SUPREME COURT
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IN THE SUPREME COURT OF CALIFORNIA

MOUNTAIN AIR ENTERPRISES, LLC

Plaintiff and Respondent,

v.

SUNDOWNER TOWERS, LLC et al.,

Defendants and Appellants.

PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEAL,
FIRST APPELLATE DISTRICT, DIVISION TWO, CASE NO. A138306,
REVERSING ORDER OF THE SUPERIOR COURT OF CALIFORNIA,
FOR THE COUNTY OF MARIN, CASE NO. CIV081957

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

The single issue presented to this Court is whether an affirmative defense constitutes an "action" or "proceeding" within the scope of this attorney fee provision.

The majority opinion in the Court of Appeal—applying "the ordinary rules of contract interpretation," as this Court has instructed (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608)—concluded that it does. After analyzing the plain meaning of these words within the context of this specific attorney fee provision, the majority decided that "action" and "proceeding" encompass the entire proceeding, including the pleading of an affirmative defense.

Neither the majority opinion, nor the well-reasoned, recent decision in *Windsor Pacific LLC v. Samwood Co., Inc.* (2013) 213 Cal.App.4th 263 (which reached the same conclusion based on the meaning of "action" and "proceeding"), decided that attorney fees "*should*" be available for an affirmative defense, as Mountain Air erroneously contends (Opening Brief on the Merits "OBOM" 2). Under the ordinary rules of contract interpretation, *they are.*

In this case, the parties entered into an Option Agreement that, by its terms, "expressly supersede[d]" all prior agreements between the parties relating to a parcel of real property. (Typed Majority Opinion ("Maj. opn."), 19.) The Option Agreement provided for the recovery of attorney fees to the prevailing party should "any legal action or any other proceeding" be brought to enforce the Option Agreement or because of a dispute in connection with any of its

provisions. (Maj. opn., 11.) When Mountain Air sued to enforce a prior agreement, Defendants and Appellants Bijan Madjlessi, Glenn Larsen, and Sundowner Towers, LLC (collectively, "Defendants") pleaded novation as an affirmative defense, asserting that the Option Agreement had extinguished that prior agreement, and Defendants prevailed.

Mountain Air concedes that Defendants' novation affirmative defense satisfied the purposes specified in the attorney fee provision—meaning it sought the enforcement of the Option Agreement or the resolution of a dispute in connection with its provisions.[1] Mountain Air, however, argues that Defendants had to plead novation via a claim for declaratory relief in a complaint or cross-complaint, and not via an affirmative defense, to trigger the attorney fee provision. According to Mountain Air, only the *filing* of a suit is an "action" or "proceeding" within the scope of the attorney fee provision.

The Option Agreement's attorney fee provision reveals no such intent by the parties. Mountain Air twists and tortures the provision's language to support a fiction as to why the parties might have wanted to distinguish between pleading claims and pleading defenses. But, in

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[1] The dissent in the Court of Appeal quarreled with the majority regarding whether Defendants' novation affirmative defense satisfied these purposes. (Typed Dissenting Opinion ("Dis. opn."), 8.) There was no division between the majority and dissent as to whether an affirmative defense is an "action" or "proceeding" within the scope of the attorney fee provision. (Maj. opn., 20, fn. 12; Dis. opn., 8.)

doing so, Mountain Air ignores the breadth of the provision's text and the plain meaning of its words. The provision's broad language reflects an *inclusive* intent by the parties—not the exclusive, restrictive intent Mountain Air urges—and belies any intent by the parties to distinguish between claims and affirmative defenses. "The idea that the parties intended such a form-over-function approach to govern recovery of attorney fees strains credulity." (Maj. opn., 18.)

Had these parties intended such an arrangement whereby attorney fees would be recoverable only when a plaintiff pleads a contract-based claim, and not when a defendant pleads a contract-based affirmative defense, it is reasonable to assume that they would have specifically spelled this out in their attorney fee provision. At the very least, parties with such an intent would not have provided that any "action" or "proceeding" triggers the fee provision, language that by definition is not limited to pleading a claim in a complaint.

It takes no "stretch" of this attorney fee provision (OBOM 2)—but merely a plain and commonsense reading of its words in their context—to conclude that the parties intended to include affirmative defenses within the bounds of litigation covered by its broad scope.

STATEMENT OF FACTS

A. Mountain Air And Sundowner Enter Into A Purchase And Repurchase Agreement Relating To Commercial Real Estate In Nevada.

The underlying dispute in this case relates to commercial real estate property located in Reno, Nevada. (Maj. opn., 2.) This property was originally a single parcel of real property with multiple

buildings. (*Ibid.*) On February 17, 2006, by the recordation of a map, the property was subdivided into three legal parcels: the North Tower; the South Tower; and the Casino. (*Ibid.*)

On December 12, 2005, before the property was subdivided, Steven Scarpa and Sundowner Towers, LLC, a Nevada limited liability company ("Sundowner") entered into two separate written agreements regarding the property. (Maj. opn., 2.) In the first written agreement, Sundowner agreed to sell the South Tower to Scarpa for $7 million (the "Purchase Agreement"). (*Ibid.*; 12 CT 3078.) In the second written agreement, Sundowner agreed to repurchase the South Tower from Scarpa for $7 million plus 12 percent (the "Repurchase Agreement"). (Maj. opn., 2; 12 CT 3086.)

Bijan Madjlessi and Glenn Larsen, Sundowner's two co-owners, guaranteed Sundowner's obligations under the Repurchase Agreement. (Maj. opn., 2; 12 CT 3038)

Scarpa subsequently assigned his rights under the agreements to Mountain Air, a single-purpose California limited liability company whose sole member is Scarpa. (Maj. opn., 2.)

B. The Parties Later Execute The Option Agreement.

On April 25, 2006, Mountain Air, as seller, and Madjlessi and Larsen, as buyers, executed a written option agreement whereby Mountain Air granted Madjlessi and Larsen the exclusive right to purchase the South Tower during a specified option period (the "Option Agreement"). (Maj. opn., 2; 12 CT 3092.)

The Option Agreement includes an integration clause that declares that the Option Agreement "expressly supersedes all previous or contemporaneous agreements, understandings, representations, or statements between the parties respecting this matter." (Maj. opn., 19; 12 CT 3098 [¶ 20(d)].)

The Option Agreement also contains an attorney fee provision that states in pertinent part:

> Litigation Costs. If any legal action or any other proceeding, including arbitration or an action for declaratory relief; is brought for the enforcement of this Agreement or because of an alleged dispute, breach, default, or misrepresentation in connection with any provision of this Agreement, the prevailing party shall be entitled to recover reasonable attorney fees, expert fees and other costs incurred in that action or proceeding, in addition to any other relief to which the prevailing party may be entitled.

(Maj. opn., 11-12; 12 CT 3098 [¶ 20(c)].)

C. Mountain Air Acquires The South Tower And Sues When Sundowner Does Not Repurchase.

On April 27, 2006, Sundowner acquired the South Tower from a third party and transferred it on the same day to Mountain Air pursuant to the Purchase Agreement. (Maj. opn., 2.) Sundowner did not repurchase the South Tower. (*Id.* at 3.)

Mountain Air filed this action against Defendants, asserting claims for breach of the Repurchase Agreement and breach of the written guarantees. (Maj. opn., 3.)

D. Defendants Plead Affirmative Defenses In Their Answer.

Defendants pleaded affirmative defenses, asserting that the Option Agreement was a novation, which had extinguished the Repurchase Agreement, and that the Repurchase Agreement was illegal and thus void and unenforceable. (Maj. opn., 3; AA 17-18.)

E. Defendants Prevail At Trial, And The Trial Court Rules For Defendants On Their Affirmative Defenses.

After a 13-day trial, the trial court, on October 10, 2012, ruled in Defendants' favor on both affirmative defenses, finding for Defendants "on all issues." (Maj. opn., 3-4; 7 CT 1754, 1757.)

The trial court ruled that the Repurchase Agreement was illegal, and thus void and unenforceable, because it was executed before the recordation of a subdivision map, in violation of both Nevada and California law. (Maj. opn., 3.) The trial court further decided that, even if the Repurchase Agreement were legal, it was terminated by the Option Agreement, which was a novation. (*Id.* at 3-4.)

In ruling that Defendants prevailed on their novation affirmative defense, the trial court found "'by clear and convincing evidence that the parties treated the Repurchase Agreement as having been extinguished and the Option Agreement as the operative agreement.'" (Maj. opn., 3, quoting 7 CT 1788.) The trial court also held that the Option Agreement's integration clause was unambiguous in expressly superseding all prior agreements relating to the same subject matter, including the Repurchase Agreement, which involved precisely the same subject matter—that is, the purchase of the South

Tower. (*Id.* at 3.) The Option Agreement's materially different terms also supported the trial court's determination that the agreement was a novation. (*Id.* at 3-4.)

On October 10, 2012, the trial court entered judgment in favor of Defendants.[2] (Maj. opn., 4.)

F. The Trial Court Denies Attorney Fees To Defendants.

On December 7, 2012, Defendants moved for attorney fees as the prevailing party, relying on attorney fee provisions in both the Repurchase Agreement and the Option Agreement. (Maj. opn., 4.) The trial court denied the motion on March 20, 2013. (*Ibid.*; AA 79.)

The trial court decided that it could not award attorney fees under the Repurchase Agreement, relying on the general rule that if an entire agreement is void for illegality, then attorney fees based on that agreement are unavailable. (Maj. opn., 7; AA 82.) As to the Option Agreement's attorney fee provision, the trial court concluded that Defendants' affirmative defense of novation did not fall within the Option Agreement's attorney fee provision. (Maj. opn., 13, 20; AA 83.) The trial court reasoned that the provision "'only applies to actions 'brought' for the enforcement of the Option Agreement or because of a dispute in connection with any provision of the Agreement, *not any action* between the parties that happens to concern the Option Agreement.'" (Dis. opn., 6, quoting AA 83, original emphasis.) The trial court ruled that none of the provisions of

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[2] Mountain Air filed a notice of appeal after the entry of judgment, but that appeal was later dismissed. (Maj. opn., 4, fn. 2.)

the Option Agreement were actually "'"in dispute'" in this case. (Dis. opn., 6, quoting AA 83.)

G. The Court of Appeal Reverses The Denial Of Fees.

The Court of Appeal reversed the trial court's order denying Defendants attorney fees in a published opinion. (Maj. opn., 1, 21.) Although the Court of Appeal agreed with the trial court that attorney fees were not available under the Repurchase Agreement, as that agreement was void and unenforceable, it held that the trial court erred in denying Defendants attorney fees under the Option Agreement. (*Id.* at 1.)

Reviewing the trial court's interpretation of the Option Agreement de novo (recognizing that "neither party [had] cite[d] extrinsic evidence that bears upon interpretation of the option agreement"), the majority held that the trial court erred in interpreting the attorney fee provision of the Option Agreement to exclude Defendants' novation affirmative defense. (Maj. opn., 11-21.)

The majority first considered the form of the novation defense, specifically whether Defendants' affirmative defense "constitute[d] an 'action or any other proceeding . . . brought' within the meaning of the option agreement's fees provision." (Maj. opn., 13.) The majority decided that the trial court had "overlook[ed] the broad language" of the Option Agreement's attorney fee provision, "which includes not only an action but 'any other proceeding.'" (*Ibid.*) The majority held that an affirmative defense is an "action" or "proceeding" within the scope of this attorney fee provision. (*Id.* at 18.)

In reaching this conclusion the majority opinion agreed with the Court of Appeal in *Windsor Pacific*, *supra*, 213 Cal.App.4th 263, as well as the dissenting opinion of Justice Armstrong in *Gil v. Mansano* (2004) 121 Cal.App.4th 739, and reasoned that the words "action" or "proceeding," in their ordinary usage, "'encompass[] the entire judicial proceeding, including the answer, and that an action in which the defendant asserted a defense based on a [contract] was an action brought to enforce the terms of the [contract] within the meaning of the attorney fee clause.'" (Maj. opn., 18, quoting *Windsor Pacific*, *supra*, 213 Cal.App.4th at p. 276.) The majority rejected the interpretations adopted by *Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, and by the majority opinion in *Gil*, *supra*, 121 Cal.App.4th 739, both of which excluded affirmative defenses from the coverage of an attorney fee provision. (Maj. opn., 18.)

The majority also concluded that the subject matter of Defendants' novation defense fell within the two purposes specified in the attorney fee provision—"brought either 'for the enforcement of [the Option] Agreement' or 'because of an alleged dispute, breach, default, or misrepresentation in connection with any provision of [the Option] Agreement.'" (Maj. opn., 13, 19-21.) The majority held that Defendants, in bringing their novation affirmative defense, sought to enforce the Option Agreement's integration clause and "by doing so accomplish a material purpose of the option agreement: the extinguishment of the repurchase agreement." (*Id.* at 19.) The majority also reasoned that "[t]here can be no doubt here that

Mountain Air and defendants disputed the meaning and effect of the option agreement, including its integration clause," and thus the attorney fee provision's "in connection with" language encompassed this dispute. (*Id.* at 20.)

Justice Richmond dissented from the majority's opinion reversing the trial court's denial of attorney fees under the Option Agreement. (Dis. opn., 1.) In Justice Richmond's view, the issue was "*not whether there was an 'action' or a 'proceeding*'" but whether Defendants' novation affirmative defense fell within the purposes specified in the Option Agreement's attorney fee provision. (Dis. opn., 8, emphasis added.) Justice Richmond disputed the majority's decision that the novation defense sought to enforce the Option Agreement or to resolve a dispute in connection with that agreement. (Dis. opn., 10-13.)

STANDARD OF REVIEW

The question whether an affirmative defense is an "action" or "proceeding" within the meaning of this attorney fee provision, is an issue of law, reviewed on appeal de novo. (Maj. opn., 6, 20, fn. 12.)

While orders granting or denying an award of attorney fees are generally reviewed under an abuse of discretion standard, the determination of the *legal basis* for an attorney fee award is a question of law, reviewed de novo. (See *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175 [applying de novo standard as "'the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory

construction and a question of law,'" quoting *Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142].)

Where attorney fees are claimed under a contractual attorney fee provision, "the scope of activities for which fees may be recovered is governed by the terms of the contract." (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 577, citing *Santisas*, *supra*, 17 Cal.4th at p. 608; see also *Carver*, *supra*, 97 Cal.App.4th at p. 142 ["[T]o determine whether an award of attorney fees is warranted under a contractual attorney fees provision, the reviewing court will examine the applicable statutes and provisions of the contract."].) It is "solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence." (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.)

Therefore, where, as here, extrinsic evidence has not been offered to interpret the contractual attorney fee provision and no facts are in dispute, review is de novo. (*Carver*, *supra*, 97 Cal.App.4th at p. 142; see, e.g, *Windsor Pacific*, *supra*, 213 Cal.App.4th at p. 273 ["We interpret a contract de novo if the interpretation does not turn on the credibility of extrinsic evidence."]; *Exxess*, *supra*, 64 Cal.App.4th at p. 705 ["review[ing] the trial court's decision [regarding entitlement to fees] de novo"].)

Mountain Air—despite its position that "the only thing that matters" to this Court's inquiry is "the *actual text* of the attorney-fee provision adopted by the parties in this case"; despite its direction that

"[i]f the *text* of the attorney-fee clause includes affirmative defenses, then the defendants are entitled to a fee award"; and despite its characterization of the issue as a "*lexical* dilemma[]" (OBOM 3, 10, 12, emphasis added)—perplexingly suggests that the Court of Appeal should have reviewed the trial court's decision as to the availability of attorney fees under a "deferential standard." (OBOM 7.) Mountain Air goes so far as to propose that the trial court's decision should be affirmed if it is "within the range of reason." (OBOM 8.) Mountain Air's assertions are wholly without merit, as the applicability of the de novo standard of review to this question of law is clear.

While Mountain Air proposes that deference to the trial court is warranted "*[t]o the extent* that the trial court relied on its knowledge of the proceedings" (OBOM 8, emphasis added), it fails to identify what knowledge or evidence the trial court relied on that would inform the resolution of whether an affirmative defense constitutes an "action" or "proceeding." There is none.

The cases Mountain Air cites supporting its proposed deferential standard are inapposite, as they involve how to apportion fees between qualifying and non-qualifying claims and defenses under a contract, and not a purely legal question of contract interpretation.[3] (OBOM 7, citing *Shadoan v. World Savings & Loan Assn.* (1990) 219 Cal.App.3d 97, 107-108 [recognizing trial court's discretion to apportion fees so losing party is only required to pay fees on

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[3] Here, the Court of Appeal expressly left any apportionment of fees to the trial court on remand. (Maj. opn., 21, fn. 15.)

contractual cause of action], and *El Escorial Owners' Ass'n v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337, 1365-66 [rejecting challenge to fee apportionment because decision how to separate attorney time spent on contract and tort claims was within trial court's discretion].) In such circumstances, the basis for the discretion afforded to the trial court "is the judge's familiarity with the proceedings and the work performed by the attorneys." (*In re Tobacco Cases I* (2013) 216 Cal.App.4th 570, 588 (cited at OBOM 8) [holding no abuse of discretion when trial court refused to reduce lodestar amount].)

Mountain Air's reliance on cases from other attorney fee contexts also fails because these cases similarly involve fact-dependent determinations by the trial court, and not pure issues of law. (OBOM 7-8, citing *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 938 [recognizing that, under section 1021.5 of the Code of Civil Procedure, trial court has discretion to award fees if it determines the action vindicated an important right so as to justify a fee award under a private attorney general theory]; *Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1151-52, 1155 [recognizing deference due to trial court's "prevailing party" determination as this is a "fact intensive" inquiry that requires a "consider[ation] [of] all factors which may reasonably be considered to indicate success in the litigation"]; *Carver*, *supra*, 119 Cal.App.4th at pp. 505-506 [affirming trial court's apportionment of fees based on conflicting evidence as to what percentage of the fees should be

allocated to noncompensable claims]; *Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1180-81 [holding trial court did not abuse its discretion by declining to apportion attorney fees to contractual claim due to "monetary insignificance" of claim that indicated to trial court that it was merely an add-on claim].)

Finally, the standard of review disagreement between the majority and dissent in the Court of Appeal does not support the deferential standard for which Mountain Air advocates. (OBOM 7.) The dissent urged deference to the trial court's decision that Defendants' novation defense did not fall within the two purposes specified in the attorney fee provision—for "enforcement of" the Option Agreement or "because of an alleged or because of an alleged dispute, breach, default, or misrepresentation in connection with any provision of [the Option Agreement]." (Dis. opn., 11.) The majority rejected "the dissent's suggestion that deference to the trial court [wa]s in order here," reasoning that it was a contract interpretation issue and "no question of fact is at issue." (Maj. opn., 20, fn. 12.)

Mountain Air does not challenge whether Defendants' novation defense fell within the two purposes specified in the attorney fee provision. (OBOM 1; see also *id.* at 12 [conceding that "[i]f the text of the attorney-fee clause includes affirmative defenses, then the defendants are entitled to a fee award"]; Maj. opn., 21, fn. 13 [acknowledging Mountain Air's concession that "if defendants had filed a cross-complaint for declaratory relief *raising the same arguments as in their novation defense*, we would have a 'very

different situation'"].) The issue on which the majority and dissent quarreled is thus irrelevant.[4]

The standard of review for the purely legal issue of contract interpretation that Mountain Air raises to this Court is de novo.

LEGAL ARGUMENT

I. THE PLAIN LANGUAGE OF THE ATTORNEY FEE PROVISION, WHICH PROVIDES FOR THE RECOVERY OF FEES "IN ANY ACTION OR ANY OTHER PROCEEDING," INCLUDES AFFIRMATIVE DEFENSES WITHIN ITS BROAD SCOPE.

It is well-settled under California law that "[e]xcept as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties." (Code Civ. Proc., § 1021.) This Court has explained that when interpreting the scope of an agreement that provides for the recovery of attorney fees, courts must "apply the ordinary rules of contract interpretation." (*Santisas, supra*, 17 Cal.4th at p. 608.) Under those interpretative rules, "the mutual intention of the parties at the time the contract [wa]s formed"

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[4] In any event, the majority properly concluded that the standard of review regarding whether Defendants' novation defense fell within the provision's specified purposes was also de novo, as there was no conflicting evidence. (Maj. opn., 20, fn. 12.)

governs the construction of an attorney fee provision.[5] (*Ibid.*, citing Civ. Code, § 1636.)

This Court ascertains the contracting parties' intention, if possible, solely from the contract's written language. (*Santisas*, *supra*, 17 Cal.4th at p. 608, citing Civ. Code, § 1639.) The Court may "also consider the circumstances under which the contract was made and the matter to which it relates." (*Windsor Pacific*, *supra*, 213 Cal.App.4th at p. 274, citing Civ. Code, § 1647.) The "'clear and explicit' meaning" of the words in the attorney fee provision, "interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' controls judicial interpretation." (*Santisas*, *supra*, 17 Cal.4th at p. 608, quoting Civ. Code, §§ 1638, 1644.) "If contractual language is clear and explicit and does not involve an absurdity, the plain meaning governs." (*Windsor Pacific*, *supra*, 213 Cal.App.4th at p. 274, citing Civ. Code § 1638.)

As the majority opinion in the Court of Appeal, as well as the recent decision of the Court of Appeal in *Windsor Pacific*, *supra*, 213 Cal.App.4th 263, concluded, the ordinary meaning of the words

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[5] An attorney fee clause can provide for an attorney fee award in an action on the contract or, if worded more broadly, on noncontract actions. (Maj. opn., 6-7, citing Civ. Code, § 1717, and Code Civ. Proc., § 1021.) Neither party, nor the Court of Appeal, has raised any issue in this case as to the application of Civil Code section 1717. The sole issue presented here is whether Defendants' affirmative defense is an "action" or "proceeding" within the meaning of the Option Agreement's attorney fee provision. (OBOM 1.)

"action" and "proceeding" includes affirmative defenses. Mountain Air's position that, "[b]y definition" (OBOM 14), an affirmative defense is neither an "action" nor a "proceeding" necessarily fails. Neither does Mountain Air's reliance on the word "brought" narrow the broad scope of "any legal action or any other proceeding" or evidence any intent by the parties to limit the availability of fees to the initiation of a suit by pleading a claim in a complaint. Rather, reading these words within the context of this attorney fee provision confirms that pleading an affirmative defense in an answer triggers its coverage.

A. The Words "Action" And "Proceeding" Encompass Affirmative Defenses.

The majority opinion in the Court of Appeal, after carefully analyzing the meaning of "action" and "proceeding" and reading those words within the context of the attorney fee provision, properly concluded that an affirmative defense constitutes an "action" or "proceeding" within the scope of the attorney fee provision. A party who asserts an affirmative defense brings an "action" or "proceeding"—whether these words are interpreted in their "ordinary and popular sense" (Civ. Code, § 1644), or afforded a specialized legal meaning. (Maj. opn., 13-15 & fn. 9.)

The American Heritage Dictionary defines "action," as used in the context of "Law," as "[a] proceeding brought before a court to obtain relief; a lawsuit." (American Heritage Dictionary (5th ed. 2011) p. 17.) An "action" is "the initiating of a proceeding in a court of justice by which one demands or enforces one's right" and also

"the proceeding itself." (Merriam-Webster Online, 2015. "Action" <http://www.merriam-webster.com/dictionary/action>.) Similarly, Black's Law Dictionary defines "action," as, inter alia, "[a] civil or criminal judicial proceeding." (Black's Law Dict. (10th ed. 2014) p. 35, col. 1.)

Mountain Air, however, would limit the meaning of "action" to the filing of a complaint or cross-complaint, initiating a lawsuit. (OBOM 13, citing *Gil*, *supra*, 121 Cal.App.4th at p. 744, and Code Civ. Proc., §§ 20-22.) But the meaning of "action" is not so limited. According to each of the definitions discussed above, an "action" may encompass the entire proceeding, in addition to the act that initiates the lawsuit. A party thus may bring an "action" when it pleads an affirmative defense, just as a party brings an "action" when it pleads a claim. As Justice Armstrong explained in his dissenting opinion in *Gil*, courts have recognized in a number of contexts that the word "'action' is not limited and precise, but general and inclusive." (*Supra*, 121 Cal.App.4th at p. 747 (dis. opn. of Armstrong, J.), citing cases.)

In *Palmer v. Agee* (1978) 87 Cal.App.3d 377, for example, the Court of Appeal considered the word "action" in the context of a statutory provision for the recovery of attorney fees in any "action" arising out of a special statute related to the termination of mobile home tenancies. (*Id.* at pp. 386-387.) Mobile home landlords had filed a complaint for unlawful detainer against tenants for nonpayment of rent, and the tenants asserted, as a defense, the fact that the

landlords had not complied with the special statute. The tenants prevailed on their defense. *Palmer* held the tenants' defense constituted an "action" arising out of that special statute, holding an "[a]ction is not limited to the complaint or the document initiating the action but the entire judicial proceeding." (*Id.* at p. 387.) "The defenses raised in the answer to the complaint are a real part of any action." (*Ibid.*)

Both this Court and the Court of Appeal have similarly refused to restrict the meaning of the word "action" in the context of attorney fees recoverable under Code of Civil Procedure section 1021.5, which provides for fees to the successful party "in any action" resulting in the enforcement of an important right affecting the public interest. (*In re Head* (1986) 42 Cal.3d 223, 228 ["action" in section 1021.5 encompasses habeas corpus proceedings, even though habeas corpus is a special proceeding and not a civil action]; *Best v. California Apprenticeship Council* (1987) 193 Cal.App.3d 1448, 1460-61 ["action" in section 1021.5 encompasses administrative proceedings that preceded a later-filed civil action].) "[T]he use of the term 'action' does not in all contexts refer to the technical meaning of the term as defined in the Code of Civil Procedure." (*Best, supra,* 193 Cal.App.3d at p. 1460.)

Nonetheless, even if the word "action" in the Option Agreement's attorney fee clause were construed narrowly here, "the inclusion of the phrase 'or *any other proceeding*' suggests something broader." (Maj. opn., 13, emphasis added.)

"Proceeding" is broadly defined in ordinary usage as "[a] course of action; a procedure" (American Heritage Dict., *supra*, p. 1404) or, in legal usage, as "[l]egal action; litigation" (*ibid.*) or "the process of appearing before a court of law so a decision can be made about an argument or claim: a legal action" (Merriam Webster Online, 2015. "Proceeding" <http://www.merriam-webster.com>). Black's Law Dictionary defines "proceeding" as "[t]he regular and orderly progression of a lawsuit, *including all acts and events between the time of commencement and the entry of judgment*." (Black's Law Dict., *supra*, at p. 1398, col. 1, emphasis added.) A "proceeding" may be "[a]n act or step that is part of a larger action." (*Ibid.*)

Black's Law Dictionary explains that the word "proceeding" is necessarily more comprehensive than the word "action," quoting Edwin E. Bryant, The Law of Pleading Under the Codes of Civil Procedure 3-4 (2d ed. 1899), which stated that a "proceeding" is "'a word much used to express the business done in courts'" and is "'an act done by the authority or direction of the court, express or implied.'" (Black's Law Dict., *supra*, at p. 1398.) "Proceeding" "'is more comprehensive than the word 'action,' but it may include in its general sense *all the steps taken or measures adopted in the prosecution or defense of an action*, including the pleadings and judgment.'" (*Ibid.*, emphasis added.) Thus, as the majority opinion in the Court of Appeal concluded, "[a]n affirmative defense falls squarely within" the definition of "proceeding." (Maj. opn., 13-14; see also *Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1105

[construing "proceeding" broadly to include "'[a]nything done from the commencement to the termination'" in the progress of a civil action (quoting *Stonesifer v. Kilburn* (1892) 94 Cal. 33, 43)].)

Mountain Air's position that "*[b]y definition*, a defense is neither an action nor a proceeding" (OBOM 14, emphasis added) is therefore plainly incorrect. Both "action" and "proceeding" have broad meanings that "encompass the entire action or proceeding, including both the complaint and any responsive pleading, such as an answer." (*Windsor Pacific, supra*, 213 Cal.App.4th at p. 274.) The broad definitions of these words undermine Mountain Air's argument that the drafters, by using these words, indicated their intent to "adopt[] a narrow[] fee provision" and exclude affirmative defenses from its scope. (OBOM 15.)

Neither is there any merit to Mountain Air's argument that the word "proceeding"—notwithstanding its "expansive definition" in some contexts—should be given a narrow reading here. (OBOM 16-19.) Mountain Air criticizes the Court of Appeal's reliance on the broad meaning of "proceeding" applied in *Zellerino*, 235 Cal.App.3d 1097. (OBOM 17; Maj. opn., 14.) *Zellerino* recognized that "proceeding" may have various meanings, depending on context. (*Supra*, 235 Cal.App.3d at p. 1105.) According to Mountain Air, the Option Agreement's attorney fee provision, unlike the text interpreted in *Zellerino*, requires a narrower reading of "proceeding." (OBOM 17.)

The narrower, restrictive meaning of "proceeding" for which Mountain Air advocates, however, does not support its construction of the attorney fee provision. The narrow definition of "proceeding" that *Zellerino* recognized (but ultimately rejected in favor of a broader meaning) was "an action or remedy *before a court*." (*Supra*, 235 Cal.App.3d at p. 1105, emphasis added.) For this narrower definition, *Zellerino* relied on cases that specifically considered whether the word "proceeding" was limited to a proceedings before a *judicial* tribunal or also encompassed non-judicial proceedings. (*Ibid.*, citing *People v. Gutierrez* (1986) 177 Cal.App.3d 92, 99-100 [holding "proceeding" in article I, section 14 of the California Constitution gives a right to an interpreter during proceedings "held before a judicial tribunal," not a probation interview], and *Gibson v. Sacramento County* (1918) 37 Cal.App. 523, 526 [defining "criminal proceeding" as "some authorized step taken before a judicial tribunal"].)

If this narrower definition of "proceeding" were employed here and "proceeding" were defined as "an action or remedy *before a court*," then there is no distinction between the meaning of "legal action" and "proceeding" in the attorney fee provision. If, as Mountain Air argues, a "legal action" is an example of a "proceeding" (OBOM 18-19), its construction fails by giving the words *the same meaning*. Mountain Air's interpretation thus renders either "legal action" or "proceeding" superfluous within the attorney fee clause, violating well-settled principles of construction. (Maj. opn., 14, citing *Deutsch v. Phillips Petroleum Co.* (1976) 56 Cal.App.3d 586, 590

[contractual provision "must be construed so as to give force and effect to every word contained within it"].)

Moreover, construing "legal action" as an example of a "proceeding" does not foreclose a reading of this provision that both claims in a complaint and affirmative defenses in an answer as examples of a "proceeding." Mountain Air's contention that "proceeding" can only refer to the "entirety of a suit" fails because it assumes that the terms "legal action, "arbitration," and "an action for declaratory relief" only include the documents that initiate such proceedings. There is no support for such limitation.[6]

Finally, reading "proceeding" to encompass the assertion of a contract-based affirmative defenses will not render the attorney fee provision "incomprehensible" or "produce absurd results." (OBOM 19.) Mountain Air raises the specter of every ruling in the trial court giving rise to a separate attorney fee award without any regard to which party ultimately prevails, but ignores that the Option

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[6] Mountain Air's construction is not bolstered by language in the attorney fee provision that authorizes the recovery of fees incurred "*in* that action or proceeding." (OBOM 18, original emphasis.) The phrase "in that action or proceeding" simply means that the prevailing party can only recover fees incurred *in* whatever action or proceeding was "brought for the enforcement of this Agreement or because of an alleged dispute, breach, default, or misrepresentation in connection with any provision of this Agreement." (See Maj. opn., 21 & fn. 15.) A prevailing party thus can only recover fees incurred on the contract-based claims or defenses. (See, e.g., *El Escorial*, *supra*, 154 Cal.App.4th at pp. 1365-66 [apportioning fees].)

Agreement only provides for the recovery of attorney fees to "the prevailing party." (Maj. opn., 11.)

As explained in *Frog Creek Partners, LLC v. Vance Brown, Inc.* (2012) 206 Cal.App.4th 515 (cited at OBOM 19), under Civil Code section 1717, "there can be only one prevailing party entitled to attorney fees as 'the party prevailing on the contract.'" (*Id.* at p. 539.) That prevailing party determination is "made only upon final resolution of the contract claims and only by a comparison of the extent to which each party has succeeded and failed to succeed in its contentions." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876, quotations and citations omitted). Whether a party prevailed on any interim procedural steps in a lawsuit would not alter which party was ultimately deemed entitled to fees as the prevailing party.

Neither does the majority opinion in *Salawy v. Ocean Towers Housing Corp.* (2004) 121 Cal.App.4th 664 (OBOM 19), provide support for Mountain Air's concerns regarding whether "proceeding" should include steps in a litigation other than the filing of a complaint. *Salawy* considered only whether a demurrer to a complaint was an "action . . . to enforce" a right and concluded it was not. (*Id.* at p. 670.) Mountain Air's concerns are unfounded.

It therefore "*does not matter*" whether the party who seeks the enforcement of the contract or the resolution of a dispute regarding its provisions does so "by the allegations of a complaint or by affirmative defenses in an answer." (*Windsor Pacific, supra*, 213 Cal.App.4th at

p. 274, emphasis added.) Either falls within the broad meaning of "action" or "proceeding."[7]

B. "Brought" Does Not Support An Intent To Exclude Affirmative Defenses From This Attorney Fee Provision's Broad Scope.

To support its position that the Option Agreement's attorney fee provision is narrower than the plain meaning of "action" and "proceeding," Mountain Air relies on the inclusion of the word "brought." (OBOM 15-16.) Mountain Air argues that, by using a form of the verb "bring"—instead of the verbs "plead," "raise," or "assert"—the drafters excluded (whether purposefully or not) affirmative defenses from the clause. (OBOM 15.) According to Mountain Air, the use of this verb "confirms" the parties did not intend this attorney fee provision to cover affirmative defenses. (OBOM 15.) But, as the majority opinion in the Court of Appeal

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[7] A federal bankruptcy court recently decided a similar issue regarding the availability of attorney fees under a contract and, after considering the intermediate appellate decisions in California, followed *Windsor Pacific*, like the majority opinion here. (*In re Mac-Go Corp.* (Bankr. N.D. Cal. Mar. 20, 2015) 2015 WL 1372717, at *4-6.) The bankruptcy court recognized that, when applying California law in the absence of a controlling decision from this Court, it was bound to predict how this Court would decide the issue of California law. (*Id.* at *6, fn. 5.) The bankruptcy court reasoned that only *Windsor Pacific* followed this Court's instruction that California courts must apply the "ordinary" rules of interpretation when analyzing an attorney fee provision, not *Exxess* and *Gil*, which "narrowly interpret[ed] fee clauses," contrary to this Court's authority. (*Id.* at *5.)

concluded, Mountain Air cannot narrow the broad scope of this attorney fee provision by placing this verb under a microscope.

Mountain Air gives no reason why an affirmative defense in an answer could not be "brought," just as a cause of action in a complaint could be "brought." According to Mountain Air, affirmative defenses "are pleaded—not brought." (OBOM 2.) But even if other, more specific verbs or legal terms are used more often in connection with affirmative defenses—as Mountain Air contends, relying on what it terms "normal legal parlance" (OBOM 15)—there is no logical reason why *asserting*, *raising*, or *pleading* an affirmative defense is not the same as *bringing* an affirmative defense, within the word's usual and ordinary meaning. (Civ. Code, § 1644 ["The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."].)

Mountain Air is not correct that the verb "brought" excludes affirmative defenses because it necessarily refers "'to the *initiation* of legal proceedings in a suit.'" (OBOM 21, quoting *Curtis v. County of Los Angeles* (1985) 172 Cal.App.3d 1243, 1249, emphasis added.) In *Curtis*, the Court of Appeal considered whether "brought the proceeding," as used in a statutory attorney fee provision, meant only the *filing* of a lawsuit or also included the continued maintenance of that lawsuit. (*Id.* at pp. 1248-52.) *Curtis*, in construing the language, reasoned that Black's Law Dictionary supported both meanings and

ultimately held that the word "brought" encompasses not only the filing of an action, but also its continued maintenance. (*Id.* at p. 1252; see also *ibid.* [recognizing holding was in accord with *California Southern R. Co. v. Southern Pac. R. Co.* (1884) 65 Cal. 394, which held that the requirement that an eminent domain action be "brought" in the county in which the property was situated applied not only to the *filing* of the action but also to its continued maintenance].)[8]

The majority opinion in the Court of Appeal rightly refused to validate the technical distinction Mountain Air draws based on this verb choice, concluding that such a reading would "elevate[] form over substance and fiction over reality." (Maj. opn., 18.) As the majority reasoned—agreeing with the dissenting opinion of Justice Armstrong in *Gil*— "'*raising . . . an affirmative defense is legally the same as bringing an 'action.*'" (Maj. opn., 18, quoting *Gil, supra*, 121 Cal.App.4th at p. 747 (dis. opn. of Armstrong, J.), original

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[8] *Employers Reinsurance Corp. v. Phoenix Ins. Co.* (1986) 186 Cal.App.3d 545 (OBOM 21) does not support Mountain Air's position that "brought" refers to the initiation of a lawsuit. *Employers Reinsurance* considered an insurance policy that provided for prior acts coverage "if . . . suit is brought against the insured during the policy period." (*Id.* at p. 554.) The court decided that "suit is brought" here meant that all that was required to trigger the prior acts coverage was the filing of the complaint—and not the service of process or any additional act. The court gave "suit is brought" its narrowest reading to effectuate the intent to provide for prior acts coverage. If *Employers Reinsurance* has any application here, it supports the majority's interpretation that the technical distinction Mountain Air aims to draw by relying on "brought" does not defeat the parties' apparent intent to provide for fee recovery.

emphasis.) Mountain Air, while seeking to distinguish claims and affirmative defenses on the grounds that they arise in "different procedural contexts," ignores the inherent similarities in their substance. (OBOM 11.)

An affirmative defense is not a mere "'response to the claims of the other party,'" nor a setting forth of reasons why the plaintiff should not succeed on its claims, as Mountain Air contends. (OBOM 14, quoting *Gil*, *supra*, 121 Cal.App.4th at p. 744, emphasis omitted.) Rather, an affirmative defense is the "assertion of facts and arguments that, if true, will defeat the plaintiff's . . . claim, even if all the allegations in the complaint are true." (Black's Law Dict., *supra*, at p. 509, col. 1.)

Just as the plaintiff bears the burden of proving its claims, the defendant bears the burden of proving its affirmative defense. (Black's Law Dict., *supra*, at p. 509, col. 1.) For example, for the novation affirmative defense Defendants asserted here, the burden of proof in support of novation is "'upon the party asserting its existence'" and the "evidence in support of a novation must be 'clear and convincing.'" (*Alexander v. Angel* (1951) 37 Cal.2d 856, 860, internal citations omitted; see also *Ayoob v. Ayoob* (1946) 74 Cal.App.2d 236, 250 [applying "well established rule that the burden of proving a novation is on the party asserting its existence, and that the proof in support thereof must be clear and convincing" to defendant's pleading of novation], citations omitted.) A defendant pleading an affirmative defense in an answer is subject to the same

rules that relate to pleading a cause of action in a complaint. (*Gil*, *supra*, 121 Cal.App.4th at p. 747 (dis. opn. of Armstrong, J.) Mountain Air fails to explain why procedural differences trump such substantive similarities. They do not.

Mountain Air's criticisms of the majority opinion in the Court of Appeal are unfounded. The majority, in refusing to credit the word "brought" with the significance for which Mountain Air advocates, neither "admit[ted]" that affirmative defenses are not "brought," nor "deleted" the word "brought" from its construction. (OBOM 15-16.) The majority simply recognized that there is no logical, reality-based reason to conclude from the provision's language that the parties, by their use of the word "brought," intended to draw a narrow, technical distinction between pleading claims and pleading defenses. Mountain Air's "overly clever, and hypertechnical" reading is nonsensical "if the context is not a laboratory analysis of language, but the ordinary lives of people, organizations, and their lawyers." (*Salawy*, *supra*, 121 Cal.App.4th at p. 677 (dis. opn. of Armstrong, J.).)

The Court of Appeal in *Stockton Theatres, Inc. v. Palermo* (1954) 124 Cal.App.2d 353, rejected a similar argument when considering the word "commence" in a contractual attorney fee provision. The lease at issue in *Stockton Theatres* provided for the recovery of prevailing party fees "[i]f either party shall *commence* any legal proceedings against the other for relief" because of any default by the other party. (*Id.* at p. 354, emphasis added.) The Court of Appeal affirmed the trial court's determination that the assertion of a

successful defense to an unlawful detainer action, based on the other party's default, constituted "commenc[ing]" legal proceedings. (*Id.* at p. 362.) The Court of Appeal, agreeing with the analysis of the trial court and quoting that analysis, stated: "'The word 'commence' as used in this clause can just as well mean 'commence a successful defense.' It would be a narrow interpretation to declare that the word 'commence' must be given the restricted construction of 'file a complaint as plaintiff.''" (*Ibid.*)

Finally, there is no merit to Mountain Air's argument that the use of "brought" in combination with the attorney fee provision's two specified purposes—"for the enforcement of [the Option] Agreement" or "because of an alleged dispute, breach, default, or misrepresentation in connection with any provision of [the Option] Agreement"—narrows the availability of attorney fees to the filing of a contract-based *claim*. (OBOM 20-22.) In entirely circular reasoning, Mountain Air contends that the provision's two specified purposes can only be served by the filing of a complaint because these specified purposes must be "the reason that the lawsuit was filed." (OBOM 21.) Because, according to Mountain Air, an affirmative defense does not alter the original reason for filing a lawsuit, only pleading a contract-based claim triggers the attorney fee provision.

Mountain Air's position depends on its assumption that "bringing" "any legal action or any other proceeding" means filing a complaint. If "bringing" "any legal action or any other proceeding" includes bringing an affirmative defense in an answer (and it does),

then there is no reason why, under the plain language of the attorney fee provision, an affirmative defense could not be brought "*for* enforcement of the contract" or "*because of*" a dispute about the contract. Indeed, as the majority opinion in the Court of Appeal concluded—and Mountain Air does not challenge—Defendants' novation affirmative defense was brought *for* enforcement of the Option Agreement and *because of* a dispute about the meaning and effect of the Option Agreement. (Maj. opn., 19-21.)

Mountain Air's arguments regarding the purported significance of "brought" merely repeat its efforts below to distinguish the Option Agreement's attorney fee provision from the provision at issue in *Windsor Pacific*, which held, in a well-reasoned decision, that an attorney fee clause providing for recovery in "any action or proceeding to enforce or interpret" the contract encompassed a contract-based defense. (*Supra*, 213 Cal.App.4th at pp. 268, 274-276.) The majority opinion properly rejected this argument, declining to hold that provisions referring to actions "brought to enforce" a contract should have a materially different meaning from "action[s] . . . to enforce" a contract when seeking to give effect to the intent of contracting parties.[9] (Maj. opn., 18, quoting *Windsor Pacific*, 213 Cal.App.4th at p. 268, fn. 1.)

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[9] *Windsor Pacific* distinguished *Gil*, *supra*, 121 Cal.App.4th 739, and *Exxess*, *supra*, 64 Cal.App.4th 698, as the clauses at issue in those cases included "bring" or "brought," and the clause in *Windsor Pacific* did not. But neither *Gil* nor *Exxess* placed emphasis on the word "bring" or "brought" in its construction. (Maj. opn., 18.)

Thus, "brought" fails to narrow to broad meaning of "any legal action or any other proceeding" or to exclude affirmative defenses from the broad scope of this attorney fee provision.

C. Reading "Action" And "Proceeding" In Context Supports An Inclusive—Not Exclusive—Intent.

When construing a contract, its language must be considered as a whole, taking its individual provisions, sentences, and words together, so as to give an effect to each part, if practicable. (Civ. Code, § 1641; Code Civ. Proc., § 1858.) A contract's meaning "is not to be determined by isolating one term used by the parties and defining it without reference to other language of the contract." (*Moore v. Wood* (1945) 26 Cal.2d 621, 630; see also *First American Title Ins. Co. v. XWarehouse Lending Corp.* (2009) 177 Cal.App.4th 106, 115 [refusing to read word in insurance policy "in isolation" as "[i]t must be construed in light of the surrounding words"].)

Although Mountain Air recognizes these well-settled principles of interpretation, it nonetheless dissects the contract language without ever reaching a reading that gives effect to the language of the attorney fee provision as a whole. The party's inclusion of broad language throughout their attorney fee provision supports an inclusive intent by these parties, one which supports the interpretation that an affirmative defense is an "action" or "proceeding" within the provision's scope. The context does not support Mountain Air's position that the parties "clearly" intended to adopt a "narrow[]" fee provision that limited the recovery of fees to the filing of a contract-based claim in a complaint. (OBOM 15, 23.)

First, both "action" and "proceeding" are preceded by the word "any." The attorney fee provision specifies that fees are recoverable "[i]f *any* legal action or *any* other proceeding" is brought for either of the two specified purposes. (Maj. opn., 11, emphasis added.) The word "any" has "an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" (*Ali v. Federal Bureau of Prisons* (2008) 552 U.S. 214, 219, quoting *United States v. Gonzales* (1997) 520 U.S. 1, 5; see also American Heritage Dict., *supra*, at p. 81 [defining "any" as "[o]ne, some, every, or all without specification].)

The use of the word "any" to modify a term "suggests a broad meaning." (*Ali*, *supra*, 552 U.S. at pp. 218-219 [interpreting "any other law enforcement officer" in a federal statute that excepted from waiver of sovereign immunity any claim arising with respect to "the detention of any . . . property by any officer of customs or excise or any other law enforcement officer" broadly and not limiting it to officers acting in customs or excise capacity].) Therefore, in addition to the breadth of the ordinary meaning of the words "action" and "proceeding," the provision's use (twice) of the word "any" supports an interpretation that includes affirmative defenses within its scope, rather than excludes them.

Second, the non-exclusive examples that follow "any other proceeding"—"including arbitration or an action for declaratory relief"—support the parties' intent that the attorney fee provision have a broad application. By these examples, the parties confirmed that the recovery of attorney fees would not be limited to fees incurred in

proceedings before a judicial tribunal or in lawsuits seeking monetary relief.

Third, the two specified purposes that trigger the recovery of fees—that the action or proceeding be brought "for the enforcement of [the Option] Agreement" or "because of an alleged dispute, breach, default, or misrepresentation in connection with any provision of [the Option] Agreement"—also support a broad reading of the provision's coverage. As the majority opinion in the Court of Appeal concluded, "[t]his is broad language." (Maj. opn., 19.)

In contrast to the attorney fee clauses that *Gil*, *supra*, 121 Cal.App.4th 739, and *Exxess*, *supra*, 64 Cal.App.4th 698, held did not encompass affirmative defenses, the Option Agreement's attorney fee provision includes not only an action or proceeding brought "to enforce" the Option Agreement or to "declare rights" under the agreement but also any action or any other proceeding brought "*because of an alleged dispute, breach, default or misrepresentation in connection with any provision of [the Option] Agreement.*"[10] (Maj. opn., 11, emphasis added.) The parties' provision for the recovery of attorney fees when a dispute arises "in connection with" the Option Agreement is indicative of an intent for the provision to have broad

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[10] *Gil* interpreted a written release that contained a clause providing for attorney fees "[i]n the event action is brought to enforce the terms of this [release]." (*Supra*, 121 Cal.App.4th at p. 742.) In *Exxess*, the clause provided for attorney fees if a party "brings an action or proceeding to enforce the terms [of the lease] or declare rights [under the lease]." (*Supra*, 64 Cal.App.4th at p. 702.)

coverage. It would be inconsistent with such intent to give the words "action" or "proceeding" their narrowest meaning. Mountain Air's efforts to distinguish this attorney fee provision from cases with what it contends are "broadly worded" attorney fee clauses thus fails because *this* provision *is* broadly worded. (OBOM 14, 20, citing cases.)

Finally, Mountain Air cannot avoid the broad language of the attorney fee provision's coverage by arguing that the parties could have worded this attorney fee provision even more broadly or could have mentioned affirmative defenses by name in setting forth the provision's coverage. (OBOM 14-15.) These arguments do not alter the breadth of the provision's language and also belie Mountain Air's instruction that "the only thing that matters is the actual text" of the attorney fee provision (OBOM 10).

Thus, instead of supporting Mountain Air's narrow, restrictive interpretation, the plain meaning of the words "action" and "proceeding," read within their context, supports the interpretation that affirmative defenses are within the fee provision's scope.

II. MOUNTAIN AIR'S ALTERNATE, NARROW CONSTRUCTION OF THE ATTORNEY FEE PROVISION CREATES AN ABSURD, AND OBVIOUSLY UNINTENDED, CONSEQUENCE.

The purpose of contract law is to protect the reasonable expectations of the parties. (*ASP Properties Group v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1268.) It is for this reason that the rules of contract interpretation stem from the premise that the

interpretation of the contract must give effect to the "mutual intention" of the contracting parties. (*Santisas*, *supra*, 17 Cal.4th at p. 608; Civ. Code, §§ 1636, 1639.) Courts "must give a 'reasonable and commonsense interpretation' of a contract consistent with the parties' apparent intent" (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2003) 107 Cal.App.4th 516, 526, citation omitted) and avoid any construction that would lead to absurd results (Civ. Code, § 1638).

Mountain Air's proposed construction of the contract—reading into its language a "clear[]" intent by the parties to exclude contract-based affirmative defenses from the circumstances in which attorney fees would be recoverable—is simply not reasonable and would lead only to absurd results. (Maj. opn., 18; OBOM 23.) The majority opinion reasoned that the interpretation advanced by Mountain Air would mean that "a defendant who sought interpretation and enforcement of the contract via affirmative defense could not recover attorney fees, but if in addition or instead that same defendant simply filed a cross-complaint for declaratory relief *asserting precisely the same facts and arguments*, the defendant could. (Maj. opn., 18, emphasis added.) The idea that the parties intended, when entering into the Option Agreement, "such a form-over-function approach to govern recovery of attorney fees strains credulity." (*Ibid.*)

The parties' obvious intent in including an attorney fee provision in the Option Agreement was to provide for the recovery of attorney fees should either party be forced to incur such fees in

litigating its contractual obligations. The "only possible purpose" of this attorney fee provision was "to discourage litigation by providing that when two parties get into . . . a lawsuit over the matters subject to the contract . . ., the winner gets fees." (*Salawy*, *supra*, 121 Cal.App.4th at p. 677 (dis. opn. of Armstrong, J.).) There is no logical reason to conclude that the parties—notwithstanding their use of broad, general terms in setting forth the scope of attorney fee recovery—intended to limit recovery to when a defendant raised the contract in a cross-complaint, but not in an affirmative defense.

In this case, had Defendants raised novation by pleading a claim in a complaint or cross-complaint (in addition to or instead of pleading an affirmative defense in their answer), the facts and arguments would have been the same. Defendants invoked the Option Agreement and argued that agreement's material purpose was to novate previous agreements between the parties, relying on the Option Agreement's integration clause. (Maj. opn., 19.) There is simply no logic in Mountain Air's position that Defendants' choice to plead an affirmative defense in the same action—instead of filing a complaint or cross-complaint for declaratory relief—lost Defendants the right to recover attorney fees under this contractual provision.

Mountain Air's strained attempts to find some logic in its tortured interpretation of the attorney fee provision fail. According to Mountain Air, the provision reflects an arrangement by these parties to "retain the option of raising contract-based affirmative defenses without exposing themselves" to the risk of paying the other side's

fees should they not prevail. (OBOM 11, citing Civ. Code, § 1717.) Mountain Air contends that the parties "clearly" agreed to this arrangement. (OBOM 23.) But there would be such a risk and reward calculus whenever attorney fees are recoverable on a contract-based argument.[11] Why would it be reasonable to assume that a party with a potentially meritorious argument would choose a form for raising its argument that would *foreclose* any possible recovery of attorney fees, when there is another form that would permit them?

A party would do so only if it determined that there was a greater possibility that it would lose, rather than prevail, on its argument. Mountain Air's position thus depends on an assumption that these parties sought to insulate the raising of non-meritorious contract-based affirmative defenses from the risk of attorney fee recovery. Why would this have been the parties' intent?

The majority opinion in the Court of Appeal reasoned that if lawyers were to agree on "'such an unusual arrangement'" for the recovery of attorney fees under the contract, then there is no doubt "'they would document that agreement with elaborate care.'" (Maj. opn., 17, quoting *Gil*, *supra*, 121 Cal.App.4th at p. 747 (dis. opn. of Armstrong, J.); see also Maj. opn., 18 [concluding that "parties who

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[11] Mountain Air's reliance on *Blue Lagoon Community Assn. v. Mitchell* (1997) 55 Cal.App.4th 472 (OBOM 11), is thus misplaced because there is always this "potential downside" in the recovery of contract-based attorney fees under Civil Code section 1717. (*Id.* at p. 478.) It does support any intent here to avoid this reciprocal attorney fee right.

actually intended to adopt a fees clause that would allow a prevailing party to obtain fees only if the party were a plaintiff and not if the party were a defendant would have gone to greater lengths to document it"].)

This reasoning does not "flip[] the burden of proof" (OBOM 10), but merely recognizes that the construction for which Mountain Air advocates would result in an *unusual* arrangement regarding the recovery of contract-based attorney fees. It is not reasonable to read such an unusual arrangement into the attorney fee provision's broad language without any specific indication from that language (which there is not) that the parties intended to adopt it.

The majority in the Court of Appeal thus properly sought the reasonable and commonsense meaning of this attorney fee provision, to give effect to the parties' intent, in accordance with well-settled principles of contractual interpretation, and refused to twist the language into Mountain Air's strained meaning.

CONCLUSION

For all the foregoing reasons, the Court of Appeal's opinion should be affirmed.

Respectfully submitted,

Dated: July 16, 2015

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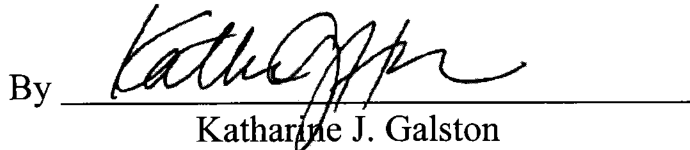
By 
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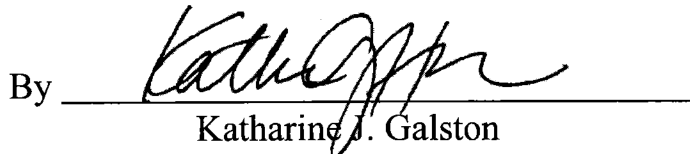
By 
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