UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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CASE NO.: CV 11-04846 SJO (MRWx) **DATE:** October 21, 2013

TITLE: Gregory Valentini, et al. v. Eric Shinseki, et al.

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PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz Courtroom Clerk	Not Present Court Reporter
COUNSEL PRESENT FOR PLAINTIFFS:	**COUNSEL PRESENT FOR DEFENDANTS:**
Not Present	Not Present

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PROCEEDINGS (in chambers): ORDER GRANTING IN PART AND DENYING IN PART THE REGENTS OF THE UNIVERSITY OF CALIFORNIA'S MOTION (1) FOR LEAVE TO INTERVENE UNDER RULE 24(a)(2); AND (2) TO VACATE THE JUDGMENT UNDER RULE 59(e) [Docket No. 144]; **GRANTING IN PART AND DENYING IN PART THE BRENTWOOD SCHOOL'S MOTION (1) FOR LEAVE TO INTERVENE UNDER RULE 24(a)(2); AND (2) TO VACATE THE JUDGMENT UNDER RULE 59(e)** [Docket No. 155]; **DENYING AS MOOT THE REGENTS OF THE UNIVERSITY OF CALIFORNIA'S EX PARTE APPLICATION FOR AN ORDER EXTENDING THE TIME TO FILE AN APPEAL** [Docket No. 146]

This matter is before the Court on the Regents of the University of California's ("UCLA") Motion (1) for Leave to Intervene under Rule 24(a)(2); and (2) to Vacate the Judgment under Rule 59(e) ("UCLA Motion") and the Brentwood School's ("Brentwood") (together with UCLA, "Movants") Motion (1) for Leave to Intervene under Rule 24(a)(2); and (2) to Vacate the Judgment under Rule 59(e) ("Brentwood Motion") (collectively, the "Motions"), filed respectively on September 23, 2013, and October 3, 2013. Plaintiffs Gregory Valentini, Adrian Moraru, Jane Doe, Leroy Smith, Jr., Leslie Richardson, Wayne Early, Willie Floyd, Demetrious Kassitas, Zachary Isaac, Lawrence Green, and the Vietnam Veterans of America (collectively, "Plaintiffs") filed an Opposition to the UCLA Motion on September 30, 2013 and to the Brentwood Motion on October 10, 2013. UCLA replied to Plaintiffs' Opposition on October 7, 2013. Defendants Eric Shinseki ("Shinseki") and Donna M. Beiter ("Beiter") (together with Shinseki, "Defendants" or the "Government") filed a Response to the UCLA Motion on September 30, 2013. UCLA also filed an Ex Parte Application for an Order Extending the Time to File a Notice of Appeal ("Application") on September 26, 2013. The Court found these matters suitable for decision without oral argument and vacated the hearings set for October 21, 2013 and November 4, 2013. *See* Fed. R. Civ. P. 78(b). For the following reasons, the Court **GRANTS IN PART AND DENIES IN PART** the Motions, and **DENIES AS MOOT** UCLA's Application.

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I. FACTUAL AND PROCEDURAL BACKGROUND

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The individual Plaintiffs in this case are severely disabled veterans with mental disabilities, brain injuries, or both. (*See* Order Den. Defs.' Mot. for Summ. J.; Granting in Part Pls.' Mot. for Summ. J. ("Summ. J. Order") 1, ECF No. 141.) As a result of Plaintiffs' disabilities, they are homeless and cannot access necessary medical and mental health treatment. (Summ. J. Order 1.) The individual Plaintiffs are joined by the Vietnam Veterans of America, which asserts associational standing on behalf of its members. (Summ. J. Order 1.)

Shinseki is the Secretary of the United States Department of Veterans Affairs ("DVA"), whose official duties include execution and administration of all laws and programs governed by the DVA. (Summ. J. Order 1-2.) Shinseki is responsible for ensuring that the DVA complies with contracts and land grants. (Summ. J. Order 2.) Beiter is the Director of the Veterans Affairs Greater Los Angeles Healthcare System, whose official duties include supervising daily operations and services of all programs operated by the West Los Angeles Campus ("WLA Campus"). (Summ. J. Order 2.)

On June 8, 2011, Plaintiffs filed a Class Action Complaint ("Complaint") against the Government (ECF No. 1), which was superseded by the First Amended Complaint ("FAC") on August 12, 2011 (ECF No. 24). Plaintiffs asserted six causes of action against Defendants: one claim for violation of the Administrative Procedure Act ("APA"); two claims for violations of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and three claims for violations of the Government's duties as trustee of a charitable trust. (*See generally* FAC.) Plaintiffs' APA claim first appeared in the FAC. (*Compare* Compl., *with* FAC.)

On March 16, 2012, Defendants filed a Motion to Dismiss, which the Court granted in part and denied in part, permitting Plaintiffs' APA claim and one of Plaintiffs' Rehabilitation Act claims to proceed. (*See generally* Order Granting in Part and Den. in Part Defs.' Mot. to Dismiss, ECF No. 70.) On May 25, 2012, Defendants filed a Motion for Reconsideration (ECF No. 83) based on the Ninth Circuit's *en banc* decision in *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012). The Court granted in part and denied in part this Motion for Reconsideration, leaving only Plaintiffs' APA claim. (*See generally* Order Granting in Part and Den. in Part Defs.' Mot. for Recons., ECF No. 87.)

In their APA claim, Plaintiffs argued that the DVA had exceeded its statutory authority under Health Care Resources Sharing Authority, 38 U.S.C. §§ 8151-8153, by entering into a number of agreements with third parties for sharing the use of portions of the WLA Campus (the "Disputed Agreements"). Among the Disputed Agreements were (1) an agreement with Brentwood ("Brentwood Agreement") under which Brentwood has the right to use a 20-acre parcel of the WLA Campus as an athletic complex ("Complex") and (2) an agreement with UCLA ("UCLA Agreement") for the use of Jackie Robinson Stadium ("Stadium") by the UCLA baseball team. (FAC ¶ 24.) Defendants and Plaintiffs filed cross Motions for Summary Judgment to decide the APA claim on April 10 and May 10, 2013, respectively. (ECF Nos. 116, 124.)

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On August 29, 2013, the Court entered judgment in favor of Plaintiffs ("August 29 Judgment"), declaring the Disputed Agreements to be unauthorized by law and therefore void. (Aug. 29 J., ECF No. 142.) The Court stayed enforcement pending the resolution of any appeal. (Summ. J. Order 21.) On September 23, 2013, UCLA filed its Motion, and Brentwood followed suit on October 3, 2013.[1] Movants seek to intervene for the purpose of vacating the Court's August 29 Judgment, or in the alternative, for the purpose of appeal. (UCLA Mot. 1; Brentwood Mot. 1.)

II. DISCUSSION

Movants contend that, as parties adversely affected by the Court's August 29 Judgment voiding the Disputed Agreements, they have a right to intervene in the instant action under Federal Rule of Civil Procedure 24(a). (UCLA Mot. 2; Brentwood Mot. 1.) Rule 24(a) requires a court,

> [o]n timely motion . . . [to] permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless the existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). The language of Rule 24(a)(2) contains four discrete elements:

> (1) the application must be timely; (2) the applicant must have a "significantly protectable" interest relating to the transaction that is the subject of the litigation; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest must be inadequately represented by the parties before the court.

League of United Latin Am Citizens v. Wilson (*LULAC*), 131 F.3d 1297, 1302 (9th Cir. 1997); *see also Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir. 1978) ("Intervention of right motions, however, should be treated more leniently than permissive intervention motions because serious harm is more likely."). "If the court finds that the motion to intervene was not timely, it need not reach any of the remaining elements of Rule 24." *United States v. Washington*, 86 F.3d 1499, 1503 (9th Cir. 1996); *see also United States v. Oregon*, 913 F.2d 576, 588 (9th Cir. 1990) ("Timeliness is the threshold requirement for intervention.").

[1] The Brentwood Motion "incorporates the legal arguments in support of UCLA's Motion . . . [because] Brentwood's relationship to this litigation is substantially identical to UCLA's." (Brentwood Mot. 1.)

A. Timeliness of the Motions

"Timeliness is to be determined from all the circumstances," *NAACP v. New York*, 413 U.S. 345, 366 (1973), but in the Ninth Circuit three factors predominate the inquiry: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay," *LULAC*, 131 F.3d at 1302 (quoting *Cnty. of Orange v. Air Cal*, 799 F.2d 535, 537 (9th Cir. 1986)). Although a long delay in moving to intervene is not determinative, "any substantial lapse of time weighs heavily against intervention." *Washington*, 86 F.3d at 1503; *see also LULAC*, 131 F.3d at 1302 (holding that a party who filed its motion to intervene twenty-seven months after an action had commenced was "fight[ing] an uphill battle"). Ultimately, the question of timeliness is left to a district court's discretion. *NAACP*, 413 U.S. at 366; *LULAC*, 131 F.3d at 1302.

1. Stage of the Proceedings

It is within a district court's discretion to "control the proceedings before it." *United States v. Alisal Water Corp.*, 370 F.3d 915, 922 (9th Cir. 2004) (quoting *Oregon*, 913 F.2d at 588) (internal quotation marks omitted). Although "a party's interest in a specific phase of a proceeding may support intervention at that particular stage of the lawsuit," courts disfavor intervention by parties seeking "merely to attack or thwart a remedy." *Alisal*, 370 F.3d at 921-22 (internal citations omitted); *see also R&G Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 584 F.3d 1, 7 (1st Cir. 2009) ("As a case progresses toward its ultimate conclusion, the scrutiny attached to a request for intervention necessarily intensifies."). As a result, the stage-of-the-proceedings factor typically weighs against an intervenor whose ultimate purpose appears to be the reopening of previously litigated issues. *See Oregon*, 913 F.2d at 588. This factor also weighs against intervention where "a lot of water had already passed underneath [the] litigation bridge." *LULAC*, 131 F.3d at 1303; *see also Smith v. Marsh*, 194 F.3d 1045, 1051 (9th Cir. 1999) ("[S]ubstantial engagement by the district court with the issues in a case weighs heavily against allowing intervention as of right." (internal citations and quotation marks omitted)).

Movants seek to intervene after the Court has adjudicated each claim and closed the action. (Summ. J. Order 5, 21.) No issues remain pending before the Court. It is unclear, therefore, what Movants hope to obtain by intervening for the purpose of further proceedings before this Court other than the opportunity to relitigate Plaintiffs' APA claim. Movants, however, contend that unlitigated issues remain because "[t]he [Disputed Agreements] were treated as indistinguishable in the Court's [Summary Judgment Order]." (UCLA Mot. 24.) Movants indicate that, if given the opportunity, they will "present evidence and argument" as to why the UCLA and Brentwood Agreements should not be invalidated under 38 U.S.C. §§ 8151-8153. [2] (UCLA Mot. 24;

[2] It is unclear what new evidence Movants could offer because, as Defendants correctly point out, "the record on which this claim may be decided is limited to the certified

Brentwood Mot. 3-4.) In a preview of the arguments they intend to put forward, Movants attempt to distinguish their Agreements with the DVA from the other Disputed Agreements by describing how Movants' Agreements provide health-care benefits to veterans. (*See* UCLA Mot. 4, 15; Brentwood Mot. 3-4.) This line of argument, however, merely retreads ground already covered by the parties.

In its Summary Judgment Order, the Court resolved the issues raised by Movants. The Court ruled that 38 U.S.C. § 8153 "is intended to be used to share resources that relate to the provision of health-care" and found that "none of the Disputed Agreements are for the purpose of sharing health-care resources as that term is defined by Congress." (Summ. J. Order 16.) The Court went on to explain that "the propriety of [the Disputed Agreements] does not hinge on precisely how the health-care resource is utilized." (Summ. J. Order 17-18.) Rather, "[t]he determining factor is whether what is shared is a health-care resource in the first instance." (Summ J. Order 18.) The fact that veterans sometimes utilize the Stadium and the Complex for recreation and rehabilitation does not convert those sports facilities into health-care resources. The Court did not fail to distinguish between the Disputed Agreements. The Disputed Agreements were simply indistinguishable in the one respect that mattered to the APA claim; none of the facilities subject to the Disputed Agreements qualified as health-care resources.[3]

Allowing intervention at this late stage of the proceedings would only permit Movants to reopen and relitigate hotly contested issues resolved after extensive litigation. Not only has "a lot of water already passed underneath the litigation bridge," but the whole stream has dried up. Reopening the procedural flood gates at this late stage serves no purpose. Accordingly, the stage-of-the-proceedings factor weighs strongly against granting the instant Motions.

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2. Prejudice to Other Parties

Motions for intervention filed later in the proceedings are more likely to prejudice the parties to the action. *LULAC*, 131 F.3d at 1304. Once admitted to the district court proceedings, a late-moving

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administrative record, as supplemented." (Defs.' Resp. to UCLA Mot. 2, ECF No. 149; *see also* Order Granting in Part and Den. in Part Pls.' Mot. to Supp. the Admin. R. ("Admin. Order") 4-5, 9, ECF No. 108.)

[3] Furthermore, all the features that Movants claim are distinguishable were before the Court when it found that "none of the Disputed Agreements are for the purpose of sharing health-care resources as that term is defined by Congress." (Summ J. Order 16.) The Government addressed Movants' arguments in its Motion for Summary Judgment. (Defs.' Mot. for Summ. J. 21-23, ECF No. 116.)

intervenor is more likely to relitigate issues essential to an action's resolution, *see Washington*, 86 F.3d at 1506, and to delay "relief from long-standing inequities," *Alaniz*, 572 F.2d at 659. *See also LULAC*, 131 F.3d at 1304.

Movants seek not only to relitigate issues that have been resolved, but to reopen a case already adjudicated. This is bound to prejudice the parties by unsettling over two years of litigation and muddying the issues on the eve of appeal. Furthermore, relitigation of the APA claim will necessarily delay the relief to which Plaintiffs, veterans long-suffering from mental disabilities and homelessness (*see* FAC ¶¶ 1-18), are entitled under the August 29 Judgment. Movants contend that "delay resulting from [Movants'] intervention at this stage in the litigation will not directly affect [P]laintiffs' care" because the Court's invalidation of the Disputed Agreements "will not immediately result in housing or long-term care for [Plaintiffs] or other homeless veterans." (UCLA Mot. 10.) Movants' misunderstand the nature of prejudice. The Court recognizes that invalidation of the Disputed Agreements will not have an immediate impact on Plaintiffs, but every delay in the final resolution of Plaintiffs' claims prolongs their injuries and the suffering of similarly situated veterans. The sooner this case is resolved, the sooner Plaintiffs will begin receiving medical care, whether it be tomorrow or next year. Because intervention for further proceedings before this Court will unnecessarily delay Plaintiffs' "relief from long-standing inequities," the Court finds that the factor of prejudice also weighs against granting the Motions.

3. Reason for and Length of Delay

Where the first two timeliness factors weigh against intervention, the movant "must convincingly explain [its] delay in filing the[] motion[] to intervene." *Cal. Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc.* (*Toxic Substances*), 309 F.3d 1113, 1119 (9th Cir. 2002). "A party seeking to intervene must act as soon as he knows or has reason to know that his interests might be adversely affected by the outcome of the litigation.'" *Oregon*, 913 F.2d at 589 (quoting *United States v. Chicago*, 870 F.2d 1256, 1263 (7th Cir. 1989)). In other words, the timeliness clock starts ticking from the point at which the intervenor has actual or constructive knowledge that his interests are in jeopardy and that they are not being adequately represented. *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 934 F.2d 1092, 1096 (9th Cir. 1991). The Court addresses each Movant's reasons for its delay in turn.

a. UCLA

"UCLA obtained a copy of the [C]omplaint on June 9, 2011, one day after the action was filed." (UCLA Mot. 5; *see also* Compl.) At that time, UCLA recognized that an adverse outcome in the instant action could impact its use of the Stadium. (Reply 1; Decl. of Mark Rosenbaum in Supp. of Pls.' Opp'n ("Rosenbaum Decl.") ¶ 3, ECF No. 152; Opp'n 6 & n.5.) After reading the Complaint, UCLA's Vice Chancellor for Legal Affairs concluded that "the action did not pose a clear risk to UCLA's interests." (UCLA Mot. 5.) The APA claim that ultimately led to the invalidation of the Disputed Agreements was added by Plaintiffs in their FAC, which was filed on

August 12, 2011. (*Compare* Compl., *with* FAC.) UCLA contends that it "reasonably concluded that the fiduciary duty claims in the original [C]omplaint posed little risk to its interests . . . [and] did not learn until August 30, 2013—after the Court's [August 29 J]udgment was entered—that [P]laintiffs had asserted a new claim under the APA." (UCLA Mot. 11.) UCLA's decision not to intervene in and to cease monitoring the action may have been reasonable from a cost-benefit perspective. It was unreasonable, however, to move for intervention two years after it had learned that the UCLA Agreement was at issue in the case.

The fact that UCLA knew that there was a pending action that might affect its use of the Stadium is precisely the sort of constructive notice that triggers the timeliness clock. *Toxic Substances*, 309 F.3d at 1120 ("While [defendants] were not certain that the consent decree would be adverse to their interests, they had reason to know that negotiations might produce a settlement decree to their detriment."); *R&G Mortg.*, 584 F.3d at 8 ("Perfect knowledge of the particulars of the pending litigation is not essential to start the clock running."). Moreover, UCLA should have known much earlier that Plaintiffs had amended their Complaint to include the APA claim by regularly monitoring the status of the litigation, *see Alisal*, 370 F.3d at 923 (concluding that filing of a third amended complaint was enough to give rise to constructive notice), something UCLA did intermittently throughout the lawsuit, (*see* Rosenbaum Decl. ¶¶ 3-5). UCLA's delay appears to be the product of its failure to consider the possibility of an amended complaint when assessing the costs of intervening in and closely monitoring the lawsuit. *Cf. Alisal*, 370 F.3d at 923-24 ("An applicant's desire to save costs by waiting to intervene until a late stage in the litigation is not a valid justification for delay."). If this was UCLA's strategy and if it had been correct in its assessment, UCLA would have saved the cost of litigation without detriment to its interests. This matter did not come out UCLA's way, however, and UCLA must now absorb the risk it took by allowing the Government to represent its interests and bear the cost of litigation alone. If the Court were to permit UCLA to intervene and relitigate the case after it has avoided the cost of two years of litigation, the Court would essentially convert UCLA's apparent decision to sit on the sidelines into a riskless proposition. Such a policy would encourage other would-be intervenors to await judgment in cases potentially affecting their interests and then to request a "do over" from the trial court in the event of an adverse judgment. Allowing UCLA to intervene at this point would create the perverse incentive that proper application of the third timeliness factor is designed to avoid. *Id.* at 924.

Nor can UCLA claim that the Government did not adequately represent its interests in the proceedings before this Court. (UCLA Mot. 20-21; Reply 5.) The Government's position on the validity of the Disputed Agreements has not changed over the course of the lawsuit. Any alleged divergence in interest existed from the outset of the suit, and UCLA knew or should have known about this divergence when it made its decision not to intervene. *See Alisal*, 370 F.3d at 923; *LULAC*, 131 F.3d at 1307. Allowing the Government to bear the burden of litigation and to represent Movants' interests was part of UCLA's apparent risk assessment analysis. *See Alisal*, 370 F.3d at 923. Moreover, the Court is unpersuaded that Defendants' interests diverged from UCLA's during the proceedings before it. UCLA attempts to distinguish the Government's interests

from its own based on the fact that the Government tried to defend all of the Disputed Agreements instead of focusing on the UCLA Agreement. (*See* UCLA Mot. 14-15; Opp'n 18-19.) However, the Government is in the best position to justify its decision-making based on the administrative record, and this was the only question necessary to determine the validity of the UCLA Agreement. (*See supra* note 3.)

Furthermore, the extensive news coverage surrounding the action supports the Court's finding that UCLA had notice well before the Court issued its August 29 Judgment. *NAACP*, 413 U.S. at 366 & n.19 (listing a single full-page article in the New York Times as a significant factor in finding that party had notice). During the two-year life of the action there were numerous news publications discussing the lawsuit in general and the APA claim specifically. [4] UCLA argues that "vague statements in news reports" were insufficient to provide it with actual or constructive notice that the UCLA Agreement was in jeopardy. (Reply 1.) The publications in question were neither vague nor insufficient. For example, an article in the *Santa Monica Mirror*, published in March 2012, specifically mentions Plaintiffs' APA claim.[5] Another article, broadcast on National Public Radio's Morning Edition in September 2012, explains that one of Plaintiffs' arguments against the validity of the Disputed Agreements was that the DVA was "sharing" rather than "leasing" the land at issue.[6] Combined with UCLA's knowledge that the UCLA Agreement was at issue in the lawsuit, there is more than enough evidence to find that UCLA knew or should have known that its interests could be adversely affected by the claims raised in the Complaint or by any amended pleading thereafter. UCLA has failed to "convincingly explain" its delay in moving for intervention. Accordingly, the Court **DENIES** UCLA's Motion for the purpose of participating in further proceedings before this Court.

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b. Brentwood

Brentwood admits that it "was aware of this action prior to the [August 29 Judgment]." (Decl. of Michael Riera, PhD in Supp. of Brentwood Mot. ¶ 2.) Although Brentwood does not state exactly when it became of aware of the instant action, a news article in the Los Angeles Times, published

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[4] The Court takes judicial notice of each of the news publications cited in Plaintiffs' Opposition. (*See* Opp'n 1, 4-6 & n.1-5.)

[5] Terence Lyons, *Veterans Suit Against West L.A. VA Will Go Forward*, Santa Monica Mirror, March 20, 2012, *available at* http://www.smmirror.com/articles/News/Veterans-Suit-Against- West-LA-VA-Will-Go-Forward/34309.

[6] Ina Jaffe, *Los Angeles VA Has Made Millions on Rental Deals*, National Public Radio, Sept. 10, 2012, *available at* http://www.npr.org/2012/09/10/160736598/los-angeles-va-has-made-millions-on-rental-deals (last visited Oct. 10, 2013).

on June 9, 2011, reported that Plaintiffs were specifically challenging Brentwood's use of the WLA Campus as the site for the Complex.[7] This coverage continued intermittently throughout the next two years. (*See* Opp'n 4-6.) Thus, the Court finds that Brentwood knew, or at least should have known, that the validity of the Brentwood Agreement was in jeopardy months, if not years, before the Court issued its August 29 Judgment.

Brentwood argues that its delay in moving for intervention was reasonable because "Brentwood does not employ in-house counsel, was not named as a party, and did not understand that it could intervene in this litigation until after the [August 29 Judgment]." (Brentwood Mot. 3.) Brentwood's argument justifying delay on the basis that it was not named a party is unconvincing; had Brentwood been named a party, it would not have needed to file a Motion to Intervene. The point is, therefore, moot. The fact that Brentwood does not employ in-house counsel is likewise no excuse, since Brentwood was on notice about the risk that the instant action posed to its Agreement with the DVA. Many entities do not retain in-house counsel and are unschooled in the law. While a lack of legal knowledge may justify some delay in asserting one's interests, it does not absolve an entity from doing so within a reasonable time after it knew or should have known that its interests might be adversely affected. *See R&G Mortg.*, 584 F.3d at 9 (holding that knowing and failing to act for three months was unreasonable).

The Court notes that Brentwood claims only that it "does not employ in-house counsel," not that it never sought legal advice concerning the lawsuit nor had an attorney review the matter. (*See* Brentwood Mot. 3.) Assuming that Brentwood did not obtain any form of legal advice until after the Court's August 29 Judgment, Brentwood offers no explanation for why it was incapable of doing so. Brentwood should have sought legal advice and intervened before its interests had already been adversely impacted. *See Toxic Substances*, 309 F.3d at 1120 (holding that knowledge of ongoing negotiations between parties was enough to know that those negotiations could lead to consent decree unfavorable to intervenor); *Oregon*, 913 F.2d at 589 (holding that even intentional deception is not enough, standing alone, to excuse delay when a party had other reason to know that its interests might be adversely affected). The fact that it sought legal advice at all indicates that it had the capacity to do so before the Court rendered final judgment. Thus, Brentwood's plea of ignorance is not a sufficient reason for its lengthy delay. Accordingly, the Court finds that all three timeliness factors weigh against Brentwood and **DENIES** its Motion to Intervene for further proceedings before this Court.

B. Intervention for Limited Purpose of Appeal

[7] Martha Groves, *Suit Alleges Misuse of Los Angeles VA Facility*, L.A. Times, June 9, 2011, *available at* http://articles.latimes.com/2011/jun/09/local/la-me-aclu-veterans-lawsuit-20110609.

Movants request, in the alternative, that they be allowed to intervene solely for the purpose of filing an appeal. (UCLA Mot. 1; Brentwood Mot. 1.) "Intervention should be allowed even after a final judgment where it is necessary to preserve some right which cannot otherwise be protected." *Pellegrino v. Nesbit*, 203 F.2d 463, 465 (9th Cir. 1953). The ability to appeal a judgment adverse to the movant's interests is just such a right. *Id.* Post-judgment intervention for the limited purpose of appeal is appropriate where the movant acts promptly once it becomes clear that the party representing its interests in the litigation has elected not to appeal. *United Airlines v. McDonald*, 432 U.S. 385, 392-96 (1977). In addition to the four elements of Rule 24(a), a party moving to intervene for the purpose of appeal must demonstrate that it has Article III standing to pursue the suit in the absence of the party whom it intends to replace. *Yniguez v. Ariz.*, 939 F.2d 727, 731 (9th Cir. 1991).

1. Article III Standing

Movants "can meet the Article III 'standing criteria by alleging a threat of particularized injury from the order they seek to reverse that would be avoided or redressed if their appeal succeeds.'" *Id.* at 731-32 (quoting *Legal Aid Soc'y v. Brennan*, 608 F.2d 1319, 1328 (9th Cir. 1979)). If Defendants do not appeal and the Court's Summary Judgment Order is enforced, the UCLA and Brentwood Agreements will remain legally void and Movants will be prevented from using the Stadium and the Complex until and unless the DVA obtains statutory approval from Congress. (*See* Summ. J. Order 4 n.3.) Movants could avoid this particularized injury if they succeed in an appeal by demonstrating that entering into the Disputed Agreements did not exceed the DVA's statutory authority under 38 U.S.C. §§ 8151-8153. Thus, Movants' interest in preserving the validity of the UCLA and Brentwood Agreements by a successful appeal provides them with Article III standing under the test set forth in *Yniguez*.

2. Timeliness

The Court's calculus changes now that it considers whether the Motions are timely for the limited purpose of appeal rather than for the purpose of further district court proceedings. The potential disruption to the proceedings is less dramatic when intervention occurs at "a new stage in the action." *Oregon*, 913 F.2d at 588. This is especially true where the intervenor has an "interest in a specific phase of a proceeding." *Alisal*, 370 F.3d at 921. An appeal is a new stage because it does not require reopening or relitigating the issues resolved before this Court. Although Movants would be seeking to have the Court's Summary Judgment Order reversed on appeal, they would be compelled to do so based on the record as it stands today. In other words, Movants cannot amend the record through relitigation after not participating in its development.

In addition, Movants will have a special interest in filing an appeal if the Government does not continue to prosecute the action. The Government has adequately represented the interests of Movants in the proceedings before this Court through its vigorous defense of the Disputed Agreements. However, Movants have recently been given reason to believe that the Government

may not continue to represent their interests by appealing the Court's Summary Judgment Order. (*See* Decl. of George M. Soneff in Supp. of UCLA Mot. ¶ 4.) Based on the Government's vigorous prosecution of the case, Movants could not have anticipated the Government's apparent reluctance to appeal. *See McDonald*, 432 U.S. at 394. Furthermore, Movants acted in a timely manner once they learned that the Government's interests might diverge from their own. The Motions were filed well within the sixty-day period permitted for filing an appeal in an action where a government officer is sued in his official capacity. Fed. R. App. P. 4(a)(1)(B); *see also McDonald*, 432 U.S. at 392. Thus, appellate arguments would proceed apace if Movants are permitted to intervene for that limited purpose.

An appeal will prejudice Plaintiffs by delaying the enforcement of the August 29 Judgment, but the prejudice is less than it would have been had Movants been allowed to intervene for further proceedings before this Court. While Plaintiffs could not have foreseen the possibility of Movants intervening after a final judgment and relitigating settled issues, the possibility of an appeal was always a real one in such a hotly contested case. *Cf. McDonald*, 432 U.S. at 394-95 (explaining that the defendant was not prejudiced because it was "on notice" that intervenor would have an interest in appealing denial of class certification). Thus, the delay associated with an appeal is not unexpected or unusual enough to shift the scales of timeliness in Plaintiffs' favor where the case is entering a new phase and where Movants could not have known until recently that the Government might cease prosecuting the action. The Court finds that the Motions are timely for the purpose of appeal.

3. Impair or Impede Ability to Protect a "Significantly Protectable" Interest

"Contract rights are traditionally protectable interests." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001). The August 29 Judgment rendered the UCLA and Brentwood Agreements void. Unless the Court's Judgment is appealed and reversed, Movants' will no longer be able to use of the Stadium and the Complex pursuant to their contracts with the DVA. Movants, therefore, have a significantly protectable interest in the validity of the UCLA and Brentwood Agreements.

Furthermore, Movants' ability to protect their interest in the validity of the UCLA and Brentwood Agreements would be impaired were intervention denied and should Defendants choose not to appeal. "[I]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." *Berg*, 268 F.3d at 822 (quoting Fed. R. Civ. P. 24 advisory committee's note). The invalidation of an agreement has both a legal and practical effect on the interests of parties to the agreement. *Id.* In this case, the practical result of the UCLA and Brentwood Agreements being deemed invalid is that UCLA's baseball team and Brentwood's student-athletes will be displaced. At this stage in the litigation, Movants can only prevent an adverse outcome through a successful appeal. If Defendants decline

to appeal the Court's Summary Judgment Order, Movants' opportunity to ensure the continued use of the Stadium and the Complex for the duration of the Agreements will evaporate.[8]

4. Inadequate Representation

Three factors are relevant when considering whether a party adequately represents an intervenor's interests:

> (1) whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect.

Nw. Forest Res. Council v. Glickman, 82 F.3d 825, 838 (9th Cir. 1996). "In assessing the adequacy of representation, the focus should be on the 'subject of the action,' not just the particular issues before the court at the time of the motion." *Berg*, 268 F.3d 810 at 823 (quoting *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983)). Although the burden of proving inadequate representation rests on the intervenor, that burden is "minimal." *Id.* at 822.

A successful appeal is Movants' only chance to continue operating the Stadium and the Complex under the terms of the invalidated UCLA and Brentwood Agreements. Movants represent, however, that Defendants will not disclose whether they intend to appeal the Court's Summary Judgment Order. (UCLA Mot. 13.) The Government's refusal to appeal would signal that it is no longer "capable and willing" to make any, let alone "all," of the arguments that Movants would make in defense of the UCLA and Brentwood Agreements. Although the Government is well-situated to defend its decision-making against Plaintiffs' APA claim on appeal, it would cease to adequately represent Movants' interests should it decline to do so. *Pellegrino*, 203 F.2d at 465.

Movants were right to bring the Government's hesitation to the Court's attention in a timely manner. A successful appeal is Movants' only chance to continue using the Stadium and the Complex under the terms of the invalidated Agreements, and the Government cannot ensure that these interests are adequately represented. Therefore, the Court **GRANTS** the instant Motions for the sole purpose of appeal.

C. UCLA's Ex Parte Application

[8] The Court takes no position on whether Movants have recourse to any legal or equitable remedy short of the continued use of the Stadium and the Complex if the Summary Judgment Order is affirmed.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

CASE NO.: CV 11-04846 SJO (MRWx) **DATE: October 21, 2013**

UCLA's Application requesting an extension of the deadline for filing an appeal is **DENIED AS MOOT** because the Court grants the Motions for the limited purpose appeal before the applicable filing deadline has elapsed. UCLA and Brentwood have until October 28, 2013, to file an appeal. *See* Fed. R. App. P. 4(a)(1)(B).

III. RULING

For the foregoing reasons, the Court **GRANTS IN PART AND DENIES IN PART** UCLA and Brentwood's Motions. The Court **ORDERS** that UCLA and Brentwood are permitted to intervene solely for the purpose of appealing the Court's Summary Judgment Order and Judgment, both issued on August 29, 2013. The Court **DENIES AS MOOT** UCLA's Application.

IT IS SO ORDERED.