1. IMPERIUM BLUE TAHOE HOLDINGS, LLC v. TAHOE CHATEAU HOLDING, LLC, 22CV1204

(1) Demurrer

(2) Motion to Strike Portions of Second Amended Complaint

This action involves two adjoining property owners and the written and recorded contracts governing their relationship. Plaintiff Imperium Blue Tahoe Holdings LLC's Second Amended Complaint ("SAC") asserts causes of action ("C/A") for (1) declaratory relief regarding the parties' Maintenance and Easement ("M&E") Agreement, (2) declaratory relief regarding the parties' Parking and Access Easement Agreement ("Parking Agreement"), (3) injunctive relief regarding the M&E Agreement, (4) injunctive relief regarding the Parking Agreement, (5) breach of contract regarding the M&E Agreement, and (6) breach of contract regarding the Parking Agreement. Pending is a demurrer to the SAC and a motion to strike portions of the SAC filed by defendants Tahoe Chateau Land Holding, LLC ("TCLH"), and Propriis LLC.

Demurrer

Defendants demur to plaintiff's 1st, 3rd, and 4th C/A alleged in the SAC for failure to state facts sufficient to allege a C/A. Attached to plaintiff's opposition memorandum is a proposed Third Amended Complaint, which has not been filed.

1. Standard of Review

"[A] demurrer challenges only the legal sufficiency of the complaint, not the truth or the accuracy of its factual allegations or the plaintiff's ability to prove those allegations." (*Amarel v. Connell* (1998) 202 Cal.App.3d 137, 140.) A demurrer is directed at the face of the complaint and to matters subject to judicial notice. (Code Civ. Proc., § 430.30, subd. (a).) All properly pleaded allegations of fact in the complaint are accepted as true, however, improbable they may be, but not the contentions, deductions or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) A judge gives "the complaint a reasonable

interpretation, reading it as a whole and its parts in their context." (*Blank, supra*, 39 Cal.3d at p. 318.)

2. Discussion

2.1. 1st C/A for Declaratory Relief Re: M&E Agreement

Any person claiming rights under a contract or under a written instrument other than a will or trust, or with respect to property, may bring an action for a declaration of the person's rights or duties with respect to another. (Code Civ. Proc., § 1060; *Market Lofts Cmty. Assn. v. 9th St. Market Lofts*, *LLC* (2014) 222 Cal.App.4th 924, 931.) "It is elementary that questions relating to the formation of a contract, its validity, its construction and effect, excuses for nonperformance, and termination are proper subjects for declaratory relief." (*Fowler v. Ross* (1983) 142 Cal.App.3d 472, 478, citing *Foster v. Masters Pontiac Co.* (1958) 158 Cal.App.2d 481, 486.) A general demurrer is usually not an appropriate method for testing the merits of a declaratory relief action because the plaintiff is entitled to a declaration of rights even if the declaration is adverse to the plaintiff's interest. (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 751.)

In this case, plaintiff seeks a judicial declaration of the parties' rights and responsibilities under the following paragraphs of the M&E Agreement: (1) Paragraph 1, subdivision (h), which concerns the potential relocation of the HVAC system located on the roof of the Chateau Retail buildings; (2) Paragraph 4, which provides for the sharing of maintenance costs between the parties; and (3) Paragraph 6, subdivision (a), which requires defendant to obtain insurance and make copies of said insurance available for inspection.

The court finds that plaintiff has stated a proper C/A for declaratory relief related to the parties' M&E Agreement. Therefore, defendants' demurrer to the 1st C/A is overruled.

2.2. 3rd C/A for Injunctive Relief Re: M&E Agreement

Plaintiff alleges that "Defendants threaten to, and unless restrained will, begin removal of the existing rooftop HVAC system above Plaintiff's retail property to Plaintiff's great and irreparable injury for which pecuniary compensation would not afford adequate relief, in that Plaintiff's tenants will suffer business losses which will be difficult or impossible to quantify." (SAC, ¶ 29.)

Defendants argue that injunctive relief is a remedy and not, in itself, a C/A. (*McDowell v. Watson* (1997) 59 Cal.App.4th 1155, 1159.) The court agrees. "A preliminary injunction is an interim remedy designed to maintain the status quo pending a decision on the merits. [Citation.] It is not, in itself, a cause of action. Thus, a cause of action must exist before injunctive relief may be granted. [Citation.]" (*MaJor v. Miraverde Homeowners Assn.* (1992) 7 Cal.App.4th 618, 623.)

The court finds that plaintiff has failed to state a C/A underlying its request for injunctive relief. Paragraph 1, subdivision (h), of the M&E Agreement provides that defendant TCLH, at its sole expense, has the right "to relocate any HVAC component or other fixture situated on the roof of the Chateau Retail buildings as is reasonably needed to complete the improvements situated above the Chateau retail buildings." Therefore, the allegations do not give rise to a breach of contract claim and the demurrer to this C/A is sustained. Because there does not appear to be a reasonable possibility that the 3rd C/A can be amended to cure the defect, leave to amend is denied. (*Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 322.)

2.3. 4th C/A for Injunctive Relief Re: Parking Agreement

Plaintiff's 4th C/A alleges that defendants "have, and unless restrained will, continue to set the parking rates at commercially unreasonable rates" in violation of the parties' Parking Agreement. (SAC, ¶ 32.) Paragraph 7 of the Parking Agreement gives defendant TCLH the right to charge Chateau and Zalanta Retail tenants and their customers at commercially reasonable rates. (SAC, Ex. 2 at ¶ 7.)

As previously discussed, an injunction is not a C/A but is solely a remedy. (*Venice Coalition to Preserve Unique Cmty. Character v. City of Los Angeles* (2019) 31 Cal.App.5th 42, 54.) Technically, the Parking Agreement does not prohibit defendant TCLH from charging commercially unreasonable rates; instead, it gives defendant TCLH the right *to charge* commercially reasonable rates. Therefore, plaintiff has not stated a C/A underlying its request for injunctive relief and the demurrer to this C/A is sustained. Because there does not appear to be a reasonable possibility that the 4th C/A can be amended to cure the defect, leave to amend is denied. (*Roman*, *supra*, 85 Cal.App.4th at p. 322.)

Motion to Strike Portions of the SAC

1. Standard of Review

A motion to strike is generally used to address defects appearing on the face of a pleading that are not subject to demurrer. (*Pierson v. Sharp Memorial Hospital* (1989) 216 Cal.App.3d 340, 342.) Further, "[t]he court may, upon a motion [to strike] …, or at any time in its discretion … [¶] … [s]trike out any irrelevant, false, or improper matter inserted in any pleading." (Code Civ. Proc. § 463, subd. (a).) Like a demurrer, the grounds for a motion to strike must appear on the face of the pleading or from any matter which the court is required to take judicial notice. (Code Civ. Proc., § 437, subd. (a).) On a motion to strike, the trial court must read the complaint as a whole, considering all parts in their context, and must assume the truth of all well-pleaded allegations. (*Courtesy Ambulance Service v. Super. Ct.* (1992) 8 Cal.App.4th 1504, 1519.)

2. Discussion

Defendants claim that plaintiff's SAC "includes new allegations regarding terms of the M&E Agreement which Tahoe Chateau argues do not exist." (Mot. at 2:2–3.)

"Where written documents are the foundation of an action and are attached to the complaint and incorporated therein by reference, they become a part of the complaint" and may be considered in deciding a motion to strike. (*City of Pomona v. Superior Court* (2001) 89 Cal.App.4th 793, 800.) "[F]acts appearing in exhibits attached to the complaint

will also be accepted as true and, if contrary to the allegations in the pleading, will be given precedence." (*Dodd v. Citizens Bank of Costa Mesa* (1990) 222 Cal.App.3d 1624, 1627.)

In this regard, the court finds that certain portions of the SAC cited by defendants are contrary to the M&E Agreement. Thus, the language of the M&E Agreement will be given precedence.

Accordingly, the motion to strike as to a portion of paragraph 10 (SAC at 3:6–12) is denied in part and granted in part. The first sentence does not explicitly contradict the M&E Agreement: "Prior to the commencement of construction of the 16 units above the existing constructed retail development, the rooftop HVAC units above the IB Retail F&B must be removed and replaced with a new HVAC system to service the mixed-use development." (SAC at 3:6–8). The second sentence, however, is contrary to the M&E Agreement: "The M&E Agreement obligates Defendant TCLH … to remove and replace the existing HVAC currently servicing the retail businesses, with a new system, and to ensure no disruption of HVAC service to the retail and restaurant businesses during normal business hours." (SAC at 3:8–12.) Paragraph 1, subdivision (h) of the M&E Agreement merely gives defendant LCLH the option to relocate any HVAC component; it does not include an obligation to do so. (SAC, Ex. 1 at ¶ 1, subd. (h).)

Accordingly, as to paragraph 10, the motion to strike the first sentence is denied. The motion to strike the second sentence is granted without leave to amend as there does not appear to be a reasonable possibility the sentence can be amended to cure the defect. (*Roman*, *supra*, 85 Cal.App.4th at p. 322.)

The motion to strike paragraph 14 in its entirety is denied in part and granted in part. The phrase, "pursuant to Paragraph 1(h) of the M&E Agreement" (SAC at 4:6) shall be stricken, without leave to amend. (*Roman*, *supra*, 85 Cal.App.4th at p. 322.) The motion is denied as to the remainder of paragraph 14.

The motion to strike a portion of paragraph 16 (SAC at 4:21–24) is denied.

The motion to strike a portion of paragraph 17 (SAC at 5:5–7) is denied in part and granted in part. Paragraph 6, subdivision (b) of the M&E Agreement provides, "Copies of all insurance policies … shall be retained by TCLH and shall be available for inspection by TSV at any reasonable time." (SAC, Ex. 1 at ¶ 6, subd. (b).) There is no requirement that defendants provide copies to plaintiff. Thus, the phrase, "to provide copies of all insurance policies (or certificates thereof showing the premiums have been paid)," shall be stricken. Because there does not appear to be a reasonable possibility that the paragraph can be amended to cure the defect, leave to amend is denied. (*Roman*, *supra*, 85 Cal.App.4th at p. 322.)

The motion as to paragraph 38 (SAC at 8:11–16) and paragraph 39 (SAC at 8:18–21) is granted, without leave to amend. (*Roman*, *supra*, 85 Cal.App.4th at p. 322.)

The motion as to paragraphs 41 and 47 in their entirety is denied. In every contract or agreement there is an implied promise of good faith and fair dealing. "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658 [internal citation omitted].)

Lastly, defendants move to strike the 1st, 5th, and 6th C/A in their entirety. The court finds that a motion to strike is not the proper method to strike these C/A in their entirety. The motion is denied as to these C/A.

TENTATIVE RULING # 3: DEFENDANTS' DEMURRER TO THE SECOND AMENDED COMPLAINT IS OVERRULED IN PART AND SUSTAINED IN PART, WITHOUT LEAVE TO AMEND. DEFENDANTS' MOTION TO STRIKE PORTIONS OF THE SECOND AMENDED COMPLAINT IS DENIED IN PART AND GRANTED IN PART, WITHOUT LEAVE TO AMEND. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY

TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. PARTIES MAY APPEAR IN PERSON AT THE HEARING. IF ANY PARTY WISHES TO APPEAR REMOTELY THEY MUST APPEAR BY ZOOM.

2. CARILLO, ET AL. v. THE VAIL CORPORATION, SC20190226

Motion for Summary Judgment

Plaintiffs Lewis Carillo, Jr., and Ann Withey are the parents of Lewis Carillo, III ("decedent"), who died while skiing at Heavenly Valley Ski Resort ("Heavenly"), owned and operated by defendant Heavenly Valley, LP. Plaintiffs have brought this action alleging general negligence, premises liability, and gross negligence. Defendant moves for summary judgment against the complaint on the affirmative defenses of primary and express assumption of risk.

1. FACTUAL BACKGROUND

The decedent was a 49-year-old novice skier at the time of his death. (Mot., Lee Decl., Ex. 6 at p. 77:17–21.) On December 27, 2017, decedent went skiing at Heavenly with a close friend, Keith Stie, an advanced level skier with prior experience as a certified ski instructor. (Mot., Stmt. of Undisputed Material Facts ("UMF"), ¶¶ 8, 9.)

1.1. The Express Liability Waiver

Before skiing on the date of the incident, decedent rented equipment from "Heavenly Sports," located in the California Main Lodge at Heavenly. (Mot., Murphy Decl., ¶¶ 4, 7.) As part of the rental process, decedent executed an Equipment Rental Agreement and Release of Liability Agreement ("Release Agreement"). (Mot., UMF, ¶ 26.)

Edward Murphy, the equipment technician who assisted decedent with his rental, states that decedent entered his personal information into a computer terminal that printed out the proposed Release Agreement. (Mot., Murphy Decl., ¶¶ 7 & 8.) Located at the top right of the Release Agreement were details of the rental transaction which included, amongst other items, decedent's height, weight, age, skiing ability, boot size, and release setting. (*Id.*, ¶ 8.) Mr. Murphy also handwrote decedent's release setting under the heading "Alpine Binding Settings." (*Id.*, ¶ 9.) Both Mr. Murphy and decedent signed under a heading labeled "Equipment Settings Match Form." (*Id.*, ¶ 10.) Decedent declined a rental helmet and initialed the document accordingly. (*Id.*, ¶ 11.) He also

accepted a waiver for equipment damage and handwrote his initials on the document in the box next to "Waiver Accepted." (*Id.*, ¶ 12.)

Mr. Murphy requested decedent review the information under the heading, "Equipment Rental Agreement and Release of Liability Agreement." (*Id.*, ¶ 13.) The text of the agreement is printed in relatively small font and includes six paragraphs. Some of the terms are written in bold font and/or capitalized letters. The agreement provides, in relevant part, "**I EXPRESSLY ASSUME ALL RISKS ASSOCIATED WITH USING THE EQUIPMENT AND PARTICIPATION IN THE ACTIVITY (OF SKIING), WHICH INCLUDES BUT IS NOT LIMITED TO:** changing weather conditions, variations in terrain, existing and changing trail and surface conditions, rocks, stumps, trees, erosion, collisions, natural or man made obstacles, and the negligence of other individuals. … [¶] … **IN CONSIDERATION FOR BEING ALLOWED TO PARTICIPATE, I AGREE TO DEFEND, INDEMNIFY, RELEASE AND NOT TO SUE** … Heavenly Valley, Limited Partnership … **FROM ANY AND ALL LIABILITY** [sic] and/or claims for injury or death to person or damage to property arising from the Renter's participation in the Activity, **INCLUDING THOSE INJURIES AND DAMAGES CAUSED BY ANY RELEASED PARTY'S ALLEGED OR ACTUAL NEGLIGENCE OR BREACH OF ANY EXPRESS OR IMPLIED WARRANTY.** I take full responsibility for any injury or loss … including death … arising in whole or in part out of the Activity (of skiing)." (Mot., UMF, ¶ 29 [emphasis in original].)

Decedent's signature appears under a paragraph that reads in small, bold, capitalized letters, **"THE UNDERSIGNED AGREES TO INDEMNIFY THE RELEASED PARTIES FOR ALL LIABILITY AND CLAIMS, INCLUDING ATTORNEY'S FEES, ARISING FROM ANY MISREPRESENTATIONS MADE IN THIS APPLICATION OR FRAUDULENT EXECUTION OF THIS AGREEMENT. ... I UNDERSTAND THIS RELEASE AND SIGN IT WITH FULL KNOWLEDGE OF ITS SIGNIFICANCE."** (Mot., Murphy Decl., ¶ 14 [emphasis in original].)

1.2. The Incident

After spending approximately 1.5 to two hours skiing in Heavenly's magic carpet area, Mr. Stie decided decedent was ready to ski down an actual ski run. (Mot., UMF, ¶ 14.) Mr. Stie took decedent to the Poma Trail, a designated beginner run. (*Id.*, ¶ 16.)

Along the left edge of the Poma Trail where the incident occurred was roughly 200 feet of orange mesh fencing that stood approximately three feet, six inches tall. (*Id.*, ¶ 21.) There is no dispute that the orange mesh fencing was plainly visible. (*Id.*, ¶ 22.) Plaintiffs claim, however, that the terrain beyond the orange mesh fencing—a downwards slope of at least 45 to 50 degrees—was not plainly visible from where decedent was skiing on the Poma Trail. (Opp'n at p. 8:10–13; Mot., UMF, ¶ 23.)

Immediately before the incident occurred, decedent turned and skied to his right, then turned and skied towards his left. (Mot., UMF, ¶ 18.) For reasons unknown, decedent stopped turning and failed to stop, continuing to slide at a slow pace until he ran into and went over the orange mesh fencing. (*Ibid*.) Mr. Stie, who had been downhill watching decedent, climbed over the same area of the orange mesh fencing where decedent went over and side-slipped down to decedent. (*Id.*, ¶ 24.) Mr. Stie called 911. (Opp'n at p. 8:19.) Despite resuscitation efforts, paramedics pronounced decedent's death at the scene. (Opp'n at p. 8:28–9:2.)

2. EVIDENTIARY OBJECTIONS

Defendant's Objections 1 through 9 to plaintiffs' evidence in opposition to the motion are sustained for lack of authentication and lack of foundation. A writing must be authenticated by declarations or other evidence establishing that the writing is what it purports to be. (Evid. Code, §§ 250, 1401, subd. (a); see *O'Laskey v. Sortino* (1990) 224 Cal.App.3d 241, disapproved on other grounds by *Flanagan v. Flanagan* (2002) 27 Cal.4th 766 [transcript of tape recording not enough to authenticate accuracy of tape].) Here, plaintiffs failed to submit any declaration or affidavit to authenticate its proffered evidence.

3. STANDARD OF REVIEW

A defendant moving for summary judgment bears the burden of persuasion that one or more elements of the cause of action at issue cannot be established, or that there is a complete defense to the cause of action. (*Aguilar v. Atl. Richfield Co.* (2001) 25 Cal.4th 826, 850.) The moving party bears the initial burden of making a prima facie showing of the nonexistence of a triable issue of material fact, and only if the moving party carries the initial burden does the burden shift to the opposing party to produce a prima facie showing of the existence of a triable issue of material fact. (*Ibid*.)

"The court focuses on issue finding; it does not resolve issues of fact. The court seeks to find contradictions in the evidence, or inferences reasonably deducible from the evidence, which raise a triable issue of material fact." (*Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1024.) The evidence of the moving party is strictly construed and the evidence of the opposing party liberally construed. Doubts as to the propriety of granting the motion must be resolved in favor of the party opposing the motion. (*Stationers Corp. v. Dun & Bradstreet*, *Inc.* (1965) 62 Cal.2d 412, 417.)

Because assumption of risk is an affirmative defense for which defendant would bear the burden at trial, defendant must show that no reasonable fact-finder could find in plaintiffs' favor on the issue. (*Clark v. Capital Credit & Collection Services*, *Inc.* (9th Cir. 2006) 460 F.3d 1162, 1177.)

4. DISCUSSION

Defendant moves for summary judgment on the grounds of primary and express assumption of risk.

4.1. Primary Assumption of Risk Doctrine

Defendant first moves for judgment on the grounds that the affirmative defense of primary assumption of risk bars each of plaintiffs' claims against it. To establish a cause of action for negligence, a plaintiff must prove the defendant owed him a duty of care. (*Wattenbarger v. Cincinnati Reds*, *Inc*. (1994) 28 Cal.App.4th 746, 751.) Generally, each

person has a duty to use due care to avoid injuring others by their careless conduct. (Civ. Code, § 1714.) Any exception to the general rule must be based on statute or clear public policy. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 315.) The doctrine of primary assumption of risk is one such exception. (*Hamilton v. Martinelli & Assocs.* (2003) 110 Cal.App.4th 1012, 1021.)

In *Knight v. Jewett*, *supra*, 3 Cal.4th 296, the California Supreme Court examined the principles of assumption of risk. To determine if a plaintiff assumed the risk of a particular activity, a court must decide if the defendant owed a duty to the plaintiff. (*Id.* at p. 313.) The existence and scope of a defendant's duty of care is a question of law. (*Ibid*.) In the sport or recreational context, determining the existence and scope of a defendant's duty of care is a "legal question which depends on the nature of the sport or activity in question and on the parties' general relationship to the activity," (*ibid*.), rather than "the particular plaintiff's subjective knowledge and awareness[.]" (*Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1068.)

Some dangers are inherent and integral to participation in a sport or recreational activity, and a court is to consider these dangers when determining whether there is a duty of care: "As a general rule, persons have a duty to use due care to avoid injury to others, and may be held liable if their careless conduct injures another person. [Citation.] Thus, for example, a property owner ordinarily is required to use due care to eliminate dangerous conditions on his or her property. [Citations.] In the sports setting, however, conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself. Thus, although moguls on a ski run pose a risk of harm to skiers that might not exist were those configurations removed, the challenge and risks posed by the moguls are part of the sport of skiing, and a ski resort has no duty to eliminate them. [Citation.] In this respect, the nature of a sport is highly relevant in defining the duty of care owed by the particular defendant." (*Knight*, supra, 3 Cal.4th at pp. 315–316.)

Whether and to what extent a defendant has a duty of care in a particular context depends not only on the nature of the sport or recreational activity in question, but also on the " 'role of the defendant whose conduct is at issue in a given case.' " (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1004, quoting *Knight*, supra, 3 Cal.4th at p. 318.) "In the sport of baseball, for example, although the batter would not have a duty to avoid carelessly throwing the bat after getting a hit—vigorous deployment of a bat in the course of a game being an integral part of the sport—a stadium owner, because of his or her different relationship to the sport, may have a duty to take reasonable measures to protect spectators from carelessly thrown bats. For the stadium owner, reasonable steps may minimize the risk without altering the nature of the sport." (*Kahn*, *supra*, at p. 1004, citing *Knight*, *supra*, at p. 317; see also *Ratcliff v. San Diego Baseball Club* (1938) 27 Cal.App.2d 733, 736.)

"In any case in which the primary assumption of risk doctrine applies, operators, instructors, and participants in the activity owe other participants a duty 'not to act so as to increase the risk of injury over that inherent in the activity.' [Citation.] But owners and operators of sports venues and other recreational activities have an *additional duty* to undertake reasonable steps or measures to protect their customers' or spectators' safety–if they can do so without altering the nature of the sport or the activity." *(Mayes v. La Sierra University* (2022) 73 Cal.App.5th 686, 698 [italics in original].)

"Safety is important, but so is the freedom to engage in recreation and challenge one's limits. The primary assumption of risk doctrine balances these competing concerns by absolving operators of activities with inherent risks from an obligation to protect their customers from those risks. What the primary assumption of risk doctrine does not do, however, is absolve operators of any obligation to protect the safety of their customers. [Citation.] As a general rule, where an operator can take a measure that would increase safety and minimize the risks of the activity without also altering the nature of the activity,

the operator is required to do so." (*Grotheer v. Escape Adventures*, *Inc.* (2017) 14 Cal.App.5th 1283, 1299–1300.)

Indeed, "[t]he primary assumption of risk doctrine has never relieved an operator of its duty to take reasonable steps to minimize inherent risks without altering the nature of the activity." (*Grotheer*, *supra*, 14 Cal.App.5th at pp. 1300–1301, citing *Morgan v. Fuji Country USA*, *Inc.* (1995) 34 Cal.App.4th 127, 133–134 [golf course owner and operator had duty to design golf course to minimize risk that player would be hit by a golf ball]; *Saffro v. Elite Racing*, *Inc.* (2002) 98 Cal.App.4th 173, 179 [marathon organizer had duty to provide "adequate water and electrolyte fluids along the 26-mile course" to minimize risks that runners would suffer dehydration and hyponatremia]; and *Rosencrans v. Dover Images*, *Ltd.* (2011) 192 Cal.App.4th 1072, 1083–1084 [motocross track operator had duty to provide signaling system for warning riders when a rider fell on the track to minimize risks of collisions between riders].)

4.2. Whether Defendant Increased the Inherent Risk of Harm to Decedent

"[A] resort cannot increase the risks associated with skiing without incurring a duty of care toward its patrons." (*Solis v. Kirkwood Resort Co.* (2001) 94 Cal.App.4th 354, 364, citing *Knight*, *supra*, 3 Cal.4th at pp. 315–316.)

For example, in *Solis v. Kirkwood Resort Co.*, the plaintiff was skiing at defendant's resort when, without warning, he entered an area of the resort that had recently been altered to accommodate a ski race. (*Solis*, *supra*, 94 Cal.App.4th at p. 358.) "This area now consisted of hazardous man-made jumps, which increased the risk of harm to skiers and caused the plaintiff to fall down." (*Ibid.*) At the motion for summary judgment level, the "plaintiff produced evidence from which a jury could find that defendant failed to mark off the race start area (with the jumps) before the accident, and that an ordinary skier would not expect to encounter such jumps in that location." (*Id.* at p. 365.) The court found that "when a resort turns part of a previously ordinary run into a significantly more dangerous racing area, it has a duty to warn its patrons." (*Id.* at p. 366.) "Defendant

produced evidence it *did* warn plaintiff, by erecting a line of colored bamboo poles, which are commonly used to mark off ski areas." (*Ibid.* [italics in original].) The court explained that if the hazard was plainly visible, defendant may not be liable. (*Ibid.*) However, the evidence was in conflict. (*Id.* at p. 367.) Therefore, summary judgment was inappropriate. (*Ibid.*)

In *Van Dyke v. S.K.I. Ltd.* (1998) 67 Cal.App.4th 1310, a skier brought a negligence action against a ski resort after he crossed a ski run to reach a chairlift and was injured striking a steel directional signpost. The plaintiff alleged, and presented evidence tending to show, the defendant ski resort "increased the risk of harm by placing a signpost in the ski run where it was virtually invisible to skiers crossing over to the connector trial to chair lift No. 2." (*Id.* at p. 1317.) "Unlike a ski lift tower which is wide and equally visible from all angles, the sign the plaintiff hit had about an eight-and-one-half-inch profile including the foam wrapping." (*Ibid.*) The court explained, "[w]hen a ski area puts signs in a ski run … it has a duty to mark the signs so they are plainly visible from all angles to skiers who are skiing on the run. Otherwise, the ski area, by an affirmative act, significantly increases the risk of harm without enhancing the sport." (*Ibid.*)

Unlike *Solis* and *Van Dyke*, which both involved manmade hazards, the instant case involves an injury caused by a natural feature of the terrain—the steep slope beyond the orange mesh fencing. No evidence was presented which arguably shows that defendant took any affirmative action to increase the risk of harm. To the contrary, the evidence shows that defendant attempted to decrease the risk of harm by installing a large visual barrier along the edge of the Poma Trail.

4.3. **Whether Defendant Took Reasonable Steps to Minimize the Inherent Risks if It Could Have Done So Without Changing the Fundamental Nature of the Activity**

The court next considers whether there is a triable issue of material fact as to whether defendant took reasonable steps to increase safety and minimize inherent risks of injury,

assuming such steps could be taken without altering the nature of the activity. (See *Mayes*, *supra,* 73 Cal.App.5th at p. 698, citing *Knight*, *supra*, 3 Cal.4th at pp. 317–318 ["owners and operators of sports venues and other recreational activities have an *additional duty* to undertake reasonable steps or measures to protect their customers' or spectators' safety–if they can do so without altering the nature of the sport or the activity" (original italics)].)

Defendant's motion does not explicitly address this issue.

Plaintiffs argue that the orange mesh fencing was merely a visual barrier and insufficient given the risk of the terrain on the opposite side of the beginner's ski run. (Opp'n at p. 18:13–18.) There were no signs specifically relating to the steep terrain and the terrain variation was not clearly visible from where decedent had been skiing on the Poma Trail. (Opp'n at p. 8:10–14.) Further, plaintiffs argue, skiers "could visualize the same orange mesh fencing used elsewhere in the ski area and would have no reason to suspect a danger existed." (Opp'n at p. 14:26–27.) Plaintiffs, however, do not offer any evidence of orange mesh fencing used in other areas of the ski resort.

Viewing the evidence in the light most favorable to plaintiffs, the court finds a disputed issue of material fact as to whether defendant took reasonable steps to minimize the inherent risks of injury, if it could do so without changing the nature of the activity of skiing. (See *Mayes*, *supra*, 73 Cal.App.5th at p. 704.) Defendant has not shown there were no reasonable steps it could have taken to minimize the risk that skiers would be injured by going over the edge of the Poma Trail, a beginner run. Because the evidence is in dispute, summary judgment is inappropriate.

The court finds that defendant has not met its initial burden of showing it is entitled to summary judgment against the complaint based on its affirmative defense of primary assumption of risk.

4.4. Express Contractual Assumption of Risk

Defendant also contends that Plaintiffs' claims are barred by decedent's express assumption of the risk in the Release Agreement he signed the morning of the incident when he rented ski equipment from Heavenly Sports. The Release Agreement states that decedent assumes "all risks associated with using the equipment and participating in the activity (of skiing)." (Mot., UMF, ¶ 29.) It also states that decedent takes "full responsibility for any injury or loss … including death … arising in whole or in part out of the Activity (of skiing)." (*Ibid.*)

Plaintiffs argue that the particular risk in this case—dangerous terrain adjacent to a beginner's ski run—was not reasonably foreseeable, and therefore, outside the scope of the express waiver. (Opp'n at p. 11:9–13.) Moreover, plaintiffs contend that the scope of the Release Agreement should be limited to the equipment rental because that was the focus of decedent's transaction when he rented the equipment. (*Id.* at p. 11:6–9.)

"Express assumption occurs when the plaintiff, in advance, expressly consents … to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone. … The result is that … being under no duty, [the defendant] cannot be charged with negligence."[1] (*Saenz v. Whitewater Voyages*, *Inc.* (1990) 226 Cal.App.3d 758, 764 [internal citations omitted].) "With respect to the question of express waiver, the legal issue is not whether the particular risk of injury [at issue] is inherent in the recreational activity to which the Release applies [citations], but simply *the scope of the Release*." (*Hass v. RhodyCo Productions* (2018) 26 Cal.App.5th 11, 27 [italics in original].) "Where, as here, no conflicting parol evidence is introduced concerning the interpretation of the document, 'construction of the instrument is a question of law ….' " (*Benedek v. PLC Santa Monica,*

[1] A release cannot exculpate a party from gross negligence (i.e., failure to adhere to even a minimal standard of care). (*City of Santa Barbara v. Superior Court* (*Janeway*) (2007) 41 Cal.4th 747, 776–777; *Jimenez v. 24 Hour Fitness USA*, *Inc.* (2015) 237 Cal.App.4th 546, 554–555.)

LLC (2002) 104 Cal.App.4th 1351, 1356, quoting *Paralift*, *Inc. v. Superior Court* (1993) 23 Cal.App.4th 748, 754.)

For a release to be enforceable, California courts have identified three prerequisites. First, the release "must be clear, unambiguous and explicit in expressing the intent of the parties." (*Madison v. Superior Court* (1988) 203 Cal.App.3d 589, 598.) Second, "the act of negligence, which results in injury to the tortfeasor, [must] be reasonably related to the object or purpose for which the release is given." (*Id.* at p. 601.) Third, the release must not be contrary to public policy. (*Id.* at pp. 598–599.)

As it relates to the first requirement, "[a] valid release must be simple enough for a layperson to understand and additionally give notice of its import." (*Hohe v. San Diego Unified School Dist.* (1990) 224 Cal.App.3d 1559, 1566.) The release must be easily readable, with the operative language placed in a position that is readily noticeable and distinguishable from the surrounding text. (See *Leon v. Family Fitness Ctr. (#107)*, *Inc.* (1998) 61 Cal.App.4th 1227, 1232 ["In other words, a release must not be buried in a lengthy document, hidden among other verbiage, or so encumbered with other provisions as to be difficult to find."].) Whether the release language is sufficiently conspicuous depends on the size of the print, the form of the document, and the location of the release language within the surrounding document. (*Ibid.*) The use of specific language, such as the term, "negligence," is not required to validate an exculpatory clause. (*Sanchez v. Bally's Total Fitness Corp.* (1998) 68 Cal.App.4th 62, 67.) Moreover, a defendant need not outline every possible specific act of negligence in the release. (See *Madison*, *supra*, 203 Cal.App.3d at p. 601.) "Ultimately, whether an express assumption of risk is sufficiently clear and unambiguous to be enforced is a question of law, not of fact." (*Id.* at p. 598.)

Here, the Release Agreement appears on the bottom half of a single-page equipment rental document under the heading, **"EQUIPMENT RENTAL AGREEMENT AND RELEASE OF LIABILITY AND INDEMNITY AGREEMENT."** (Mot., Murphy Decl., Ex. 1 [emphasis in

original].) The text of the agreement is six paragraphs long in relatively small font. (Mot., Murphy Decl., Ex. 1.) Several terms are written in bold font and/or capitalized letters. (*Ibid.*) The agreement expressly states it relates to all risks associated with using the equipment and participating in the activity of skiing. (*Ibid.*) It identifies some of the key risks as being changing weather conditions, variations in terrain, existing and changing trail and surface conditions, rocks, stumps, and trees. (*Ibid.*) On the other hand, the names of the released parties do appear somewhat hidden beginning in the first line of the fifth paragraph, in regular font. (*Ibid.*) Defendant is one of six named parties, the others being Specialty Sports Venture LLC, Vail Resorts, Inc., The Vail Corporation d/b/a Vail Resorts Management Company, VR US Holdings, and Vail Resorts Retail. (*Ibid.*)

Considering all of these factors, the court finds the Release Agreement is clear and unambiguous to the extent that it disclaims liability for injuries related to skiing. The size of the text could be larger. However, it is printed legibly and contains adequate, clear, and explicitly exculpatory language and indicates that defendant was to be absolved from the consequences of its own negligence. There is also no evidence that decedent questioned, or objected to, the Release Agreement before signing it.

Next, decedent's injuries must have been reasonably related to the purpose for which the release was given. (*Sweat v. Big Time Auto Racing*, *Inc.* (2004) 117 Cal.App.4th 1301, 1305.) Plaintiffs argue that defendant's alleged negligence—the failure to take reasonable steps to minimize the risk of steep terrain next to a beginner's ski run—is not reasonably related to the object or purpose for which the release was signed, that being decedent's equipment rental.

"An act of negligence is reasonably related to the object or purpose for which the release was given if it is included within the express scope of the release." (*Benedek*, *supra*, 104 Cal.App.4th at pp. 1351, 1357–1358.) In this case, the Release Agreement clearly pertains to using the equipment and participating in the activity of skiing. (Mot., Murphy Decl., Ex. 1.) It states that decedent "take[s] full responsibility for any injury or

loss to [decedent], including death, which [decedent] may suffer, arising in whole or in part out of the Activity." (Mot., Murphy Decl., Ex. 1.) The court finds that the subject incident is expressly covered by the scope of the Release Agreement.

The last requirement is that the agreement is not contrary to public policy. "Exculpatory agreements in the recreational sports context do not implicate the public interest and therefore are not void as against public policy." (*Benedek*, *supra*, 104 Cal.App.4th at pp. 1356–1357.)

Plaintiffs also argue pursuant to Civil Code section 1542, "[a] general release does not extend to claims that the … releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the … released party." (*Ibid.*) The text of the Release Agreement, however, explicitly contemplates the "risk of physical injury or death." (Mot., Murphy Decl., Ex. 1.) Therefore, the court rejects plaintiffs' Civil Code section 1542 argument.

The court finds that the Release Agreement constitutes a clear and unequivocal waiver with specific reference to defendant's negligence. Because decedent expressly released defendant, it has no liability to decedent in this case as a matter of law. Accordingly, the court concludes that the legal effect of the Release Agreement provides to defendant "a complete defense" to plaintiffs' first cause of action for negligence and second cause of action for premises liability.

5. CONCLUSION

Defendant's motion for summary judgment is granted in part and denied in part. Plaintiffs' first and second causes of action are barred by decedent's express assumption of the risk in the Release Agreement he signed the morning of the incident. Because defendant did not move for judgment against the third cause of action for gross negligence on a basis other than primary assumption of risk—to which the court found

there is a triable issue of fact concerning that issue—that cause of action survives defendant's motion.

TENTATIVE RULING # 5: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IS GRANTED IN PART AND DENIED IN PART. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS v. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

3. MATTER OF NUNEZ, 23CV0603

OSC Re: Name Change

Mother petitions to change her minor child's name to add the natural father's last name as a middle name. The minor's natural father has joined in the petition.

TENTATIVE RULING # 2: ABSENT OBJECTION, PETITION IS GRANTED AS REQUESTED.

4. PERFECT UNION SLT, LLC v. CITY OF SOUTH LAKE TAHOE, SC20210172

OSC Re: Dismissal

TENTATIVE RULING # 1: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, JUNE 30, 2023, IN DEPARTMENT FOUR.

5. KACLUDIS, ET AL. v. ARIZ. PIPELINE CO., ET AL., 22CV0268

Motion to Deem Facts Admitted and for Monetary Sanctions

This matter was continued from June 16, 2023, when the court began hearing oral argument.

TENTATIVE RULING # 4: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY, JUNE 30, 2023, IN DEPARTMENT FOUR.