected Trust staff, experts, and counsel from the
18 Easement Property on April 4, 2017.

19 The Court finds that Trust's experts are highly trained, experienced, and credible, and
20 that the restoration plan and tree appraisal they developed are thorough, reasonable, necessary,
21 and credible. Defendants presented no evidence or argument that the cost of Trust's experts'
22 assessment of defendants' damage and development of restoration plans and an appraisal of the
23 three large oaks was unreasonable or unnecessary. Accordingly, the Court awards Trust its
24 expert costs of \$90,943.

25 In sum, the Court awards Trust \$318,870 for restoration, \$73,800 for destruction of three
26 large oak trees, staff costs of \$92,286, and expert costs of \$90,943, for total damages of
27 \$575,899.
28

1 **D. The judgment shall include unpaid sanctions previously awarded to Trust.**

2 In its Order filed May 19, 2017, this Court ordered defendants to pay sanctions to Trust
3 of \$4,050. In its Order filed May 25, 2018 this Court ordered defendants to pay sanctions to
4 Trust of \$3,090. Defendants have not paid either of the sanctions. Accordingly, the amount of
5 \$7,140 shall be included in the judgment against defendants.

6 **E. The Court issues a permanent injunction allowing Trust to restore the**
7 **Easement Property.**

8 Under Civil Code section 815.7(b), Easement section 10, and Code of Civil Procedure
9 section 526(a)(1), (4)-(6), the Court issues an injunction to enforce the express terms of the
10 Easement by prohibiting further excavation, grading, pruning, tree removal, or revegetation
11 activities on the Easement Property without prior written approval by Trust. The injunction will
12 prohibit defendants from impeding access by Trust staff, consultants, and contractors to the
13 Easement Property to restore it to the conditions that existed prior to defendants' violations and
14 to monitor and maintain the restoration work for enough time to ensure the lasting success of the
15 restoration. The Court finds that an injunction is necessary and appropriate in light of
16 defendants' persistent interference with Trust's efforts to investigate and address their violations
17 and their refusal, including during trial, to acknowledge the validity of Trust's claims and
18 authority to enforce the Easement against them.

19 Trust initially sought a further mandatory injunction requiring defendants to restore the
20 Easement Property to pre-violation conditions pursuant to a restoration plan that was first
21 subject to review and approval by Trust. However, defendants' repeated attempts to mislead
22 Trust, refusal to comply with the Easement, and hostile interactions with Trust staff and
23 representatives, coupled with the dramatic inadequacy of restoration recommendations by
24 defendants' chosen experts, together have undermined confidence in defendants' willingness or
25 ability to implement an adequate restoration.

26 As a result, the Court awards Trust funds to restore the Easement Property and to conduct
27 the subsequent monitoring and maintenance required to ensure that erosion and revegetation
28 measures succeed over the long term ("Restoration Funds") in accordance with the Work Plan

1 and any and all other tasks reasonably necessary to restore the Easement Property to its
2 condition prior to the damage caused by defendants (collectively referred to as the
3 “Restoration”). The injunction will allow Trust to attempt to implement the Restoration by
4 restoring the Easement Property as close as reasonably possible to baseline, pre-violation
5 conditions, as follows:

6 (1) Defendants are prohibited from any further excavation, grading, pruning, or
7 removal of trees on the Easement Property and from attempting any further reseeding or
8 revegetation measures without Trust’s prior written approval.

9 (2) Defendants shall provide Trust and contractors access to the Easement Property as
10 needed, if necessary through the portion of the PG&E utility easement that crosses the
11 Henstooth Property, so that Trust and its consultants and contractors can access the disturbed
12 portions of the Easement Property with minimal disturbance of the Easement (1) to complete
13 tasks necessary to restore the property, and (2) to perform the monitoring and maintenance of
14 that work—e.g., maintenance of erosion control measures and weed management to allow the
15 native vegetation that defendants damaged to reestablish, especially through the first rainy
16 season for erosion control measures and the first growing season for revegetation.

17 (3) Immediately following defendants’ payment of the Adjusted Restoration Funds to
18 Trust, Trust shall deposit the Adjusted Restoration Funds (as defined in the Injunction) into
19 escrow to ensure the availability of funds to complete the Restoration and limit Trust’s exposure
20 to claims of improper implementation of the Restoration. To facilitate the holding and
21 disbursement of the Adjusted Restoration Funds, defendants shall be required to pay a fee of
22 \$350 per year for five years (total \$1,750) to maintain the escrow account and \$25 for each
23 disbursement by the escrow company to pay costs to restore the Easement Property (based on 12
24 disbursements per year x five years = \$1,500), for a total of \$3,250 (“Escrow Fees”). The
25 Adjusted Restoration Funds shall be the sum of the Restoration Funds—\$257,337 for restoring
26 the disturbed areas, \$49,033 for replacing and maintaining the trees removed for the haul road,
27 and \$12,500 for long term maintenance of erosion controls and weed management— and \$3,250
28 for Escrow Fees, for a total of \$322,120, as adjusted for changes in the Consumer Price Index as

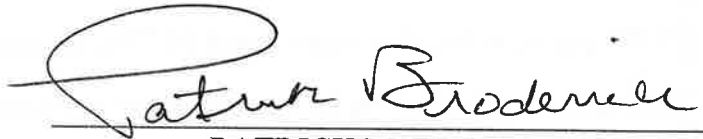
1 set forth in the Injunction. Trust shall have no obligation to deposit the Adjusted Restoration
2 Funds in the escrow account and begin restoring the Easement Property until defendants pay the
3 Adjusted Restoration Funds to Trust in full, although Trust may, at its sole discretion, begin and
4 complete restoration in conformance with the injunction at any time following filing of the
5 Judgment. Trust shall apply any interest accruing from the balance of the Adjusted Restoration
6 Funds on deposit in the escrow to implement the Restoration.

7 **CONCLUSION**

8 Trust has carried its burden to prove, by a preponderance of the admissible evidence, that
9 all three defendants knowingly and intentionally violated multiple provisions of the Easement,
10 on numerous occasions. Each of the defenses proffered, including Trust's alleged failure to
11 mitigate damages, waiver, and estoppel, is directly contradicted by credible evidence. Trust
12 substantiated each component of its claim for damages with detailed testimony and documentary
13 evidence. Accordingly, the Court awards the full \$575,899 requested, plus overdue sanctions of
14 \$7,140 and escrow costs of \$3,250 for a total award of \$586,289. The exceptional factual
15 circumstances presented at trial further warrant and, in fact, necessitate the injunctive relief
16 requested by Trust. The Court finds, based on the totality of the evidence, and particularly on
17 defendants' past actions and continued hostility toward Trust's reasonable claims at trial, that
18 the requested injunction is necessary to ensure the restoration of the Easement Property, as
19 required by the Easement and Civil Code section 815.7.

20 **IT IS SO ORDERED.**

21 DATED: April 16, 2019

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24 PATRICK M. BRODERICK
25 Judge of the Superior Court
26
27
28

PROOF OF SERVICE BY MAIL

I certify that I am an employee of the Superior Court of California, County of Sonoma, and that my business address is 600 Administration Drive, Room 107-J, Santa Rosa, California, 95403; that I am not a party to this case; that I am over the age of 18 years; that I am readily familiar with this office's practice for collection and processing of correspondence for mailing with the United States Postal Service; and that on the date shown below I placed a true copy of the attached Final Statement of Decision (Code of Civil Procedure section 632) in an envelope, sealed and addressed as shown below, for collection and mailing at Santa Rosa, California, first class, postage fully prepaid, following ordinary business practices.

Date: April 16, 2019

Arlene D. Junior
Court Executive Officer

By: Cynthia Gaddie
Cynthia Gaddie, Deputy Clerk

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