1. BANTAM INVESTMENTS, LLC v. KTL HOLDINGS, INC. 22CV0795

Judgment Debtor Examination.

TENTATIVE RULING # 1: THE PERSONAL APPEARANCE OF THE DEBTOR IS REQUIRED AT 8:30 A.M., FRIDAY, JULY 15, 2022, IN DEPARTMENT NINE.

2. PEOPLE v. KRYLOV PC-20200443

Claim Opposing Forfeiture.

On August 21, 2020, claimant Krylov filed a verified Judicial Council Form MC-200 claim opposing forfeiture of $25,510 in response to a notice of administrative proceedings.

On October 2, 2020, the People filed a petition for forfeiture of currency in the amount of $25,510 that was seized by the El Dorado County Sheriff's Department. The petition states: the funds and other property are currently in the hands of the El Dorado County District Attorney's Office; and the property became subject to forfeiture pursuant to Health and Safety Code, § 11470(f), because that money was a thing of value furnished or intended to be furnished by a person in exchange for a controlled substance, the proceeds was traceable to such an exchange, and the money was used or intended to be used to facilitate a violation of various provisions of the Health and Safety Code. The People pray for judgment declaring that the money is forfeited to the State of California.

The proof of service of the petition declares that on August 17, 2020, the petition was served on the claimant by mail to his address of record.

"The following are subject to forfeiture: ¶ * * * (f) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, or securities used or intended to be used to facilitate any violation of Section 11351, 11351.5, 11352, 11355, 11359, 11360, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11382, or 11383 of this code, or Section 182 of the Penal Code, or a felony violation of Section 11366.8 of this code, insofar as the offense involves manufacture, sale, possession for sale, offer for sale, or offer to manufacture, or conspiracy to commit at

least one of those offenses, if the exchange, violation, or other conduct which is the basis for the forfeiture occurred within five years of the seizure of the property, or the filing of a petition under this chapter, or the issuance of an order of forfeiture of the property, whichever comes first." (Health and Safety Code, § 11470(f).)

"(a) Except as provided in subdivision (j), if the Department of Justice or the local governmental entity determines that the factual circumstances do warrant that the moneys, negotiable instruments, securities, or other things of value seized or subject to forfeiture come within the provisions of subdivisions (a) to (g), inclusive, of Section 11470, and are not automatically made forfeitable or subject to court order of forfeiture or destruction by another provision of this chapter, the Attorney General or district attorney shall file a petition of forfeiture with the superior court of the county in which the defendant has been charged with the underlying criminal offense or in which the property subject to forfeiture has been seized or, if no seizure has occurred, in the county in which the property subject to forfeiture is located. If the petition alleges that real property is forfeitable, the prosecuting attorney shall cause a lis pendens to be recorded in the office of the county recorder of each county in which the real property is located. ¶ A petition of forfeiture under this subdivision shall be filed as soon as practicable, but in any case within one year of the seizure of the property which is subject to forfeiture, or as soon as practicable, but in any case within one year of the filing by the Attorney General or district attorney of a lis pendens or other process against the property, whichever is earlier." (Emphasis added.) (Health and Safety Code, § 11488.4(a).)

"(a)(1) Any person claiming an interest in the property seized pursuant to Section 11488 may, unless for good cause shown the court extends the time for filing, at any time within 30 days from the date of the first publication of the notice of seizure, if that person was not personally served or served by mail, or within 30 days after receipt of actual notice, file with the

superior court of the county in which the defendant has been charged with the underlying or related criminal offense or in which the property was seized or, if there was no seizure, in which the property is located, a claim, verified in accordance with Section 446 of the Code of Civil Procedure, stating his or her interest in the property. An endorsed copy of the claim shall be served by the claimant on the Attorney General or district attorney, as appropriate, within 30 days of the filing of the claim…" (Health and Safety Code, § 11488.5(a)(1).)

"(c)(1) If a verified claim is filed, the forfeiture proceeding shall be set for hearing on a day not less than 30 days therefrom, and the proceeding shall have priority over other civil cases. Notice of the hearing shall be given in the same manner as provided in Section 11488.4. Such a verified claim or a claim filed pursuant to subdivision (j) of Section 11488.4 shall not be admissible in the proceedings regarding the underlying or related criminal offense set forth in subdivision (a) of Section 11488. ¶ (2) The hearing shall be by jury, unless waived by consent of all parties. ¶ (3) The provisions of the Code of Civil Procedure shall apply to proceedings under this chapter unless otherwise inconsistent with the provisions or procedures set forth in this chapter. However, in proceedings under this chapter, there shall be no joinder of actions, coordination of actions, except for forfeiture proceedings, or cross-complaints, and the issues shall be limited strictly to the questions related to this chapter." (Emphasis added.) (Health and Safety Code, § 11488.5(c).)

"(d)(1) At the hearing, the state or local governmental entity shall have the burden of establishing, pursuant to subdivision (i) of Section 11488.4, that the owner of any interest in the seized property consented to the use of the property with knowledge that it would be or was used for a purpose for which forfeiture is permitted, in accordance with the burden of proof set forth in subdivision (i) of Section 11488.4. ¶ (2) No interest in the seized property shall be affected by a forfeiture decree under this section unless the state or local governmental entity

has proven that the owner of that interest consented to the use of the property with knowledge that it would be or was used for the purpose charged. Forfeiture shall be ordered when, at the hearing, the state or local governmental entity has shown that the assets in question are subject to forfeiture pursuant to Section 11470, in accordance with the burden of proof set forth in subdivision (i) of Section 11488.4." (Health and Safety Code, § 11488.5(d).)

"(e) The forfeiture hearing shall be continued upon motion of the prosecution or the defendant until after a verdict of guilty on any criminal charges specified in this chapter and pending against the defendant have been decided. The forfeiture hearing shall be conducted in accordance with Sections 190 to 222.5, inclusive, Sections 224 to 234, inclusive, Section 237, and Sections 607 to 630 of the Code of Civil Procedure if trial by jury, and by Sections 631 to 636, inclusive, of the Code of Civil Procedure, if by the court. Unless the court or jury finds that the seized property was used for a purpose for which forfeiture is permitted, the court shall order the seized property released to the person it determines is entitled thereto. ¶ If the court or jury finds that the seized property was used for a purpose for which forfeiture is permitted, but does not find that a person claiming an interest therein, to which the court has determined he or she is entitled, had actual knowledge that the seized property would be or was used for a purpose for which forfeiture is permitted and consented to that use, the court shall order the seized property released to the claimant." (Health and Safety Code, § 11488.5(e).)

"(i)(1) With respect to property described in subdivisions (e) and (g) of Section 11470 for which forfeiture is sought and as to which forfeiture is contested, the state or local governmental entity shall have the burden of proving beyond a reasonable doubt that the property for which forfeiture is sought was used, or intended to be used, to facilitate a violation of one of the offenses enumerated in subdivision (f) or (g) of Section 11470." (Health and Safety Code, § 11488.4(i)(1).)

"(2) In the case of property described in subdivision (f) of Section 11470, except cash, negotiable instruments, or other cash equivalents of a value of not less than twenty-five thousand dollars ($25,000), for which forfeiture is sought and as to which forfeiture is contested, the state or local governmental entity shall have the burden of proving beyond a reasonable doubt that the property for which forfeiture is sought meets the criteria for forfeiture described in subdivision (f) of Section 11470." (Health and Safety Code, § 11488.4(i)(2).)

"(3) In the case of property described in paragraphs (1) and (2), a judgment of forfeiture requires as a condition precedent thereto, that a defendant be convicted in an underlying or related criminal action of an offense specified in subdivision (f) or (g) of Section 11470 which offense occurred within five years of the seizure of the property subject to forfeiture or within five years of the notification of intention to seek forfeiture. If the defendant is found guilty of the underlying or related criminal offense, the issue of forfeiture shall be tried before the same jury, if the trial was by jury, or tried before the same court, if trial was by court, unless waived by all parties. The issue of forfeiture shall be bifurcated from the criminal trial and tried after conviction unless waived by all the parties." (Health and Safety Code, § 11488.4(i)(3).)

"In the case of property described in subdivision (f) of Section 11470 that is cash or negotiable instruments of a value of not less than twenty-five thousand dollars ($25,000), the state or local governmental entity shall have the burden of proving by clear and convincing evidence that the property for which forfeiture is sought is such as is described in subdivision (f) of Section 11470. There is no requirement for forfeiture thereof that a criminal conviction be obtained in an underlying or related criminal offense." (Emphasis added.) (Health and Safety Code, § 11488.4(i)(4).)

"(5) If there is an underlying or related criminal action, and a criminal conviction is required before a judgment of forfeiture may be entered, the issue of forfeiture shall be tried in

conjunction therewith. Trial shall be by jury unless waived by all parties. If there is no underlying or related criminal action, the presiding judge of the superior court shall assign the action brought pursuant to this chapter for trial." (Health and Safety Code, § 11488.4(i)(5).)

At the hearing on April 15, 2022, the People requested the matter be continued to a date following criminal arraignment. The court continued the hearing to July 15, 2022.

The respondent did not appear in court on April 15, 2022. The People served notice of the continuance of the hearing by mail directly to the respondent at a street address in Shingle Springs, CA. The People need to explain why notice was not served on the respondent's counsel of record.

TENTATIVE RULING # 2: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, JULY 15, 2022, IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

3. PEOPLE v. ANDERSON PCL-2020122

Claim Opposing Forfeiture.

On February 19, 2021, claimant Anderson filed a verified Judicial Council Form MC-200 claim opposing forfeiture of $4,646.52 in response to a notice of administrative proceedings. The proof of service declares that the endorsed claim opposing forfeiture was served by mail on the El Dorado County District Attorney on March 1, 2021.

"The following are subject to forfeiture: ¶ * * * (f) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, or securities used or intended to be used to facilitate any violation of Section 11351, 11351.5, 11352, 11355, 11359, 11360, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11382, or 11383 of this code, or Section 182 of the Penal Code, or a felony violation of Section 11366.8 of this code, insofar as the offense involves manufacture, sale, possession for sale, offer for sale, or offer to manufacture, or conspiracy to commit at least one of those offenses, if the exchange, violation, or other conduct which is the basis for the forfeiture occurred within five years of the seizure of the property, or the filing of a petition under this chapter, or the issuance of an order of forfeiture of the property, whichever comes first." (Health and Safety Code, § 11470(f).)

"(a) Except as provided in subdivision (j), if the Department of Justice or the local governmental entity determines that the factual circumstances do warrant that the moneys, negotiable instruments, securities, or other things of value seized or subject to forfeiture come within the provisions of subdivisions (a) to (g), inclusive, of Section 11470, and are not automatically made forfeitable or subject to court order of forfeiture or destruction by another

provision of this chapter, the Attorney General or district attorney shall file a petition of forfeiture with the superior court of the county in which the defendant has been charged with the underlying criminal offense or in which the property subject to forfeiture has been seized or, if no seizure has occurred, in the county in which the property subject to forfeiture is located. If the petition alleges that real property is forfeitable, the prosecuting attorney shall cause a lis pendens to be recorded in the office of the county recorder of each county in which the real property is located. ¶ A petition of forfeiture under this subdivision shall be filed as soon as practicable, but in any case within one year of the seizure of the property which is subject to forfeiture, or as soon as practicable, but in any case within one year of the filing by the Attorney General or district attorney of a lis pendens or other process against the property, whichever is earlier." (Emphasis added.) (Health and Safety Code, § 11488.4(a).)

"(a)(1) Any person claiming an interest in the property seized pursuant to Section 11488 may, unless for good cause shown the court extends the time for filing, at any time within 30 days from the date of the first publication of the notice of seizure, if that person was not personally served or served by mail, or within 30 days after receipt of actual notice, file with the superior court of the county in which the defendant has been charged with the underlying or related criminal offense or in which the property was seized or, if there was no seizure, in which the property is located, a claim, verified in accordance with Section 446 of the Code of Civil Procedure, stating his or her interest in the property. An endorsed copy of the claim shall be served by the claimant on the Attorney General or district attorney, as appropriate, within 30 days of the filing of the claim…" (Health and Safety Code, § 11488.5(a)(1).)

"(c)(1) If a verified claim is filed, the forfeiture proceeding shall be set for hearing on a day not less than 30 days therefrom, and the proceeding shall have priority over other civil cases. Notice of the hearing shall be given in the same manner as provided in Section 11488.4. Such

a verified claim or a claim filed pursuant to subdivision (j) of Section 11488.4 shall not be admissible in the proceedings regarding the underlying or related criminal offense set forth in subdivision (a) of Section 11488. ¶ (2) The hearing shall be by jury, unless waived by consent of all parties. ¶ (3) The provisions of the Code of Civil Procedure shall apply to proceedings under this chapter unless otherwise inconsistent with the provisions or procedures set forth in this chapter. However, in proceedings under this chapter, there shall be no joinder of actions, coordination of actions, except for forfeiture proceedings, or cross-complaints, and the issues shall be limited strictly to the questions related to this chapter." (Emphasis added.) (Health and Safety Code, § 11488.5(c).)

"(d)(1) At the hearing, the state or local governmental entity shall have the burden of establishing, pursuant to subdivision (i) of Section 11488.4, that the owner of any interest in the seized property consented to the use of the property with knowledge that it would be or was used for a purpose for which forfeiture is permitted, in accordance with the burden of proof set forth in subdivision (i) of Section 11488.4. ¶ (2) No interest in the seized property shall be affected by a forfeiture decree under this section unless the state or local governmental entity has proven that the owner of that interest consented to the use of the property with knowledge that it would be or was used for the purpose charged. Forfeiture shall be ordered when, at the hearing, the state or local governmental entity has shown that the assets in question are subject to forfeiture pursuant to Section 11470, in accordance with the burden of proof set forth in subdivision (i) of Section 11488.4." (Health and Safety Code, § 11488.5(d).)

"(e) The forfeiture hearing shall be continued upon motion of the prosecution or the defendant until after a verdict of guilty on any criminal charges specified in this chapter and pending against the defendant have been decided. The forfeiture hearing shall be conducted in accordance with Sections 190 to 222.5, inclusive, Sections 224 to 234, inclusive, Section 237,

and Sections 607 to 630 of the Code of Civil Procedure if trial by jury, and by Sections 631 to 636, inclusive, of the Code of Civil Procedure, if by the court. Unless the court or jury finds that the seized property was used for a purpose for which forfeiture is permitted, the court shall order the seized property released to the person it determines is entitled thereto. ¶ If the court or jury finds that the seized property was used for a purpose for which forfeiture is permitted, but does not find that a person claiming an interest therein, to which the court has determined he or she is entitled, had actual knowledge that the seized property would be or was used for a purpose for which forfeiture is permitted and consented to that use, the court shall order the seized property released to the claimant." (Health and Safety Code, § 11488.5(e).)

"(i)(1) With respect to property described in subdivisions (e) and (g) of Section 11470 for which forfeiture is sought and as to which forfeiture is contested, the state or local governmental entity shall have the burden of proving beyond a reasonable doubt that the property for which forfeiture is sought was used, or intended to be used, to facilitate a violation of one of the offenses enumerated in subdivision (f) or (g) of Section 11470." (Health and Safety Code, § 11488.4(i)(1).)

"(2) In the case of property described in subdivision (f) of Section 11470, except cash, negotiable instruments, or other cash equivalents of a value of not less than twenty-five thousand dollars ($25,000), for which forfeiture is sought and as to which forfeiture is contested, the state or local governmental entity shall have the burden of proving beyond a reasonable doubt that the property for which forfeiture is sought meets the criteria for forfeiture described in subdivision (f) of Section 11470." (Health and Safety Code, § 11488.4(i)(2).)

"(3) In the case of property described in paragraphs (1) and (2), a judgment of forfeiture requires as a condition precedent thereto, that a defendant be convicted in an underlying or related criminal action of an offense specified in subdivision (f) or (g) of Section 11470 which

offense occurred within five years of the seizure of the property subject to forfeiture or within five years of the notification of intention to seek forfeiture. If the defendant is found guilty of the underlying or related criminal offense, the issue of forfeiture shall be tried before the same jury, if the trial was by jury, or tried before the same court, if trial was by court, unless waived by all parties. The issue of forfeiture shall be bifurcated from the criminal trial and tried after conviction unless waived by all the parties." (Health and Safety Code, § 11488.4(i)(3).)

"In the case of property described in subdivision (f) of Section 11470 that is cash or negotiable instruments of a value of not less than twenty-five thousand dollars ($25,000), the state or local governmental entity shall have the burden of proving by clear and convincing evidence that the property for which forfeiture is sought is such as is described in subdivision (f) of Section 11470. There is no requirement for forfeiture thereof that a criminal conviction be obtained in an underlying or related criminal offense." (Emphasis added.) (Health and Safety Code, § 11488.4(i)(4).)

"(5) If there is an underlying or related criminal action, and a criminal conviction is required before a judgment of forfeiture may be entered, the issue of forfeiture shall be tried in conjunction therewith. Trial shall be by jury unless waived by all parties. If there is no underlying or related criminal action, the presiding judge of the superior court shall assign the action brought pursuant to this chapter for trial." (Health and Safety Code, § 11488.4(i)(5).)

On May 10, 2021, the People filed a petition for forfeiture. The proof of service filed on May 14, 2021, declares that claimant's counsel was served the petition for forfeiture by fax on May 11, 2021.

At the May 13, 2022, hearing, the court was advised that the criminal case settled four weeks ago, and the court granted the People's request to continue the hearing. At the June 17, 2022, hearing the court was advised that respondent's counsel was in the wrong court and a

continuance was granted. The June 17, 2022, minute order continuing the hearing to July 15, 2022, was served by email to counsels for the parties on June 21, 2022.

TENTATIVE RULING # 3: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, JULY 15, 2022, IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

4. PEOPLE v. KELLY PCL-20210332

Claim Opposing Forfeiture.

Claimant Kelly filed a claim opposing forfeiture in response to a notice of administrative proceedings to determine that certain funds are forfeited. The People responded by filing a petition for forfeiture. The unverified petition contends: $13,914 in U.S. Currency was seized by the El Dorado County Sheriff's Office; such funds are currently in the hands of the El Dorado County District Attorney's Office; and the property became subject to forfeiture pursuant to Health and Safety Code, § 11470(f), because that money was a thing of value furnished or intended to be furnished by a person in exchange for a controlled substance, the proceeds was traceable to such an exchange, and the money was used or intended to be used to facilitate a violation of Health and Safety Code, § 11358. The People pray for judgment declaring that the money is forfeited to the State of California.

"The following are subject to forfeiture: ¶ * * * (f) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, or securities used or intended to be used to facilitate any violation of Section 11351, 11351.5, 11352, 11355, 11359, 11360, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11382, or 11383 of this code, or Section 182 of the Penal Code, or a felony violation of Section 11366.8 of this code, insofar as the offense involves manufacture, sale, possession for sale, offer for sale, or offer to manufacture, or conspiracy to commit at least one of those offenses, if the exchange, violation, or other conduct which is the basis for the forfeiture occurred within five years of the seizure of the property, or the filing of a petition

under this chapter, or the issuance of an order of forfeiture of the property, whichever comes first." (Health and Safety Code, § 11470(f).)

"(a) Except as provided in subdivision (j), if the Department of Justice or the local governmental entity determines that the factual circumstances do warrant that the moneys, negotiable instruments, securities, or other things of value seized or subject to forfeiture come within the provisions of subdivisions (a) to (g), inclusive, of Section 11470, and are not automatically made forfeitable or subject to court order of forfeiture or destruction by another provision of this chapter, the Attorney General or district attorney shall file a petition of forfeiture with the superior court of the county in which the defendant has been charged with the underlying criminal offense or in which the property subject to forfeiture has been seized or, if no seizure has occurred, in the county in which the property subject to forfeiture is located. If the petition alleges that real property is forfeitable, the prosecuting attorney shall cause a lis pendens to be recorded in the office of the county recorder of each county in which the real property is located. ¶ A petition of forfeiture under this subdivision shall be filed as soon as practicable, but in any case within one year of the seizure of the property which is subject to forfeiture, or as soon as practicable, but in any case within one year of the filing by the Attorney General or district attorney of a lis pendens or other process against the property, whichever is earlier." (Emphasis added.) (Health and Safety Code, § 11488.4(a).)

"(a)(1) Any person claiming an interest in the property seized pursuant to Section 11488 may, unless for good cause shown the court extends the time for filing, at any time within 30 days from the date of the first publication of the notice of seizure, if that person was not personally served or served by mail, or within 30 days after receipt of actual notice, file with the superior court of the county in which the defendant has been charged with the underlying or related criminal offense or in which the property was seized or, if there was no seizure, in

which the property is located, a claim, verified in accordance with Section 446 of the Code of Civil Procedure, stating his or her interest in the property. An endorsed copy of the claim shall be served by the claimant on the Attorney General or district attorney, as appropriate, within 30 days of the filing of the claim…" (Health and Safety Code, § 11488.5(a)(1).)

"(c)(1) If a verified claim is filed, the forfeiture proceeding shall be set for hearing on a day not less than 30 days therefrom, and the proceeding shall have priority over other civil cases. Notice of the hearing shall be given in the same manner as provided in Section 11488.4. Such a verified claim or a claim filed pursuant to subdivision (j) of Section 11488.4 shall not be admissible in the proceedings regarding the underlying or related criminal offense set forth in subdivision (a) of Section 11488. ¶ (2) The hearing shall be by jury, unless waived by consent of all parties. ¶ (3) The provisions of the Code of Civil Procedure shall apply to proceedings under this chapter unless otherwise inconsistent with the provisions or procedures set forth in this chapter. However, in proceedings under this chapter, there shall be no joinder of actions, coordination of actions, except for forfeiture proceedings, or cross-complaints, and the issues shall be limited strictly to the questions related to this chapter." (Health and Safety Code, § 11488.5(c).)

"(d)(1) At the hearing, the state or local governmental entity shall have the burden of establishing, pursuant to subdivision (i) of Section 11488.4, that the owner of any interest in the seized property consented to the use of the property with knowledge that it would be or was used for a purpose for which forfeiture is permitted, in accordance with the burden of proof set forth in subdivision (i) of Section 11488.4. ¶ (2) No interest in the seized property shall be affected by a forfeiture decree under this section unless the state or local governmental entity has proven that the owner of that interest consented to the use of the property with knowledge that it would be or was used for the purpose charged. Forfeiture shall be ordered when, at the

hearing, the state or local governmental entity has shown that the assets in question are subject to forfeiture pursuant to Section 11470, in accordance with the burden of proof set forth in subdivision (i) of Section 11488.4." (Health and Safety Code, § 11488.5(d).)

"(e) The forfeiture hearing shall be continued upon motion of the prosecution or the defendant until after a verdict of guilty on any criminal charges specified in this chapter and pending against the defendant have been decided. The forfeiture hearing shall be conducted in accordance with Sections 190 to 222.5, inclusive, Sections 224 to 234, inclusive, Section 237, and Sections 607 to 630 of the Code of Civil Procedure if trial by jury, and by Sections 631 to 636, inclusive, of the Code of Civil Procedure, if by the court. Unless the court or jury finds that the seized property was used for a purpose for which forfeiture is permitted, the court shall order the seized property released to the person it determines is entitled thereto. ¶ If the court or jury finds that the seized property was used for a purpose for which forfeiture is permitted, but does not find that a person claiming an interest therein, to which the court has determined he or she is entitled, had actual knowledge that the seized property would be or was used for a purpose for which forfeiture is permitted and consented to that use, the court shall order the seized property released to the claimant." (Health and Safety Code, § 11488.5(e).)

"(3) In the case of property described in paragraphs (1) and (2), a judgment of forfeiture requires as a condition precedent thereto, that a defendant be convicted in an underlying or related criminal action of an offense specified in subdivision (f) or (g) of Section 11470 which offense occurred within five years of the seizure of the property subject to forfeiture or within five years of the notification of intention to seek forfeiture. If the defendant is found guilty of the underlying or related criminal offense, the issue of forfeiture shall be tried before the same jury, if the trial was by jury, or tried before the same court, if trial was by court, unless waived by all

parties. The issue of forfeiture shall be bifurcated from the criminal trial and tried after conviction unless waived by all the parties." (Health and Safety Code, § 11488.4(i)(3).)

"(5) If there is an underlying or related criminal action, and a criminal conviction is required before a judgment of forfeiture may be entered, the issue of forfeiture shall be tried in conjunction therewith. Trial shall be by jury unless waived by all parties. If there is no underlying or related criminal action, the presiding judge of the superior court shall assign the action brought pursuant to this chapter for trial." (Health and Safety Code, § 11488.4(i)(5).)

Upon the request of the respondent's counsel, the court continued the hearing from May 13, 2022, to July 15, 2022.

TENTATIVE RULING # 4: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, JULY 15, 2022, IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

5. MATTER OF TAHA 22CV0648

OSC Re: Name Change.

TENTATIVE RULING # 5: THE PETITION IS GRANTED.

6. COUNTY OF EL DORADO v. WALDOW 21CV0122

(1) Plaintiff's Motion to Compel Defendant International Farmers Kitchen, LLC to Respond to Form Interrogatories, Special Interrogatories, and Requests for Production without Objection.

(2) Plaintiff's Motion to Deem Admitted Requests for Admission Propounded on Defendant International Farmers Kitchen, LLC.

(3) Plaintiff's Motion to Compel Defendant Waldow to Respond to Form Interrogatories, Special Interrogatories, and Requests for Production without Objection.

(4) Plaintiff's Motion to Deem Admitted Requests for Admission Propounded on Defendant Waldow.

Plaintiff's Motion to Compel Defendant International Farmers Kitchen, LLC to Respond to Form Interrogatories, Special Interrogatories, and Requests for Production without Objection.

Plaintiff's counsel declares on March 25, 2022, form interrogatories special interrogatories, and requests for production were served on defendant International Farmers Kitchen, LLC; and despite a request for responses and production, defendant International Farmers Kitchen, LLC failed to provide any responses to the discovery propounded. Plaintiff moves to compel answers and production of documents without objections and further requests an award of monetary sanctions in the amount of $500.

The proof of service in the court's file declares that on June 2, 2022, notice of the hearing and copies of the moving papers were served by mail and email on defense counsel. There was no opposition to the motion in the court's file when this ruling was prepared.

The party to whom interrogatories and requests for production have been served must serve responses upon the propounding party within 30 days after service or any other later date the propounding party stipulates to. (Code of Civil Procedure, §§ 2030.260, 2030.270, 2031.260, and 2031.270.) The failure to timely respond waives all objections to the interrogatories and requests and the propounding party may move to compel answers to interrogatories and production of documents. (Code of Civil Procedure, §§ 2030.290 and 2031.300.)

Absent opposition, it appears appropriate under the circumstances to grant the motion to compel answers and production.

Sanctions

Failure to respond to interrogatories, and requests for production is a sanctionable misuse of the discovery process. (Code of Civil Procedure, §§ 2023.010(d), 2023.030, 2030.290(c), and 2031.300(c).) The court may award sanctions under the Discovery Act in favor of the moving party even though no opposition to the motion to compel was filed, or the opposition was withdrawn, or the requested discovery was provided to the moving party after the motion was filed. (Rules of Court, Rule 3.1348(a).)

It appears appropriate under the circumstances presented to award monetary sanctions in the amount of $500 payable by defendant International Farmers Kitchen, LLC in ten days.

Plaintiff's Motion to Deem Admitted Requests for Admission, Set One, Propounded on Defendant International Farmers Kitchen, LLC.

Plaintiff's counsel declares on March 25, 2022, requests for admission were served on defendant International Farmers Kitchen, LLC; and despite a request for responses, defendant International Farmers Kitchen, LLC failed to provide any responses to the requests for

admission. Plaintiff moves to deem admitted the requests for admission and further requests an award of monetary sanctions in the amount of $1,050.

The proof of service in the court's file declares that on June 2, 2022, notice of the hearing and copies of the moving papers were served by mail and email on defense counsel. There was no opposition to the motion in the court's file at the time this ruling was prepared.

"If a party to whom requests for admission have been directed fails to serve a timely response, the following rules apply: ¶ * * * (b) The requesting party may move for an order that the genuineness of any documents and the truth of any matters specified in the requests be deemed admitted, as well as for a monetary sanction under Chapter 7 (commencing with Section 2023.010)." (Code of Civil Procedure, § 2033.280(b).)

Absent opposition, it appears appropriate under the circumstances to grant the motion to deem admitted the requests for admission.

Sanctions

Failure to respond to requests for admission is a sanctionable misuse of the discovery process. (Code of Civil Procedure, §§ 2023.010(d), 2023.030, and 2033.280(c).) The court may award sanctions under the Discovery Act in favor of the moving party even though no opposition to the motion to compel was filed, or the opposition was withdrawn, or the requested discovery was provided to the moving party after the motion was filed. (Rules of Court, Rule 3.1348(a).)

It appears appropriate under the circumstances presented to award monetary sanctions in the amount of $1,050 payable by defendant International Farmers Kitchen, LLC in ten days.

Plaintiff's Motion to Compel Defendant Waldow to Respond to Form Interrogatories, Special Interrogatories, and Requests for Production without Objection.

Plaintiff's counsel declares on March 25, 2022, form interrogatories, special interrogatories, and requests for production were served on defendant Waldow; and despite a request for responses and production, defendant Waldow failed to provide any responses to the discovery propounded. Plaintiff moves to compel answers and production of documents without objections and further requests an award of monetary sanctions in the amount of $500.

The proof of service in the court's file declares that on June 2, 2022, notice of the hearing and copies of the moving papers were served by mail and email on defense counsel. There was no opposition to the motion in the court's file at the time this ruling was prepared.

The party to whom interrogatories and requests for production have been served must serve responses upon the propounding party within 30 days after service or any other later date the propounding party stipulates to. (Code of Civil Procedure, §§ 2030.260, 2030.270, 2031.260, and 2031.270.) The failure to timely respond waives all objections to the interrogatories and requests and the propounding party may move to compel answers to interrogatories and production of documents. (Code of Civil Procedure, §§ 2030.290 and 2031.300.)

Absent opposition, it appears appropriate under the circumstances to grant the motion to compel answers and production.

Sanctions

Failure to respond to interrogatories and requests for production is a sanctionable misuse of the discovery process. (Code of Civil Procedure, §§ 2023.010(d), 2023.030, 2030.290(c), and 2031.300(c).) The court may award sanctions under the Discovery Act in favor of the moving party even though no opposition to the motion to compel was filed, or the opposition was

withdrawn, or the requested discovery was provided to the moving party after the motion was filed. (Rules of Court, Rule 3.1348(a).)

It appears appropriate under the circumstances presented to award monetary sanctions in the amount of $500 payable by defendant Waldow in ten days.

Plaintiff's Motion to Deem Admitted Requests for Admission, Set One, Propounded on Defendant Waldow.

Plaintiff's counsel declares on March 25, 2022, requests for admission were served on defendant Waldow; and despite a request for responses, defendant Waldow failed to provide any responses to the requests for admission. Plaintiff moves to deem admitted the requests for admission and further requests an award of monetary sanctions in the amount of $1,050.

The proof of service in the court's file declares that on June 2, 2022, notice of the hearing and copies of the moving papers were served by mail and email on defense counsel. There was no opposition to the motion in the court's file at the time this ruling was prepared.

"If a party to whom requests for admission have been directed fails to serve a timely response, the following rules apply: ¶ * * * (b) The requesting party may move for an order that the genuineness of any documents and the truth of any matters specified in the requests be deemed admitted, as well as for a monetary sanction under Chapter 7 (commencing with Section 2023.010)." (Code of Civil Procedure, § 2033.280(b).)

Absent opposition, it appears appropriate under the circumstances to grant the motion to deem admitted the requests for admission.

Sanctions

Failure to respond to requests for admission is a sanctionable misuse of the discovery process. (Code of Civil Procedure, §§ 2023.010(d), 2023.030, and 2033.280(c).) The court may award sanctions under the Discovery Act in favor of the moving party even though no

opposition to the motion to compel was filed, or the opposition was withdrawn, or the requested discovery was provided to the moving party after the motion was filed. (Rules of Court, Rule 3.1348(a).)

It appears appropriate under the circumstances presented to award monetary sanctions in the amount of $1,050 payable by defendant Waldow in ten days.

TENTATIVE RULING # 6: PLAINTIFF'S MOTION TO COMPEL DEFENDANT INTERNATIONAL FARMERS KITCHEN, LLC TO RESPOND TO FORM INTERROGATORIES, SPECIAL INTERROGATORIES, AND REQUESTS FOR PRODUCTION WITHOUT OBJECTION IS GRANTED. PLAINTIFF'S MOTION TO DEEM ADMITTED REQUESTS FOR ADMISSION, SET ONE, PROPOUNDED ON DEFENDANT INTERNATIONAL FARMERS KITCHEN, LLC IS GRANTED. REQUESTS FOR ADMISSION, SET ONE PROPOUNDED ON DEFENDANT INTERNATIONAL FARMERS KITCHEN, LLC ARE DEEMED ADMITTED. DEFENDANT INTERNATIONAL FARMERS KITCHEN, LLC IS ORDERED TO PROVIDE ANSWERS TO FORM INTERROGATORIES, SET ONE AND SPECIAL INTERROGATORIES, SET ONE WITHOUT OBJECTION WITHIN TEN DAYS. DEFENDANT INTERNATIONAL FARMERS KITCHEN, LLC IS FURTHER ORDERED TO PROVIDE RESPONSES AND PRODUCTION OF THE DOCUMENTS REQUESTED IN REQUESTS FOR PRODUCTION, SET ONE, WITHOUT OBJECTION WITHIN TEN DAYS. DEFENDANT INTERNATIONAL FARMERS KITCHEN, LLC IS ALSO ORDERED TO PAY PLAINTIFF $1,550 IN MONETARY SANCTIONS WITHIN TEN DAYS. PLAINTIFF'S MOTION TO COMPEL DEFENDANT WALDOW TO RESPOND TO FORM INTERROGATORIES, SPECIAL INTERROGATORIES, AND REQUESTS FOR PRODUCTION WITHOUT OBJECTION IS GRANTED. PLAINTIFF'S MOTION TO DEEM ADMITTED REQUESTS FOR ADMISSION, SET ONE, PROPOUNDED ON DEFENDANT WALDOW IS GRANTED.

REQUESTS FOR ADMISSION, SET ONE PROPOUNDED ON DEFENDANT WALDO ARE DEEMED ADMITTED. DEFENDANT WALDO IS ORDERED TO PROVIDE ANSWERS TO FORM INTERROGATORIES, SET ONE AND SPECIAL INTERROGATORIES, SET ONE WITHOUT OBJECTION WITHIN TEN DAYS. DEFENDANT WALDOW IS FURTHER ORDERED TO PROVIDE RESPONSES AND PRODUCTION OF THE DOCUMENTS REQUESTED IN REQUESTS FOR PRODUCTION, SET ONE, WITHOUT OBJECTION WITHIN TEN DAYS. DEFENDANT WALDOW IS ALSO ORDERED TO PAY PLAINTIFF $1,550 IN MONETARY SANCTIONS WITHIN TEN DAYS. NO HEARING ON THESE MATTERS 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) 621-6551 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. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED

AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, JULY 15, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

7. BOWMAN v. GOLD COUNTRY HOMEOWNERS PC-20200539

(1) Defendant's Motion for Reconsideration of Ruling on Plaintiff's Motion to Compel Deposition and Production of Documents, or, in the Alternative, Motion for Protective Order.

(2) Defendants" Motion for Leave to File 1st Amended Answer.

Defendant's Motion for Reconsideration of Ruling on Plaintiff's Motion to Compel Deposition and Production of Documents, or, in the Alternative, Motion for Protective Order.

The court issued a 19 page tentative ruling on plaintiff's motion to compel further responses to requests for production, numbers 13-16 propounded on Randall Benton; further responses to requests for production, numbers 4 and 7 propounded on Barbara Erb; further responses to request for production, number 7 propounded on Darlene Ott; further responses to requests for production numbers 3 and 4 propounded on Diane Shakal in her notice of deposition; further responses to two deposition questions that deponent Diane Shakal refused to answer on the ground of attorney-client privilege, which were directed at documents brought to a meeting with attorney Crystal Center and email communications with attorney Russell Townsend; further responses to two deposition questions that deponent Russell Collins refused to answer on the ground of attorney-client privilege, which were directed at discussions with an attorney concerning his interpretation of the C,C,&Rs and discussions with an attorney before initiating litigation; and further responses to request for production, number 13 propounded on defendant Gold Country HOA seeking the HOA minute books for the period of January 1997 through October 2021, which defendant HOA objected to on several grounds, which included an attorney-client privilege objection.

At the hearing on May 6, 2022, the parties' counsels provided oral argument concerning the motion and the court took the matter under submission.

On May 19, 2022, the court granted the motion in part and denied the motion in part as stated in the text of the written ruling. The court ordered defendant Gold Country Homeowners' Association to produce the documents requested in request number 13 related to the HOA minute books for the period commencing January 2001 through October 2021, except for those documents identified in the HOA's privilege log, within ten days. Absent evidence the HOA operating rules provide that HOA membership entry elections are governed by the secret election article of the civil code, the court ordered defendant Erb to produce the unredacted vote results within ten days. The court was prepared to sustain the objection to production of attorney-client privileged documents on the ground that there was no explicit or implied waiver of the attorney-client privilege by the holder of the privilege and left the issue of admission of any advice of counsel evidence for the time of trial. The court advised the parties that, on the other hand, the parties may render that decision moot by stipulating to the defendant HOA filing a 1st amended answer to the complaint raising the advice of counsel affirmative defense, the defendant HOA agreeing to produce the documents sought, and the parties agreeing to a protective order. The court denied the sanction requests.

The parties apparently were unable to reach a stipulation to allow the defendants leave to file a 1st amended answer to assert the advice of counsel defense as the defendants have filed a motion for leave to amend the answer to assert such a defense subject to a protective order.

Defendants move for the court to reconsider the portion of the order that required defendant Erb to produce the unredacted votes of the HOA members as there was no evidence the HOA operating rules provided that HOA membership entry elections are governed by the secret election article of the civil code. Defendants argue reconsideration and entry of an order

denying that discovery is justified by the following: there are many concerns related to disclosure of an unredacted vote tally sheet, including plaintiffs interrogating all or most of their neighbors as to their vote in the election; tensions in the neighborhood are already high due to the lawsuits, and production of the unredacted election results will allow plaintiffs to harass their neighbors again over their votes; the election results are not meant to be used as a basis for an inquisition, especially where the clear intent was to keep them private; the new and different facts justifying reconsideration are contained in the Erb declaration; the Erb declaration is evidence the HOA members reasonably believed their votes were private; and, in the alternative, the court should grant a protective order.

Plaintiffs oppose the motion on the following grounds: there was no meet and confer in violation of Code of Civil Procedure, § 2031.060(a), therefore the court should deny the motion; there are no new or different facts submitted in support of the motion; defendants have failed to provide a reasonable explanation for their failure to assert those alleged new and different facts in connection with the prior hearings; an assertion that the secret nature and privacy of the names of the members who voted and their votes was self-evident is not a reasonable explanation for failure to raise the alleged new and different facts; the election results document is directly relevant to the issues of the case and is not privileged nor protected by the Davis-Stirlng Act; the moving defendants do not have standing as individuals to object to production of the election results, because the election results are records that belong to the HOA, not defendant Erb who prepared the election document for the HOA; defendant HOA has not joined in the motion for reconsideration; the Bowmans are well aware they can not annoy or harass members as to how they voted and all they want is the information they are entitled to in order to properly evaluate and conduct their case, therefore, there is no good cause to issue a protective order.

Defendants replied to the opposition: the individual defendants have standing to request reconsideration as members of the association to assert their right to privacy related to the election results and the HOA joined in the objection at the hearing in the motion; Civil Code, § 5215(a)(4) expressly provides that the vote results are not to be disclosed, because the HOA can withhold and redact from HOA record information reasonably likely to compromise the privacy of an individual member of the association; new and different facts have been submitted in support of the motion for reconsideration; the court has inherent power to reconsider any ruling with or without a motion; and the defendants have offered a reasonable alternative of a protective order.

Meet and Confer Requirement

"(a) When an inspection, copying, testing, or sampling of documents, tangible things, places, or electronically stored information has been demanded, the party to whom the demand has been directed, and any other party or affected person, may promptly move for a protective order. This motion shall be accompanied by a meet and confer declaration under Section 2016.040." (Code of Civil Procedure, § 2031.060(a).)

"It is a central precept to the Civil Discovery Act of 1986 (Code Civ.Proc., § 2016 et seq.) (hereinafter "Discovery Act") that civil discovery be essentially self-executing. (*Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1111, 1 Cal.Rptr.2d 222.) The Discovery Act requires that, prior to the initiation of a motion to compel, the moving party declare that he or she has made a serious attempt to obtain "an informal resolution of each issue." (§ 2025, subd. (o); *DeBlase v. Superior Court* (1996) 41 Cal.App.4th 1279, 1284, 49 Cal.Rptr.2d 229.) This rule is designed "to encourage the parties to work out their differences informally so as to avoid the necessity for a formal order...." (*McElhaney v. Cessna Aircraft Co.* (1982) 134 Cal.App.3d 285, 289, 184 Cal.Rptr. 547.) This, in turn, will lessen the burden on the court and reduce the unnecessary

expenditure of resources by litigants through promotion of informal, extrajudicial resolution of discovery disputes. (*DeBlase v. Superior Court*, supra, 41 Cal.App.4th 1279, 1284, 49 Cal.Rptr.2d 229; see also *Volkswagenwerk Aktiengesellschaft v. Superior Court* (1981) 122 Cal.App.3d 326, 330, 175 Cal.Rptr. 888.)" (Townsend v. Superior Court (1998) 61 Cal.App.4th 1431, 1434-1435.) "A determination of whether an attempt at informal resolution is adequate also involves the exercise of discretion. The level of effort at informal resolution which satisfies the 'reasonable and good faith attempt' standard depends upon the circumstances. In a larger, more complex discovery context, a greater effort at informal resolution may be warranted. In a simpler, or more narrowly focused case, a more modest effort may suffice. The history of the litigation, the nature of the interaction between counsel, the nature of the issues, the type and scope of discovery requested, the prospects for success and other similar factors can be relevant. Judges have broad powers and responsibilities to determine what measures and procedures are appropriate in varying circumstances. (See, e.g., Gov.Code, § 68607 [judge has responsibility to manage litigation]; Code Civ. Proc., § 128, subd. (a)(5) [judge has power to control conduct of judicial proceeding in furtherance of justice].) Judges also have broad discretion in controlling the course of discovery and in making the various decisions necessitated by discovery proceedings. (Citations omitted.)" (Obregon v. Superior Court (1998) 67 Cal.App.4th 424, 431.) "Although some effort is required in all instances (see, e.g., *Townsend*, supra, 61 Cal.App.4th at p. 1438, 72 Cal.Rptr.2d 333 [no exception based on speculation that prospects for informal resolution may be bleak]), the level of effort that is reasonable is different in different circumstances, and may vary with the prospects for success. These are considerations entrusted to the trial court's discretion and judgment, with due regard for all relevant circumstances." (Obregon, supra at pages 432-433.)

Where informal efforts to resolve the discovery dispute are found to have been inadequate, discovery should not be automatically denied. The court should instead consider whether it would be more appropriate to specify additional efforts which will be required before the court will turn to the merits of the discovery dispute. (Obregon v. Superior Court (1998) 67 Cal.App.4th 424, 434-435.) "Relevant factors will include the history of the case and the past conduct of counsel as it reflects upon the bona fides of their efforts, the nature and extent of the actual efforts expended, the nature of the discovery requested and its importance to the case, the size and complexity of the case, the effect of expense upon litigation of the case and whether unfeasible levels of expense might force resolution on a basis other than the merits, the margin by which the moving party deviated from a reasonable and good faith effort at informal resolution under the circumstances, the predictability that an effort of the type made would be found wanting, whether supplemental responses have been served, [Footnote omitted.] and such other factors as are relevant under all the circumstances presented. [Footnote omitted.] Inasmuch as judges are duty bound to manage court calendars with a view to minimizing both delay (Gov.Code, § 68607) and unnecessary expense (cf. *Calcor Space Facility, Inc. v. Superior Court*, supra, 53 Cal.App.4th at p. 221, 61 Cal.Rptr.2d 567), the prospects that further informal efforts would be fruitful should also be considered. When appropriate, the party whose efforts were found wanting may be assessed with monetary sanctions." (Emphasis added.) (Obregon v. Superior Court (1998) 67 Cal.App.4th 424, 435.)

Defense counsel declares: as detailed in his April 11, 2022 declaration in support of defendants' opposition to the initial motion, he engaged in extensive meet and confer activities with plaintiffs' counsel over the subject matter of the underlying motion, including production of unredacted election results; and he attempted to contact plaintiffs' counsel by phone on June

1, 2022, but was forced to leave a voicemail; as of the drafting of the declaration, he had not received a response. (Declaration of Austin Haigh in Support of Motion, paragraph 4.)

Plaintiffs' counsel declares in opposition: defense counsel's assertion that he called plaintiffs' counsel on June 1, 2022 to meet and confer about the motion is incorrect; the call was, in fact, to return plaintiffs' counsel's call to defense counsel he had made the day before to discuss another matter related to the case; and this is confirmed by the voicemail he left that their voicemail system converted to an email, which stated defense counsel was just returning plaintiffs counsels' call and does not mention any meet and confer concerning the subject motion. (Declaration of Douglas Roeca in Opposition to Motion, paragraph 4.)

The remedy for failure to meet and confer prior to filing the motion is not to automatically deny the motion. The remedy is for the court to determine whether to continue the hearing and send it back to the parties to meet and confer prior to the continued hearing. The court may consider the prospects that informal efforts would be fruitful in making the determination of whether to send it back to the parties for meet and confer activities prior to the continued hearing date.

Considering the previous meet and confer activities regarding the underlying motion and the issues raised and argued in the motion for reconsideration, the opposition, and the reply, the court has formed the opinion that informal efforts would not be fruitful as the parties appear to be well entrenched in their positions concerning the issues raised.

The court denies the request to deny the motion due to failure to meet and confer. The court also does not impose sanctions against defendants, because plaintiffs have not requested sanctions and not placed defendants on notice that sanctions would be requested. It would violate the fundamental principles of due process to award sanctions to plaintiffs payable by defendants under such circumstances.

Standing

Individual HOA members who voted in the subject election would appear to have an individual right to assert a claim that they have an individual right to privacy to prevent what they claim would be a wrongful disclosure of their votes in a secret ballot HOA election proceeding. The court rejects the lack of standing argument.

Motion for Reconsideration Principles

In order for an interested party to obtain reconsideration of a prior ruling or order, the applicant is required to file the motion within 10 days after service upon the party of the written notice of entry of the order and the application must be based upon new or different facts, circumstances or law. (Code of Civil Procedure, § 1008(a).)

"Section 1008, subdivision (a) requires that a motion for reconsideration be based on new or different facts, circumstances, or law. A party seeking reconsideration also must provide a satisfactory explanation for the failure to produce the evidence at an earlier time. (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 689, 68 Cal.Rptr.2d 228.)" (New York Times Co. v. Superior Court (2005) 135 Cal.App.4th 206, 212.) The Third District Court of Appeal has held: "A motion for reconsideration must be based on new or different facts, circumstances or law (*ibid.*), and facts of which the party seeking reconsideration was aware at the time of the original ruling are not "new or different." (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 690, 68 Cal.Rptr.2d 228.) In addition, a party must provide a satisfactory explanation for failing to offer the evidence in the first instance. (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 213, 37 Cal.Rptr.3d 338.)" (In re Marriage of Herr (2009) 174 Cal.App.4th 1463, 1468.)

"A motion for reconsideration must be based on "... new or different facts, circumstances or law...." (Code Civ.Proc., § 1008, subd. **(**a).) The moving party must provide the trial court with a

satisfactory explanation as to why he or she failed to produce the evidence at an earlier time. (*Mink v. Superior Court* (1992) 2 Cal.App.4th 1338, 1342, 4 Cal.Rptr.2d 195.)" (Lucas v. Santa Maria Public Airport Dist. (1995) 39 Cal.App.4th 1017, 1027-1028.)

"Case law after the 1992 amendments to section 1008 has relaxed the definition of "new or different facts," but it is still necessary that the party seeking that relief offer some fact or circumstance not previously considered by the court. (See *Garcia v. Hejmadi, supra,* 58 Cal.App.4th at pp. 689–690, 68 Cal.Rptr.2d 228 [motion for reconsideration improperly granted where evidence reflected knowledge plaintiff had from outset of litigation]; see also *Johnston v. Corrigan* (2005) 127 Cal.App.4th 553, 556, 25 Cal.Rptr.3d 657 [trial court had jurisdiction to reconsider prior ruling when evidence showed court failed to consider timely filed memorandum of points and authorities]; *Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500, 38 Cal.Rptr.2d 626 [claims that trial court misinterpreted the law in its initial ruling not sufficient to merit reconsideration].)" (New York Times Co. v. Superior Court (2005) 135 Cal.App.4th 206, 213.)

With the above-cited principals in mind, the court will rule on plaintiff's motion for reconsideration.

Defendants argue that the new and different evidence presented in the Erb declaration justifies reconsideration of the ruling on the motion and to prohibit disclosure of the HOA membership votes related to the issue of whether to accept plaintiffs as members of the HOA.

Defendant Erb declares in support of the motion: plaintiffs informed the HOA that they intended to petition to join the HOA; due to the time requirements to accommodate the requirements for a regular election by ballots distributed to the HOA members, plaintiffs demanded the vote be expedited due to time constraints relating to their construction and moving into the property; to accommodate plaintiffs, the HOA agreed to submit the vote of the

membership over email as opposed to regular balloting; she sent out an email to each member of the HOA presenting the issue to them and requesting them to return their votes to her over e-mail; the members were not instructed to make their votes public or otherwise disclose their votes to anyone; she intended as president of the HOA and the organizer of the election that the member votes were to remain private and that the identities of the voters and how they vote would not be disclosed to anyone other than declarant Erb; there was never any indication to the members that their votes would be made public; declarant does not believe that many of the members would have voted at all if they believed they would have been disclosed to the public, the Bowmans, or in a lawsuit. (Declaration of Barbara Erb in Support of Motion for Reconsideration, paragraphs 3 and 4.)

"(a)(1) Notwithstanding any other law or provision of the governing documents, elections regarding assessments legally requiring a vote, election and removal of directors, amendments to the governing documents, or the grant of exclusive use of common area pursuant to Section 4600 shall be held by secret ballot in accordance with the procedures set forth in this article." (Civil Code, § 5100(a)(1).)

Section 5100(a)(1) does not state that elections related to admitting persons and property into the HOA shall be held by secret ballot. Such a vote is not an election regarding assessments legally requiring a vote, election and removal of directors, amendments to the governing documents, or the grant of exclusive use of a common area. Therefore, for the subject vote to be held by secret ballot pursuant to statute, such an election/vote by the membership must be on a topic expressly identified in the operating rules as being governed by the article containing Section 5100.

"(b) This article also governs an election on any topic that is expressly identified in the operating rules as being governed by this article." (Civil Code, § 5100(b).)

There was no evidence before the court that voting to include new persons and their property into the HOA is specified in the HOA operating rules to be governed by the secret election article of the civil code. There is no new or different evidence of facts to prove that point submitted in support of the motion. Even the facts that have been provided in the Erb declaration does not lead to a reasonable belief of the HOA membership that the vote would be by secret ballot. Barbara Erb merely state she intended for the vote to remain private and there was no indication made to the membership that the vote would be public. The law is that the votes are not private unless they comply with the provisions of Civil Code, § 5100(b), therefore, the reasonable belief would be the vote would be public, unless the HOA operating rules specify otherwise. In the absence of any evidence that the HOA operating rules stated such a vote was private, there is nothing new or different that affects the court's ruling on this issue.

Furthermore, even if there were new or different facts presented, there is no reasonable explanation for defendants failing to offer the new or different facts in the first instance**.**

Defendants argue that Civil Code, § 5215(a)(4) allows the HOA to redact the names from the records of the vote, because the information would reasonably compromise the privacy of an individual member of the HOA.

"(a) Except as provided in subdivision (b), the association may withhold or redact information from the association records if any of the following are true: ¶ * * *(4) The release of the information is reasonably likely to compromise the privacy of an individual member of the association…" (Civil Code, § 5215(a)(4).)

Inasmuch as the subject voting records were not by secret ballot and, therefore, not private, secret information, disclosure can not be reasonably likely to compromise the privacy of an individual member of the HOA. Section 5215(a)(4) does not authorize the HOA to redact the

election vote results under the totality of the circumstances presented during the underlying law and motion proceeding and presented in this law and motion proceeding.

The motion for reconsideration is denied.

Protective Order

The court is persuaded to issue a protective order to make sure that the use of the records is limited to this litigation and not used for purposes outside of the litigation.

Defendants Motion for Leave to File 1st Amended Answer.

Defendants moves for leave to amend the answer to add an affirmative defense of reliance on advice of counsel. A proposed amended answer has been submitted.

Defendants argue the following in support of the motion: the plaintiffs have not agreed to the standard reliance on advice of counsel amendment and only sought an unwarranted expansion of the attorney-client privilege waiver; good cause exists to grant leave to amend; and there is no prejudice to the parties should leave to amend be granted, while the HOA will be prejudiced should leave to amend be denied.

Plaintiffs oppose the motion on the following grounds: that parties have failed to agree upon a stipulation to allow leave to amend the answer to add a reliance on advice of counsel defense with a protective order, therefore, the court should exercise its discretion to impose a just term/condition to granting the motion that defendants accept plaintiffs' proposed stipulation and protective order.

Defendants replied: the only issue before the court is whether to grant leave to amend the answer to add an affirmative defense of reliance on advice of counsel and not whether a protective order needs to be issued related to later efforts to discover otherwise attorney-client privileged communications and documents; good cause exists to permit the requested

amendment; and no parties will be prejudiced by granting leave to file the amended answer, while the HOA will be prejudiced if leave to amend is denied.

"The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code." (Code of Civil Procedure, § 473(a)(1).)

There is a general policy in this state of great liberality in allowing amendment of pleadings at any stage of the litigation to allow cases to be decided on their merits. (Kittredge Sports Co. v. Superior Court (1989) 213 Cal.App.3d 1045, 1047.) The rule of great liberality is particularly important where an amendment is sought to an answer. (Hulsey v. Koehler (1990) 218 Cal.App.3d 1150, 1159; Hyman v. Tarplee (1944) 64 Cal.App.2d 805, 813-814.) "…it is a rare case in which 'a court will be justified in refusing a party leave to amend his pleadings so that he may properly present his case.' (Citations omitted.) If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion. (Citations omitted.)" (Morgan v. Superior Court (1959) 172 Cal.App.2d 527, 530.) "…absent a showing of prejudice to the adverse party, the rule of great liberality in allowing amendment of pleadings will prevail. (*Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564, 176 Cal.Rptr. 704.)" (Board of Trustees of Leland Stanford Jr. University v. Superior Court (2007) 149 Cal.App.4th 1154, 1163.)

It is irrelevant that new legal theories are introduced in the proposed amended pleading as long as the proposed amendments relate to the same general set of facts in the pleading that will be superseded. (Kittredge Sports Co. v. Superior Court (1989) 213 Cal.App.3d 1045, 1048.)

Leave to amend a pleading, including an answer, is entrusted to the sound discretion of the trial court. (See *Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 909, 93 Cal.Rptr.3d 286; Code Civ. Proc., § 473, subd. (a)(1) [court has discretion "upon any terms as may be just" to allow an amendment to any pleading].) We will not disturb the trial court's exercise of discretion unless there is a clear showing of abuse. (*Garcia v. Roberts,* at p. 909, 93 Cal.Rptr.3d 286.) "[A]bsent a showing of prejudice to the adverse party, the rule of great liberality in allowing amendment of pleadings will prevail." (*Board of Trustees of Leland Stanford Jr. University v. Superior Court* (2007) 149 Cal.App.4th 1154, 1163, 57 Cal.Rptr.3d 755.)" (Hong Sang Market, Inc. v. Peng (2018) 20 Cal.App.5th 474, 488.)

A Judgment was entered on April 12, 2019, in favor of the Bowmans on the complaint and cross-complaint in case number PC-20170366, the Bowmans recovered damages against Gold Country Homeowners' Association in the amount of $126,971.98, and the Bowmans recovered their costs of suit against the cross-defendants, including Randall Benton, Charlene Ott, and Robert Vannucci.

On October 21, 2020, plaintiffs Bowman filed this action against defendants Gold Country Homeowners' Association, Darlene Ott, Randell Benton, Bambara Erb, Donald Erb, Robert Vannucci, and Richard Warriner asserting an action for malicious prosecution of case number PC-20170366 and civil conspiracy to maliciously prosecute case number PC-20170366.

In opposition to plaintiffs' discovery of materials claimed to be attorney-client privileged materials, the HOA asserted that it did not claim the advice of counsel defense, therefore, the

matters remained privileged and not discoverable. As stated in the ruling on the recent motion to compel: "Defendant Gold Country HOA opposes the motion on the following grounds: Gold Country is the actual holder of the attorney-client privilege and the defendants who are merely former board members who engaged counsel on behalf of the HOA can not waive the privilege; on March 25, 2022 the HOA Board authorized a limited scope waiver of the HOA's privilege solely related to attorneys Center and Townsend and to the date of judgment entered on April 12 2019, subject to a protective order; defendant HOA did not waive the privilege as it has not claimed the advice of counsel defense; protective orders are authorized as remedies for safeguarding confidential information such as attorney-client privileged materials; the advice of counsel waiver is a limited scope waiver of the attorney-client privilege and is narrowly defined so that it fits within the confines of the waiver; and any potential waiver does not extend to insurance defense counsel Katherine Parks, who only defended the HOA and individual defendants against the cross-complaint."

In ruling on that recent motion, the court stated it was willing to allow Gold Country HOA to file an amended answer to assert the advice of counsel defense should the parties stipulate to the defendant HOA filing a 1st amended answer to the complaint raising the advice of counsel affirmative defense, the defendant HOA agrees to produce the documents sought, and the parties agree to a protective order.

Plaintiffs' opposition to the motion for leave to amend the answer takes issue with the form of an acceptable stipulation between the parties and protective order and requests the court require the stipulation and protective order in the format proposed by plaintiffs attached as Exhibit 6 to plaintiffs' counsel's declaration as a just term to impose as a condition to granting leave to amend.

The court finds that it is appropriate to grant the motion for leave to amend the answer.

The court declines to impose a term to the granting of the motion for amendment of the answer that imposes the terms of the proposed stipulation and protective order set forth in plaintiffs' Exhibit 6 as a protective order that governs discovery of materials related to the reliance on advice of counsel defense. That protective order issue should be decided by the court during discovery motion proceedings.

If the parties are unable to come to a stipulated protective order, they are free to request a protective order during law and motion proceedings concerning discovery directed at the reliance on advice of counsel defense.

TENTATIVE RULING # 7: DEFENDANT'S MOTION FOR RECONSIDERATION OF RULING ON PLAINTIFF'S MOTION TO COMPEL DEPOSITION AND PRODUCTION OF DOCUMENTS, OR, IN THE ALTERNATIVE, MOTION FOR PROTECTIVE ORDER IS GRANTED IN PART AND DENIED IN PART. THE COURT DENIES RECONSIDERATION OF THE MOTION. THE COURT GRANTS THE PROTECTIVE ORDER AS REQUESTED. DEFENDANTS' MOTION FOR LEAVE TO AMEND THE ANSWER IS GRANTED. NO HEARING ON THESE MATTERS 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) 621-6551 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. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL

ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, JULY 15, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

8. BAUGH v. GREENVIEW ASSETS PC-20190436

(1) Plaintiffs' Motion to Compel Compliance with Deposition Subpoena of Non-Party and for Sanctions.

(2) Defendants'/Cross-Complainants' Motion for Protective Order to Prevent Deposition and for Sanctions.

TENTATIVE RULING # 8: THESE MATTERS ARE CONTINUED TO 8:30 AM. ON FRIDAY, JULY 29, 2022, IN DEPARTMENT NINE.

9. FENNESY v. ALTOONIAN PC-20160016

(1) Plaintiffs' Motion for New Trial.

(2) Plaintiffs' Motion for Judgment Notwithstanding the Verdict.

Plaintiffs' Motion for New Trial.

On May 16, 2022, at the conclusion of a seven-day trial the jury returned special verdicts and judgment was entered in favor of defendant Altoonian and against plaintiffs on that same date.

Plaintiff moves for a new trial on the following grounds: the court erroneously admitted testimony of defendant Brook DiVincenzi that it would be outside the scope of his agency as a real estate agent to intentionally misrepresent the facts concerning a death on the property over plaintiff's legal conclusion objection, where the same objection was sustained when the defense asked the same question of their broker standard of care expert; no evidence was presented at trial to support the jury's special verdict finding that plaintiffs failed to do something the contract required; the jury's verdict that plaintiff was not liable for the conduct of his real estate broker that harmed plaintiffs is not supported by the evidence and is against the law; and there was no evidence presented that support's the jury's special verdict concerning the real estate seller's nondisclosure claim, which found that the plaintiffs were either aware of the suicide on the property or otherwise had a duty to investigate.

Defendant Altoonian opposes the motion on the following grounds: plaintiffs submitted to the jury during trial as Plaintiffs' Exhibit 011 the Statewide Buyer and Seller Advisory form executed by the parties as part of the real estate transaction, which stated in paragraph 51 that if the buyer had concerns about a death that occurred on the property or the manner, location, details, or timing of a death, the Buyer should direct any specific questions to the seller in

writing, which establishes that the plaintiffs did not do everything required by the contract, because they never made a written request for information about the death on the property as required by the transaction documents and plaintiffs did not request a jury instruction prohibiting the jury from concluding that the plaintiffs were bound by the clause in this transaction document submitted by plaintiffs into evidence; real estate agent DeVincenzi's own testimony established a reasonable basis for the jury to find he was acting outside the scope of his agency; and plaintiffs' own evidence submitted to the jury as Plaintiffs' Exhibit 011 established a sufficient basis for the jury's verdict that the plaintiff could have discovered the suicide.

Plaintiffs replied to the opposition and asserted in footnote 2 that defendant improperly cited two Superior Court trial opinions in the opposition in violation of Rule 8.1115(a), which is a sanctionable offense, and requests that defense counsel be admonished.

Defendant Altoonian responded to the reply's request for sanctions or admonishment for allegedly citing unpublished opinions. Defendant argues that citation of trial court orders is not prohibited by Rule 8.1115(a) from being cited as they are not unpublished opinions of a California Court of Appeal or a Superior Court Appellate Division.

Citation of Trial Court Orders – Rule 8.1115(a)

"Except as provided in (b), an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action." (Rules of Court, Rule 8.1115(a).)

Citation of trial court orders are not opinions of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published.

Motion for New Trial Principles

"The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party: ¶ 1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial. ¶ 2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors. ¶ 3. Accident or surprise, which ordinary prudence could not have guarded against. ¶ 4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial. ¶ 5. Excessive or inadequate damages. ¶ 6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law. ¶ 7. Error in law, occurring at the trial and excepted to by the party making the application. ¶ When a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated. ¶ A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision. ¶ The order passing upon and determining the motion must be made and entered as provided in Section 660 and if the motion is granted must state the ground or grounds relied upon by the court, and may contain the specification of reasons. If an order

granting such motion does not contain such specification of reasons, the court must, within 10 days after filing such order, prepare, sign and file such specification of reasons in writing with the clerk. The court shall not direct the attorney for a party to prepare either or both said order and said specification of reasons. ¶ On appeal from an order granting a new trial the order shall be affirmed if it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification of reasons, except that (a) the order shall not be affirmed upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, unless such ground is stated in the order granting the motion and (b) on appeal from an order granting a new trial upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, it shall be conclusively presumed that said order as to such ground was made only for the reasons specified in said order or said specification of reasons, and such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons." (Code of Civil Procedure, § 657.)

"The motion for a new trial shall be heard and determined by the judge who presided at the trial; provided, however, that in case of the inability of such judge or if at the time noticed for hearing thereon he is absent from the county where the trial was had, the same shall be heard and determined by any other judge of the same court. Upon the expiration of the time to file counter affidavits the clerk forthwith shall call the motion to the attention of the judge who presided at the trial, or the judge acting in his place, as the case may be, and such judge thereupon shall designate the time for oral argument, if any, to be had on said motion. Five (5) days' notice by mail shall be given of such oral argument, if any, by the clerk to the respective parties. Such motion, if heard by a judge other than the trial judge shall be argued orally or shall be submitted without oral argument, as the judge may direct, not later than ten (10) days

before the expiration of the time within which the court has power to pass on the same." (Code of Civil Procedure, § 661.)

"In contrast, motions relying on the remaining three grounds "must be made on the minutes of the court." (§ 658.) Here, "[t]he 'minutes of the court' include the records of the proceedings entered by the judge or courtroom clerk, showing what action was taken and the date it was taken [citation] and may also include depositions and exhibits admitted into evidence and the trial transcript. [Citation.]" (*Lauren H. v. Kannappan* (2002) 96 Cal.App.4th 834, 839, fn. 4, 117 Cal.Rptr.2d 484.) Pertinent here are the sixth ground, which encompasses "[i]nsufficiency of the evidence" and the existence of a decision "against law" (§ 657, subd. 6), and the seventh ground, namely, "[e]rror in law, occurring at trial and excepted to by the party making the application" (§ 657, subd. 7). Generally, these grounds permit a party to assert various deficiencies in a ruling, including the absence (or presence) of substantial evidence to support a factual determination, and errors in admitting or excluding evidence. (See 8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, §§ 42–45, pp. 548–552.)" (Wall Street Network, Ltd. v. New York Times Co. (2008) 164 Cal.App.4th 1171, 1192-1193.)

With the above-cited legal principles in mind the court will rule on plaintiffs' motion for a new trial.

Whether Court Erroneously Admitted Evidence

The court takes judicial notice that on May 12, 2022, the court denied plaintiff's motion in limine number 8 on day 6 of the trial, which sought to prohibit defendant Altoonian from questioning, inquiring, and/or arguing that defendant DeVincenzi exceeded the scope of his authority by allegedly making intentional or negligent misrepresentations about the subject property to the plaintiffs.

Plaintiffs contend that a new trial should be granted pursuant to Code of Civil Procedure, § 657(7) on the ground that the court erroneously admitted testimony of defendant Brook DiVincenzi that it would be outside the scope of his agency as a real estate agent to intentionally misrepresent the facts concerning a death on the property over plaintiff's legal conclusion objection, where the same objection was sustained when the defense asked the same question of their broker standard of care expert.

Defendant Altoonian argues in opposition that the hypothetical question that resulted in defendant DeVincenzi's expert testimony at trial that where an agent makes up a story, they are obviously acting outside of their agency (Plaintiffs' Requests for Judicial Notice, Exhibit 10 – Transcript of Trial Testimony of Brook DeVincenzi, page 67, lines 10-19.) was not objected to by plaintiffs.

"If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: ¶ (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and ¶ (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." (Evidence Code, § 801.)

"Admissible expert opinion testimony is not objectionable just because it embraces the ultimate issue to be decided by the trier of fact. (See Evid.Code, § 805.) But there are limits to such testimony. " '[T]he rationale for admitting opinion testimony is that it will assist the jury in reaching a conclusion called for by the case. "Where the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions, then the need for

expert testimony evaporates." [Citation.]' [Citations.]" (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1183, 82 Cal.Rptr.2d 162 (*Summers*).) Additionally, an expert may not testify about issues of law or draw legal conclusions. (*Id*. at p. 1178, 82 Cal.Rptr.2d 162.)" (Emphasis added.) (Nevarrez v. San Marino Skilled Nursing and Wellness Centre (2013) 221 Cal.App.4th 102, 122.)

"The forfeiture rule generally applies in all civil and criminal proceedings. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 400; 6 Witkin & Epstein, Cal.Criminal Law (3d ed. 2000) Reversible Error, § 37.) The rule is designed to advance efficiency and deter gamesmanship. As we explained in *People v. Simon* (2001) 25 Cal.4th 1082, 108 Cal.Rptr.2d 385, 25 P.3d 598 (*Simon*): " ' " 'The purpose of the general doctrine of waiver [or forfeiture] is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had....' " [Citation.] " 'No procedural principle is more familiar to this Court than that a *constitutional* right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' ..." [Citation.] [¶] "The rationale for this rule was aptly explained in *Sommer v. Martin* (1921) 55 Cal.App. 603 at page 610 [204 P. 33] ...: ' "In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal." ' " [Citation.]' (Fn. omitted; [citations].)" (*Simon, supra,* 25 Cal.4th at p. 1103, 108 Cal.Rptr.2d 385, 25 P.3d 598, italics added.) [Footnote omitted.]" (Emphasis added.) Keener v. Jeld-Wen, Inc. (2009) 46 Cal.4th 247, 264–265.)

Section 657(7) mandates that any claim of error in law occurring at the trial must be excepted to by the party making the application.

First, the question asked of defendant DeVincenzi at trial that plaintiffs objected to was not the same question that the defense asked of their real estate agent/broker standard of care expert, which the court sustained the legal conclusion objection.

Defendant DeVincenzi was asked if he agreed with defendant Altoonian's counsel that if Mr. DeVincenzi was the one who made the misrepresentation, he would be acting outside the scope of his agency. Plaintiffs objected that it was calling for a legal conclusion. (Plaintiffs' Requests for Judicial Notice, Exhibit 10 – Transcript of Trial Testimony of Brook DeVincenzi, page 64, lines 15-20.)

The Court referred the the parties to use of an expert hypothetical question regarding the duty issue. (Plaintiffs' Requests for Judicial Notice, Exhibit 10 – Transcript of Trial Testimony of Brook DeVincenzi, page 66, line 17.) The hypothetical question essentially posed to him was whether the agent is acting outside the scope of the agency where the agent was not told the cause of death by the client seller and the agent then made misrepresentations about the cause of death. That question was not objected to, and defendant DeVincenzi responded that "If an agent made up a story, they are, obviously acting outside of heir agency. (Plaintiffs' Requests for Judicial Notice, Exhibit 10 – Transcript of Trial Testimony of Brook DeVincenzi, page 67, lines 10-20.)

On the other hand, the court sustained a legal conclusion objection to defendant Altoonian's question posed to defense real estate agent expert James Cantrell concerning whether it is reasonable to hold the client responsible when an agent lies without instruction from a client to do so. (Plaintiffs' Requests for Judicial Notice, Exhibit 8 – Transcript of Trial Testimony of James Cantrell, page 25, line 24 to page 26, line 1.)

Second, there was significant, sufficient trial testimony from the defense real estate agent/broker expert concerning the scope of agency of real estate agents/brokers that was admitted into evidence without any objections at trial before the subject question that was objected to. The defense expert testified: the seller's agent must work within the scope of the agency and his employment, which means that he has to be forthright, fair, and disclose things that are factual; when asked whether a person hiring an agent and the agent makes misrepresentations, is that what you hire an agent to do, he responded that it's very hard to throw the burden on the seller when an agent is out there as a maverick making misrepresentations; a license is absolutely not given to an agent to lie on the behalf of the client; and if an agent lies on behalf of their client without being instructed to do so, they have failed their clients and are not acting in the scope of agency or their employment;. (Plaintiffs' Requests for Judicial Notice, Exhibit 8 – Transcript of Trial Testimony of James Cantrell, page 24, line 26 to page 25, line 23.)

Defendant DeVincenzi's evidence was properly admitted as an opinion of an expert real estate agent/broker based upon a hypothetical. Furthermore, there was sufficient evidence through the testimony of the defense expert that where a real estate agent lies on behalf of a client and the client did not instruct the agent to lie, that conduct fell outside the scope of the agent's duties to be forthright, fair, and disclose things that are factual.

Whether Verdict was Against the Law

Plaintiffs contend that a verdict finding that the DeVincenzi defendants were not acting within the scope of their agency when they harmed plaintiffs with a negligent or intentional misrepresentation is against the law, because representations to the plaintiff purchasers was a kind of task the agent was employed by defendant Altoonian to perform.

"A decision can be said to be 'against law' only: (1) where there is a failure to find on a material issue; (2) where the findings are irreconcilable; and (3) where the evidence is insufficient in law and without conflict in any material point. *Renfer v. Skaggs*, 96 Cal.App.2d 380, 215 P.2d 487; *Townsend v. Gonzalez*, 150 Cal.App.2d 241, 309 P.2d 878; *Williams v. Fairview Hospital Ass'n*, Cal.App., 332 P.2d 791 (hearing granted); *Bray v. Rosen*, 167 Cal.App.2d 680, 335 P.2d 137, supra. When a general verdict only is returned it can be said to be 'against law' only when it is unsupported by any substantial evidence, i. e., when the entire evidence is such as would justify a directed verdict against the party in whose favor the verdict is returned. '[T]he words 'against the law' do not import a situation in which the court weighs conflicting evidence and merely finds a balance against the judgment.' *Bray v. Rosen*, 167 Cal.App.2d 680, 335 P.2d 137, 139, supra." (Kralyevich v. Magrini (1959) 172 Cal.App.2d 784, 789.)

""[W]here the ground under consideration is that the original judgment order is 'against the law,' the area of judicial action generally is not one involving discretion. The initial choice of the trial court challenged by a motion on this ground was either right or wrong, and this is the nature of the evaluation which must be made in passing upon a motion for a new trial where 'against the law' is the ground. Stated otherwise, a decision is 'against the law' where the evidence is insufficient in law and without conflict on any material point." (*In re Marriage of Beilock* (1978) 81 Cal.App.3d 713, 728, 146 Cal.Rptr. 675; see also *McCown v. Spencer* (1970) 8 Cal.App.3d 216, 229, 87 Cal.Rptr. 213.)" (Emphasis added.) (Hoffman-Haag v. Transamerica Ins. Co. (1991) 1 Cal.App.4th 10, 15.)

The Third District Court of Appeal has stated: "Under the respondeat superior doctrine, an employer may be vicariously liable for torts committed by an employee. (*Perez v. Van Groningen & Sons, Inc., supra,* 41 Cal.3d at p. 967, 227 Cal.Rptr. 106, 719 P.2d 676.) The rule

is based on the policy that losses caused by the torts of employees, which as a practical matter are certain to occur in the conduct of the employer's enterprise, should be placed on the enterprise as a cost of doing business. (*Ibid.*) The basic test for vicarious liability is whether the employee's tort was committed within the scope of employment. (*Ibid.*) ¶ The determination of scope of employment can be a difficult task. (*O'Connor v. McDonald's Restaurants, supra,* 220 Cal.App.3d at pp. 29–30, 269 Cal.Rptr. 101.)" (Kephart v. Genuity, Inc. (2006) 136 Cal.App.4th 280, 291.)

The employer is liable for the risks inherent in or created by the enterprise. To determine if the risk is inherent in or created by the enterprise the court asks whether the actual occurrence was a generally foreseeable consequence of the activity. The courts have employed a two-prong test related to this foreseeability premise. The courts ask if the employee's action is (1) either required or incident to his or her duties, or (2) could be reasonably foreseen by the employer in any event. If the employee's act satisfies either prong, the employer is liable. (Bailey v. Filco, Inc. (1996) 48 Cal.App.4th 1552, 1558-1559.)

The Seller Property Questionnaire was one of the terms of the Residential Purchase Agreement. (See Declaration of Plaintiffs' Counsel in Support of Motion, paragraph 5; and Exhibit B – Plaintiffs' Trial Exhibit 007, page 4 of 8, paragraph 11.A.) Defendant Altoonian disclosed in the Seller Property Questionnaire that an occupant of the property had died upon the property within the last three years without a description of the circumstances of the death. (See Declaration of Plaintiffs' Counsel in Support of Motion, paragraph 6; and Exhibit C – Plaintiffs' Trial Exhibit 013, page 1 of 4, paragraph V.A.1.) Plaintiffs initialed each page of the Seller Property Questionnaire and executed the portion of the document wherein they acknowledged they read, understood, and received a copy of the Seller Property questionnaire form, dated October 20, 2014.

As stated earlier, there is expert evidence properly before the jury that stated it was beyond the scope of a seller's real estate agent's duty to misrepresent facts to a purchaser in a real estate purchase transaction.

In addition, there is conflicting evidence whether defendant Altoonian ever told defendant DeVincenzi that his mother died while gardening at the home instead of her committing suicide.

Defendant DeVincenzi emphatically testified that defendant Altoonian told him his mother died while doing yard work; and defendant Altoonian changed his story after the commencement of the lawsuit. (Plaintiffs' Requests for Judicial Notice, Exhibit 10 – Transcript of Trial Testimony of Brook DeVincenzi, page 44, lines 15-27.)

Defendant Altoonian emphatically testified: during the meeting and property walk through with defendant DeVincenzi he did not ever say his mother died gardening with him, doing what she loved, when he went to get her a beverage; he would not lie about it, because that is not how she died and he's not going to lie about her death; Brook DeVincenzi never asked him about how his mother died; he does not remember ever discussing during the meeting with Mr. DeVincenzi the subject of how his mother died; he does not recall telling Mr. DeVincenzi that his mother died while gardening with him and that's what she loved to do; and Mr. DeVincenzi's testimony to the contrary is false. (Plaintiffs' Requests for Judicial Notice, Exhibit 11 – Transcript of Trial Testimony of Ron Altoonian, page 25, line 20 to page 26, line 3; and page 26, line 19 to page 27, line 6.)

The court finds that the jury's special verdict finding that defendant Brook DeVincenzi and DeVincenzi and Associates, Inc. were not acting within the scope of their agency when they harmed the plaintiffs is not against the law.

Sufficiency of Evidence

Plaintiffs assert there is no evidence that supports the jury's special verdict finding that plaintiffs failed to do something the contract required; no evidence to support the jury's special verdict as to lack of vicarious liability of defendant Altoonian; and no evidence supports the jury's special verdict finding that while defendant Altoonian did not disclose the suicide on the property, plaintiffs could have reasonably discovered the information.

"…A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision…" (Code of Civil Procedure, § 657.)

- Failure to do Something Required by Contract

It was plaintiffs' burden to prove as an essential element of the breach of contract cause of action that they fully performed their obligations under the subject agreement, including the incorporated documents.

"Under a breach of contract theory, the plaintiff must demonstrate a contract, the plaintiff's performance or excuse for nonperformance, the defendant's breach, and damage to the plaintiff. (4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 476, p. 570.)" (Amelco Electric v. City of Thousand Oaks (2002) 27 Cal.4th 228, 243.)

The Statewide Buyer and Seller Advisory Form related to the purchase of the subject residence was submitted by plaintiffs and admitted as Plaintiffs' Exhibit 011.

Plaintiffs initialed each page and executed the Statewide Buyer and Seller Advisory Form on October 20, 2014. (Declaration of Defense Counsel In opposition, paragraph 2, Exhibit A – Plaintiff' Trial Exhibit 11.) Just above where the plaintiffs executed the form, the following was

stated: "Buyer and Seller are encouraged to read this Advisory carefully. By signing below, Buyer and Seller acknowledge that each has read, understands and received a copy of this Advisory."

That document expressly provides in the "**BUYER'S RIGHTS AND DUTIES**" section on page 1 of the Statewide Buyer and Seller Advisory Form that "**YOU ARE STRONGLY ADVISED TO INVESTIGATE THE CONDITION AND SUITABILITY OF ALL ASPECTS OF THE PROPERTY. IF YOU DO NOT DO SO, YOU ARE ACTING AGAINST THE ADVICE OF BROKERS**." (Emphasis in original.) The Statewide Buyer and Seller Advisory Form further states in paragraph 51 the provisions of Civil Code, § 1710.2 related to disclosure of a death on the property, that a seller is not protected from liability for misrepresentation in response to a direct inquiry, and that "If the Buyer has any concerns about whether a death occurred on the Property or the manner, location, details or timing of a death, the buyer should direct any specific questions to the Seller in writing."

Defendant Altoonian points to the Statewide Buyer and Seller Advisory Form as a contractual obligation on plaintiffs to investigate the details about the death on the property.

Plaintiffs argue that the Statewide Buyer and Seller Advisory Form imposes no contractual obligations on them to inquire about whether a death occurred on the Property or the manner, location, details, or timing of a death if they had concerns about it, because it was not incorporated into the real estate purchase agreement (Plaintiff's Trial Exhibit 007).

Even assuming that the Statewide Buyer and Seller Advisory Form (Plaintiff's Trial Exhibit 011) is not part of the agreement, the contract imposed such an obligation in the Seller Property Questionnaire. (Declaration of Plaintiffs' Counsel in Support of Motion, paragraph 6; and Exhibit C – Plaintiffs' Trial Exhibit 013.) The Seller Property Questionnaire was one of the terms of the Residential Purchase Agreement. (See Declaration of Plaintiffs' Counsel in

Support of Motion, paragraph 5; and Exhibit B – Plaintiffs' Trial Exhibit 007, page 4 of 8, paragraph 11.A.) In paragraph IV of the Questionnaire – Note to Buyer – the Seller Property Questionnaire states that the purpose of the form is to give the buyers more information about known material or significant items affecting the value or desirability of the property and eliminate misunderstandings about the condition of the property. Paragraph IV also expressly states that if something is important to the buyers, be sure to put your concerns and questions in writing (C.A.R. From BMI). As stated earlier in this ruling, Paragraph V of the form discloses the death that occurred on the property within the last three years. There is no further elaboration as to manner, location, details or timing of a death and plaintiffs have not cited to any evidence that they ever submitted a request in writing for additional information about the death as provided in the Seller Property Questionnaire, which is admittedly incorporated into the subject purchase agreement. (See Memorandum of Points and Authorities in Support of Motion for New Trial, page 16, lines 2-5.)

The court finds that the purchase agreement (Plaintiffs' Trial Exhibit 007), the incorporated Seller Property Questionnaire (Plaintiffs' Trial Exhibit 13), and lack of any citable evidence that plaintiffs after being expressly advised of the death on the property in the Seller Property Questionnaire ever submitted a request in writing for additional information about the death as provided in the Seller Property Questionnaire is sufficient evidence to find that plaintiffs did not do all, or substantially all, of the significant things that the contract required them to do with regards to the manner, location, details or timing of the disclosed death on the property, which apparently was of concern to them in the purchase of the property.

After weighing the evidence, the court is not convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision.

- Lack of Vicarious Liability

The jury's special verdict found that defendants Brook DeVincenzi and DeVincenzi and Associates, Inc. were not acting in the scope of their agency when they harmed plaintiffs.

The Third District Court of Appeal stated: "Under the respondeat superior doctrine, an employer may be vicariously liable for torts committed by an employee. (*Perez v. Van Groningen & Sons, Inc., supra,* 41 Cal.3d at p. 967, 227 Cal.Rptr. 106, 719 P.2d 676.) The rule is based on the policy that losses caused by the torts of employees, which as a practical matter are certain to occur in the conduct of the employer's enterprise, should be placed on the enterprise as a cost of doing business. (*Ibid.*) The basic test for vicarious liability is whether the employee's tort was committed within the scope of employment. (*Ibid.*) ¶ The determination of scope of employment can be a difficult task. (*O'Connor v. McDonald's Restaurants, supra,* 220 Cal.App.3d at pp. 29–30, 269 Cal.Rptr. 101.)" (Kephart v. Genuity, Inc. (2006) 136 Cal.App.4th 280, 291.)

The employer is liable for the risks inherent in or created by the enterprise. To determine if the risk is inherent in or created by the enterprise the court asks whether the actual occurrence was a generally foreseeable consequence of the activity. The courts have employed a two-prong test related to this foreseeability premise. The courts ask if the employee's action is (1) either required or incident to his or her duties, or (2) could be reasonably foreseen by the employer in any event. If the employee's act satisfies either prong, the employer is liable. (Bailey v. Filco, Inc. (1996) 48 Cal.App.4th 1552, 1558-1559.)

The Seller Property Questionnaire was one of the terms of the Residential Purchase Agreement. (See Declaration of Plaintiffs' Counsel in Support of Motion, paragraph 5; and Exhibit B – Plaintiffs' Trial Exhibit 007, page 4 of 8, paragraph 11.A.) Defendant Altoonian disclosed in the Seller Property Questionnaire that an occupant of the property had died upon

the property within the last three years without a description of the circumstances of the death. (See Declaration of Plaintiffs' Counsel in Support of Motion, paragraph 6; and Exhibit C – Plaintiffs' Trial Exhibit 013, page 1 of 4, paragraph V.A.1.) Plaintiffs initialed each page of the Seller Property Questionnaire and executed the portion of the document wherein they acknowledged they read, understood, and received a copy of the Seller Property questionnaire form, dated October 20, 2014.

As stated earlier, there is expert evidence properly before the jury that stated it was beyond the scope of a seller's real estate agent's duty to misrepresent facts to a purchaser in a real estate purchase transaction.

In addition, there is conflicting evidence whether defendant Altoonian ever told defendant DeVincenzi that his mother died while gardening at the home instead of her committing suicide.

Defendant DeVincenzi emphatically testified that defendant Altoonian told him his mother died while doing yard work; and defendant Altoonian changed his story after the commencement of the lawsuit. (Plaintiffs' Requests for Judicial Notice, Exhibit 10 – Transcript of Trial Testimony of Brook DeVincenzi, page 44, lines 15-27.)

Defendant Altoonian emphatically testified: during the meeting and property walk through with defendant DeVincenzi he did not ever ask his mother died gardening with him doing what she loved when he went to get her a beverage; he would not lie about it, because that is not how she died and he's not going to lie about her death; Brook DeVincenzi never asked him about how his mother died; he does not remember ever discussing during the meeting with Mr. DeVincenzi the subject of how his mother died; he does not recall telling Mr. DeVincenzi that his mother died while gardening with him and that's what she loved to do; and Mr. DeVincenzi's testimony to the contrary is false. (Plaintiffs' Requests for Judicial Notice, Exhibit

11 – Transcript of Trial Testimony of Ron Altoonian, page 25, line 20 to page 26, line 3; and page 26, line 19 to page 27, line 6.)

The court finds that there is sufficient evidence to support the finding that defendant Altoonian was not liable for misrepresentations made by defendants DeVincenzi as they were not made within the scope of defendant DeVincenzi's agency.

After weighing the evidence, the court is not convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision.

- Plaintiff Either Aware of the Suicide or Could Have Reasonably Discovered the Information

Plaintiffs argue that no evidence was presented at trial that established they knew about the suicide or could have reasonably discovered the information; and the jury failed to follow the jury instructions by being biased in favor of or against a party or witness because of his or her disability, gender, or socioeconomic status; and the jury verdict was not based on the evidence presented. Plaintiffs further argue that due to the court's denial of plaintiff's motion in limine number 5, no evidence was elicited from any witnesses to the effect that the plaintiffs could have reasonably discovered the circumstances of the suicide, which left the jury with no evidence whatsoever to find in the special verdict on the Real Estate Sellers Nondisclosure of Material Facts cause of action that plaintiffs were aware of the suicide or could have reasonably discovered the information.

The special verdict form submitted to the jury explicitly asked the jury to decide whether the plaintiffs were aware of the suicide or could have reasonably discovered the information. This placed them on notice that this was an issue that needed to be addressed in their presentation of evidence. Knowing that this issue was before the jury, plaintiffs submitted for the jury's

consideration Plaintiffs' Trial Exhibits 011 and 013 and they were admitted into evidence at trial.

Exhibit 013 expressly informed plaintiffs a death occurred on the property, states that the purpose of the form is to give the buyers more information about known material or significant items affecting the value or desirability of the property and eliminate misunderstandings about the condition of the property, and if something is important to the buyers, be sure to put your concerns and questions in writing.

Plaintiffs initialed each page and executed the Statewide Buyer and Seller Advisory Form on October 20, 2014. (Declaration of Defense Counsel In opposition, paragraph 2, Exhibit A – Plaintiff' Trial Exhibit 011) Just above where the plaintiffs executed the form, the following was stated: "Buyer and Seller are encouraged to read this Advisory carefully. By signing below, Buyer and Seller acknowledge that each has read, understands and received a copy of this Advisory."

That document expressly provides in the "**BUYER'S RIGHTS AND DUTIES**" section on page 1 of the Statewide Buyer and Seller Advisory Form that "**YOU ARE STRONGLY ADVISED TO INVESTIGATE THE CONDITION AND SUITABILITY OF ALL ASPECTS OF THE PROPERTY. IF YOU DO NOT DO SO, YOU ARE ACTING AGAINST THE ADVICE OF BROKERS**." (Emphasis in original.) The Statewide Buyer and Seller Advisory Form further states in paragraph 51 the provisions of Civil Code, § 1710.2 related to disclosure of a death on the property, that a seller is not protected from liability for misrepresentation in response to a direct inquiry, and that "If the Buyer has any concerns about whether a death occurred on the Property or the manner, location, details or timing of a death, the buyer should direct any specific questions to the Seller in writing."

Even though Exhibit 011 was not apparently incorporated into the purchase agreement, it is evidence that after admittedly reading, understanding, and receiving a copy of that advisory form the plaintiffs knew that if they were concerned about the manner, location, details, or timing of a death, the buyer plaintiffs should direct any specific questions to the Seller in writing, thereby placing them on notice that they could have reasonably discovered the information about the death on the property, if the circumstances of the death was material and/or of concern to them.

This evidence alone, which was submitted by plaintiffs' to the jury, is sufficient evidence that the plaintiffs were clearly placed on notice of a readily accessible method to reasonably discover the information about the suicide.

After weighing the evidence, the court is not convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision.

The motion for new trial is denied.

Plaintiffs' Motion for Judgment Notwithstanding the Verdict.

Plaintiffs move for entry of judgment in plaintiffs' favor on the breach of contract, negligence – vicarious liability, and real estate sellers nondisclosure of material facts causes of action on the following grounds: no evidence was produced at trial from which an inference can be made that plaintiffs breached their contract with defendant; defendant's agent was acting within the scope of his agency when he harmed plaintiffs; and no evidence was presented at trial supporting the jury's verdict on the real estate sellers nondisclosure of material facts cause of action.

Defendant Altoonian opposes the motion on the following grounds: plaintiffs submitted the Statewide Buyer and Seller Advisory into evidence (Plaintiffs Trial Exhibit 011), which

established a substantive basis for the jury's special verdict that plaintiffs did not do all the things the contract required; defendant DeVincenzi's testimony established a reasonable basis for the jury to find he was acting outside the scope of his agency; and plaintiffs submitted the Statewide Buyer and Seller Advisory into evidence (Plaintiffs Trial Exhibit 011), which established a substantive basis for the jury's special verdict that plaintiffs could have discovered the suicide.

Plaintiffs replied to the opposition.

"The court, before the expiration of its power to rule on a motion for a new trial, either of its own motion, after five days' notice, or on motion of a party against whom a verdict has been rendered, shall render judgment in favor of the aggrieved party notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made. ¶ A motion for judgment notwithstanding the verdict shall be made within the period specified by Section 659 of this code in respect of the filing and serving of notice of intention to move for a new trial. The making of a motion for judgment notwithstanding the verdict shall not extend the time within which a party may file and serve notice of intention to move for a new trial. The court shall not rule upon the motion for judgment notwithstanding the verdict until the expiration of the time within which a motion for a new trial must be served and filed, and if a motion for a new trial has been filed with the court by the aggrieved party, the court shall rule upon both motions at the same time. The power of the court to rule on a motion for judgment notwithstanding the verdict shall not extend beyond the last date upon which it has the power to rule on a motion for a new trial. If a motion for judgment notwithstanding the verdict is not determined before such date, the effect shall be a denial of such motion without further order of the court. ¶ If the motion for judgment notwithstanding the verdict be denied and if a new trial be denied, the appellate court shall,

when it appears that the motion for judgment notwithstanding the verdict should have been granted, order judgment to be so entered on appeal from the judgment or from the order denying the motion for judgment notwithstanding the verdict. ¶ Where a new trial is granted to the party moving for judgment notwithstanding the verdict, and the motion for judgment notwithstanding the verdict is denied, the order denying the motion for judgment notwithstanding the verdict shall nevertheless be reviewable on appeal from said order by the aggrieved party. If the court grants the motion for judgment notwithstanding the verdict or of its own motion directs the entry of judgment notwithstanding the verdict and likewise grants the motion for a new trial, the order granting the new trial shall be effective only if, on appeal, the judgment notwithstanding the verdict is reversed, and the order granting a new trial is not appealed from or, if appealed from, is affirmed." (Code of Civil Procedure, § 629.)

The Third District Court of Appeal has held: "An appellate court reviews the grant or denial of a motion for JNOV de novo using the same standard as the trial court. (*Mason v. Lake Dolores Group* (2004) 117 Cal.App.4th 822, 829–830, 11 Cal.Rptr.3d 914.) A JNOV must be granted where, viewing the evidence in the light most favorable to the party securing the verdict, the evidence compels a verdict for the moving party as a matter of law. (*Paykar Construction, Inc. v. Spilat Construction Corp.* (2001) 92 Cal.App.4th 488, 493–494, 111 Cal.Rptr.2d 863; see, e.g., *Sukoff v. Lemkin* (1988) 202 Cal.App.3d 740, 743, 249 Cal.Rptr. 42; *DeVault v. Logan* (1963) 223 Cal.App.2d 802, 810, 36 Cal.Rptr. 145.) In general, " '[t]he purpose of a motion for judgment notwithstanding the verdict is not to afford a review of the jury's deliberation but to prevent a miscarriage of justice in those cases where the verdict rendered is without foundation.' " (*Sukoff v. Lemkin, supra,* 202 Cal.App.3d at p. 743, 249 Cal.Rptr. 42.)" (Emphasis added.) (Oakland Raiders v. Oakland-Alameda County Coliseum, Inc. (2006) 144 Cal.App.4th 1175, 1194.)

Review of the sufficiency of the evidence is not authorized in Code of Civil Procedure, § 663 motions to vacate judgment and enter a new judgment. Section 663 is a remedy that is used when the evidence is uncontradicted and the court errs in entry of judgment. "A motion to vacate under section 663 is a remedy to be used when a trial court draws incorrect conclusions of law or renders an erroneous judgment on the basis of uncontroverted evidence. The motion to vacate under section 663 is speedier and less expensive than an appeal, and is distinguished from a motion for a new trial, to be used when, e. g., the evidence is insufficient to support the findings or verdict. (See generally 5 Witkin, Cal.Procedure, Supra, pp. 3699-3700.) ¶ CORD has taken an appeal based on the clerk's transcript; this court therefore may not review the sufficiency of the evidence to support the judgment. Because CORD does not challenge the sufficiency of the evidence, the motion to vacate under section 663 was proper." (Simac Design, Inc. v. Alciati (1979) 92 Cal.App.3d 146, 153.)

With the above cited principles in mind, the court will rule on the motion for entry of judgment notwithstanding the verdict.

Breach of Contract Cause of Action

"Under a breach of contract theory, the plaintiff must demonstrate a contract, the plaintiff's performance or excuse for nonperformance, the defendant's breach, and damage to the plaintiff. (4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 476, p. 570.)" (Amelco Electric v. City of Thousand Oaks (2002) 27 Cal.4th 228, 243.)

With the respect to the breach of contact cause of action the jury returned a special verdict finding that plaintiffs did not do all, or substantially all, of the significant things that the contract required them to do.

- Evidence of Duty to Investigate Manner of Death on the Subject Property

Plaintiffs' counsel declares in support of the motion that the court granted plaintiff's motion in limine number 4, which excluded evidence that plaintiffs had an independent duty to investigate the manner of death on the subject property and, therefore, no evidence concerning anything the plaintiffs could have done or should have done was allowed at trial. (Declaration of David Frenznick in Support of Motion Notwithstanding the Verdict, paragraph 6.)

Counsel is mistaken. On April 19, 2022, plaintiff submitted a list of the Motions In Limine and prior rulings on the motions. Plaintiffs' Motion in Limine number 4, which was granted, is a motion to exclude evidence of prior settlement discussions. Plaintiffs' motion in limine number 5 is the motion to exclude evidence that plaintiffs had an independent duty to investigate the manner of death on the subject property, which plaintiffs stated in that document was tentatively denied. The court takes judicial notice that plaintiffs' motion in limine number 5 seeking exclusion of evidence that plaintiffs had no independent duty to investigate the manner of death on the subject property was denied at the commencement of trial on May 3, 2022, as reflected in the court's minute order for that date.

Therefore, evidence that such a duty existed could be and was admitted into evidence by plaintiffs as Plaintiffs' Trial Exhibit 013. The court takes judicial notice of Plaintiff's Trial Exhibits 007 and 013, which were admitted into evidence at trial.

The contract imposed obligations on plaintiffs to inquire about whether a death occurred on the Property or the manner, location, details, or timing of a death if they had concerns about it. The obligation was imposed in the Seller Property Questionnaire. (Plaintiffs' Trial Exhibit 013.) The Seller Property Questionnaire was one of the terms of the Residential Purchase Agreement. (Plaintiffs' Trial Exhibit 007, page 4 of 8, paragraph 11.A.) In paragraph IV of the

Questionnaire – Note to Buyer – the Seller Property Questionnaire states that the purpose of the form is to give the buyers more information about known material or significant items affecting the value or desirability of the property and eliminate misunderstandings about the condition of the property. Paragraph IV also expressly states that if something is important to the buyers, be sure to put your concerns and questions in writing (C.A.R. From BMI). As stated earlier in this ruling, Paragraph V of the form discloses the death that occurred on the property within the last three years. There is no further elaboration as to manner, location, details or timing of a death and plaintiffs have not cited to any evidence that they ever submitted a request in writing for additional information about the death as provided in the Seller Property Questionnaire, which is admittedly incorporated into the subject purchase agreement. (See Memorandum of Points and Authorities in Support of Motion for New Trial page 16, lines 2-5.)

The court finds that the purchase agreement (Plaintiffs' Trial Exhibit 007.), the incorporated Seller Property Questionnaire (Plaintiffs' Trial Exhibit 13.), and lack of any cited evidence that plaintiffs after being expressly advised of the death on the property in the Seller Property Questionnaire ever submitted a request in writing for additional information about the death as provided in the Seller Property Questionnaire is substantial evidence to find that plaintiffs did not do all, or substantially all, of the significant things that the contract required them to do with regards to the manner, location, details or timing of the disclosed death on the property, which apparently was of concern to them in the purchase of the property.

Viewing the evidence in the light most favorable to the defendant securing the verdict, the evidence does not compel a verdict for the moving party plaintiff as a matter of law. The motion for judgment notwithstanding the verdict on the breach of contract cause of action is denied.

Negligence – Vicarious Liability Cause of Action

With the respect to the negligence – vicarious liability cause of action, the jury returned a special verdict finding that defendant DeVincenzi was not acting within the scope of agency when he harmed plaintiffs.

Plaintiffs argue that that the jury was likely confused regarding the scope of agency issue, because the court erroneously admitted testimony of defendant Brook DiVincenzi that it would be outside the scope of his agency as a real estate agent to intentionally misrepresent the facts concerning a death on the property over plaintiff's legal conclusion objection, where the same objection was sustained when the defense asked the same question of their broker standard of care expert, James Cantrell.

Defendant Altoonian argues in opposition that the hypothetical question that resulted in defendant DeVincenzi's expert testimony at trial that where an agent makes up a story, they are obviously acting outside of their agency (Transcript of Trial Testimony of Brook DeVincenzi, page 67, lines 10-19.) was not objected to by plaintiffs.

The court takes judicial notice of the following: on May 12, 2022, the court denied plaintiff's motion in limine number 8 on day 6 of the trial, which sought to prohibit defendant Altoonian from questioning, inquiring, and/or arguing that defendant DeVincenzi exceeded the scope of his authority; and the transcripts of the trial testimony of defendant Brook DeVincenzi, defendant Ron Altoonian, and James Cantrell.

First, the question asked of defendant DeVincenzi at trial that plaintiffs objected to was not the same question that the defense asked of their real estate agent/broker standard of care expert, which the court sustained the legal conclusion objection.

Defendant DeVincenzi was asked if he agreed with defendant Altoonian's counsel that if Mr. DeVincenzi was the one who made the misrepresentation, he would be acting outside the scope of his agency. Plaintiffs objected that it was calling for a legal conclusion. (Transcript of Trial Testimony of Brook DeVincenzi, page 64, lines 15-20.)

The Court referred the parties to use of an expert hypothetical question regarding the duty issue. (Transcript of Trial Testimony of Brook DeVincenzi, page 66, line 17.) The hypothetical question essentially posed to him was whether the agent is acting outside the scope of the agency where the agent was not told the cause of death by the client seller and the agent then made misrepresentations about the cause of death. That question was not objected to, and defendant DeVincenzi responded that "If an agent made up a story, they are, obviously acting outside of heir agency. (Transcript of Trial Testimony of Brook DeVincenzi, page 67, lines 10-20.)

On the other hand, the court sustained a legal conclusion objection to defendant Altoonian's question posed to defense real estate agent expert James Cantrell whether it is reasonable to hold the client responsible when an agent lies without instruction from a client to do so. (Transcript of Trial Testimony of James Cantrell, page 25, line 24 to page 26, line 1.) This is not the same question as posed to defendant DeVincenzi.

Second, there was significant, sufficient trial testimony from the defense real estate agent/broker expert concerning the scope of agency of real estate agents/brokers that was admitted into evidence without any objections at trial before the subject question that was objected to. The defense expert testified: the seller's agent must work within the scope of the agency and his employment, which means that he has to be forthright, fair, and disclose things that are factual; when asked whether a person hiring an agent and the agent makes misrepresentations, is that what you an agent to do, he responded that it's very hard to throw

the burden on the seller when an agent is out there as a maverick making misrepresentations; a license is absolutely not given to an agent to lie on the behalf of the client; and if an agent lies on behalf of their client without being instructed to do so, they have failed their clients and are not acting in the scope of agency or their employment. (Transcript of Trial Testimony of James Cantrell, page 24, line 26 to page 25, line 23.)

"If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: ¶ (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and ¶ (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." (Evidence Code, § 801.)

"Admissible expert opinion testimony is not objectionable just because it embraces the ultimate issue to be decided by the trier of fact. (See Evid.Code, § 805.) But there are limits to such testimony. " '[T]he rationale for admitting opinion testimony is that it will assist the jury in reaching a conclusion called for by the case. "Where the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions, then the need for expert testimony evaporates." [Citation.]' [Citations.]" (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1183, 82 Cal.Rptr.2d 162 (*Summers*).) Additionally, an expert may not testify about issues of law or draw legal conclusions. (*Id*. at p. 1178, 82 Cal.Rptr.2d 162.) ¶ In ruling that the parties' experts could not testify that appellants violated any particular laws, the court apparently agreed that such testimony would be an improper legal conclusion and would interfere with the jury's function as fact finder. The correctness of this ruling has not been

challenged. Whether or not the DPH investigator qualified as an expert witness, there would have been no rational basis for treating him any differently than the parties' expert witnesses with respect to offering an opinion that San Marino violated the law." (Emphasis added.) (Nevarrez v. San Marino Skilled Nursing and Wellness Centre (2013) 221 Cal.App.4th 102, 122.)

"The forfeiture rule generally applies in all civil and criminal proceedings. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 400; 6 Witkin & Epstein, Cal.Criminal Law (3d ed. 2000) Reversible Error, § 37.) The rule is designed to advance efficiency and deter gamesmanship. As we explained in *People v. Simon* (2001) 25 Cal.4th 1082, 108 Cal.Rptr.2d 385, 25 P.3d 598 (*Simon*): " ' " 'The purpose of the general doctrine of waiver [or forfeiture] is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had....' " [Citation.] " 'No procedural principle is more familiar to this Court than that a *constitutional* right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' ..." [Citation.] [¶] "The rationale for this rule was aptly explained in *Sommer v. Martin* (1921) 55 Cal.App. 603 at page 610 [204 P. 33] ...: ' "In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal." ' " [Citation.]' (Fn. omitted; [citations].)" (*Simon, supra,* 25 Cal.4th at p. 1103, 108 Cal.Rptr.2d 385, 25 P.3d 598, italics added.) [Footnote omitted.]" (Emphasis added.) Keener v. Jeld-Wen, Inc. (2009) 46 Cal.4th 247, 264–265.)

The evidence was properly admitted as an opinion of an expert real estate agent/broker based upon a hypothetical. Furthermore, there was sufficient evidence through the testimony of the defense expert that where real estate agent lies on behalf of a client and the client did not instruct the agent to lie, that conduct fell outside the scope of the agent's duties to be forthright, fair, and disclose things that are factual.

The Third District stated: "Under the respondeat superior doctrine, an employer may be vicariously liable for torts committed by an employee. (*Perez v. Van Groningen & Sons, Inc., supra,* 41 Cal.3d at p. 967, 227 Cal.Rptr. 106, 719 P.2d 676.) The rule is based on the policy that losses caused by the torts of employees, which as a practical matter are certain to occur in the conduct of the employer's enterprise, should be placed on the enterprise as a cost of doing business. (*Ibid.*) The basic test for vicarious liability is whether the employee's tort was committed within the scope of employment. (*Ibid.*) ¶ The determination of scope of employment can be a difficult task. (*O'Connor v. McDonald's Restaurants, supra,* 220 Cal.App.3d at pp. 29–30, 269 Cal.Rptr. 101.)" (Kephart v. Genuity, Inc. (2006) 136 Cal.App.4th 280, 291.)

The employer is liable for the risks inherent in or created by the enterprise. To determine if the risk is inherent in or created by the enterprise the court asks whether the actual occurrence was a generally foreseeable consequence of the activity. The courts have employed a two-prong test related to this foreseeability premise. The courts ask if the employee's action is (1) either required or incident to his or her duties, or (2) could be reasonably foreseen by the employer in any event. If the employee's act satisfies either prong, the employer is liable. (Bailey v. Filco, Inc. (1996) 48 Cal.App.4th 1552, 1558-1559.)

The Seller Property Questionnaire was one of the terms of the Residential Purchase Agreement. (Plaintiffs' Trial Exhibit 007, page 4 of 8, paragraph 11.A.) Defendant Altoonian disclosed in the Seller Property Questionnaire that an occupant of the property had died upon

the property within the last three years without a description of the circumstances of the death. (Plaintiffs' Trial Exhibit 013, page 1 of 4, paragraph V.A.1.) Plaintiffs initialed each page of the Seller Property Questionnaire and executed the portion of the document wherein they acknowledged they read, understood, and received a copy of the Seller Property questionnaire form, dated October 20, 2014.

In addition, there is conflicting evidence whether defendant Altoonian ever told defendant DeVincenzi that his mother died while gardening at the home instead of her committing suicide.

Defendant DeVincenzi emphatically testified that defendant Altoonian told him his mother died while doing yard work; and defendant Altoonian changed his story after the commencement of the lawsuit. (Plaintiffs' Requests for Judicial Notice, Exhibit 10 – Transcript of Trial Testimony of Brook DeVincenzi, page 44, lines 15-27.)

Defendant Altoonian emphatically testified: during the meeting and property walk through with defendant DeVincenzi he did not ever ay his mother died gardening with him doing what she loved when he went to get her a beverage; he would not lie about it, because that is not how she died and he's not going to lie about her death; Brook DeVincenzi never asked him about how his mother died; he does not remember ever discussing during the meeting with Mr. DeVincenzi the subject of how his mother died; he does not recall telling Mr. DeVincenzi that his mother died while gardening with him and that's what she loved to do; and Mr. DeVincenzi's testimony to the contrary is false. (Plaintiffs' Requests for Judicial Notice, Exhibit 11 – Transcript of Trial Testimony of Ron Altoonian, page 25, line 20 to page 26, line 3; and page 26, line 19 to page 27, line 6.)

The court finds that substantial evidence supports the jury's verdict finding that defendant Altoonian was not liable for misrepresentations made by defendants DeVincenzi relating to the

death on the property as they were not made within the scope of defendant DeVincenzi's agency.

Viewing the evidence in the light most favorable to the defendant securing the verdict, the evidence does not compel a verdict for the moving party plaintiff on the vicarious liability cause of action as a matter of law. The motion for judgment notwithstanding the verdict on the negligence – vicarious liability cause of action is denied.

Real Estate Sellers Nondisclosure of Material Facts Cause of Action

With the respect to the real estate sellers nondisclosure of material facts cause of action, the jury returned a special verdict finding plaintiff was the suicide could have reasonably discovered the information.

Plaintiffs argue that there is no evidence to support finding they were aware of the suicide or had an independent duty to investigate, therefore, judgment should be entered in their favor on the real estate sellers nondisclosure of material facts cause of action.

Plaintiffs' counsel declares in support of the motion that the court granted plaintiff's motion in limine number 4 that excluded evidence that plaintiffs had an independent duty to investigate the manner of death on the subject property and, therefore, no evidence concerning anything the plaintiffs could have done or should have done was allowed at trial. (Declaration of David Frenznick in Support of Motion Notwithstanding the Verdict, paragraph 6.)

Plaintiffs' motion in limine number 5 is the motion to exclude evidence that plaintiffs had an independent duty to investigate the manner of death on the subject property, which was tentatively denied. The court takes judicial notice that plaintiffs' motion in limine number 5 seeking exclusion of evidence that plaintiffs had no independent duty to investigate the manner of death on the subject property was also denied at the commencement of trial on May 3, 2022, as reflected in the court's minute order for that date.

The special verdict form submitted to the jury explicitly asked the jury to decide whether the plaintiffs were aware of the suicide or could have reasonably discovered the information. This placed them on notice that this was an issue that needed to be addressed in their presentation of evidence. Knowing that this issue was before the jury, plaintiffs submitted for the jury's consideration Plaintiffs' Trial Exhibits 011 and 013. Exhibit 011 expressly informed plaintiffs a death occurred on the property, states that the purpose of the form is to give the buyers more information about known material or significant items affecting the value or desirability of the property and eliminate misunderstandings about the condition of the property, and if something is important to the buyers, be sure to put your concerns and questions in writing.

The Statewide Buyer and Seller Advisory Form related to the purchase of the subject residence was submitted by plaintiffs and admitted as Plaintiffs' Exhibit 011.

Plaintiffs initialed each page and executed the Statewide Buyer and Seller Advisory Form on October 20, 2014. (Plaintiff's Trial Exhibit 011.) Just above where the plaintiffs executed the form, the following was stated: "Buyer and Seller are encouraged to read this Advisory carefully. By signing below, Buyer and Seller acknowledge that each has read, understands and received a copy of this Advisory."

That document expressly provides in the "**BUYER'S RIGHTS AND DUTIES**" section on page 1 of the Statewide Buyer and Seller Advisory Form that "**YOU ARE STRONGLY ADVISED TO INVESTIGATE THE CONDITION AND SUITABILITY OF ALL ASPECTS OF THE PROPERTY. IF YOU DO NOT DO SO, YOU ARE ACTING AGAINST THE ADVICE OF BROKERS**." (Emphasis in original.) The Statewide Buyer and Seller Advisory Form further states in paragraph 51 the provisions of Civil Code, § 1710.2 related to disclosure of a death on the property, that a seller is not protected from liability for misrepresentation in response to a direct inquiry, and that "If the Buyer has any concerns about whether a death occurred on the

Property or the manner, location, details or timing of a death, the buyer should direct any specific questions to the Seller in writing."

Even though Exhibit 011 was apparently not incorporated into the purchase agreement, it is evidence that after admittedly reading, understanding, and receiving a copy of that advisory form plaintiffs knew about the advisement that if they were concerned about the manner, location, details or timing of a death, the buyer should direct any specific questions to the Seller in writing, thereby placing them on notice that they could have reasonably discovered the information about the death on the property, if the circumstances of the death was material and/or of concern to them.

Plaintiffs admit there is no evidence that they knew about the suicide, even though they were expressly advised of the death on the property. (Motion for Judgment Notwithstanding the Verdict, page 16, lines 23-24.) In the absence of citation to evidence that plaintiffs inquired about the circumstance of the death and could not uncover the facts and circumstance despite reasonably diligence, a reasonable inference to be drawn from the lack of knowledge of the circumstances of the death and their knowledge of how they could have reasonably discovered the facts concerning the circumstances of the death is that plaintiffs did not request in writing additional information concerning the circumstances of the death as they were advised to in the Sellers Questionnaire (Plaintiffs Exhibit 013) and the Statewide Buyer and Seller Advisory Form (Plaintiff's Trial Exhibit 011).

This evidence alone, which was submitted by plaintiffs to the jury, is substantial evidence that the plaintiffs were clearly placed on notice of a readily accessible method to reasonably discover the information about the suicide.

Viewing the evidence in the light most favorable to the defendant securing the verdict, the evidence does not compel a verdict for the moving party plaintiff as a matter of law. The motion

for judgment notwithstanding the verdict on the real estate seller nondisclosure of material facts cause of action is denied.

TENTATIVE RULING # 9: PLAINTIFFS' MOTION FOR NEW TRIAL IS DENIED. PLAINTIFFS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT IS DENIED. NO HEARING ON THESE MATTERS 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) 621-6551 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. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, JULY 15, 2022, EITHER IN PERSON

OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

10. WASHBURN v. WASHBURN PFL-20200663

Request for Order to Sell Family Home.

The petitioner files a Request for Orders ("RFO") to sell the family home. The respondent states Ms. Washburn can afford the marital home, the son can stay in the home, and the petitioner owes more than the debt for the equity in the house. Therefore, the court order to move the petitioner out of the community house under the temporary restraining order.

"…[T]here is no entitlement to file a notice of lis pendens without a cause of action in a *pleading* that affects title to *specific* real property." (Gale v. Superior Court (2004) 122 Cal. App. 1388, 1395-1396.) The petitioner filed an RFO to sell the community house. However, "Civil Code 4359 provides no authority for the trial court to order that a disputed asset be sold and the proceeds distributed to one spouse, over the objections of the other spouse… or in any way disposing of any property . . . whether community, . . . or separate…." (Lee v. Superior Court (1976) 63 Cal. App. 705, 709-710; Family Code, § 6300.) The respondent objects to selling the community house. (Declaration of Ms. Washburn, paragraphs 3, 15-17.)

There are three basic methods of determining the value of real property. (Marriage of Folb (1975) 53 Cal.App.3d 862, 868.) First, the court assumes there is a market value. Unfortunately, the petitioner only on the Zillow website and did not provide an appraisal. Zillow website marital home is worth $834,000 to $930,000. The respondent estimates the family home is worth $750,000 (less than $100,000 cure to the house). Therefore, the court needs an appraisal.

The deferred sale of the house is the custodial parent because of the adverse impact on the child. (Family Code, §§ 3800, 3801, 3802, 6300.) The son is eight years old and would be stable in the family home. The court cannot change the status quo until the judgment. The court orders that the petitioner and the respondent meet and confer with their attorneys. The

parties could stipulate that the petitioner would solve some of his community debt, and Bodhi could live in his home.

The court will not award attorney's fees or sanctions. Instead, the court will reserve jurisdiction over attorney's fees.

TENTATIVE RULING # 10: THE COURT DENIES THE MOTION WITHOUT PREJUDICE. 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) 621-6551 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. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW

AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, JULY 15, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

11. KIDD v. SHEEHAN 22UD0166

Plaintiff's Motion for Summary Judgment.

On June 10, 2022, plaintiff filed an action for unlawful detainer against defendant Sheehan alleging he was a trespasser who was personally served a three-day notice to quit.

On June 17, 2022, defendant filed an answer by general denial and asserting affirmative defenses.

Plaintiff moves for summary judgment on the following grounds: El Dorado County Code Enforcement has red tagged the property as "Do Not Occupy"; defendant or someone acting on his behalf removed the tag; the structure lacks permits, is dilapidated, unstable, dangerous and can not be occupied as a matter of law; defendant has conceded service of the three day notice to quit; defendant has conceded the property was purchased by plaintiff on June 9, 2022, thereby extinguishing any right, title, or interest of defendant or anyone else concerning the property; and the defendant's occupancy is in violation of the law.

The proof of service declares that Lela Hayes was personally served the notice of motion and motion for summary judgment at the subject property on June 6, 2022, which is four days before the complaint was filed and over one month before the motion for summary judgment was filed. The court has questions about the date of service. In addition, the person served was not defendant, therefore, there is insufficient evidence that defendant has received adequate notice of this proceeding.

There is no opposition in the court's file.

The failure of proof of service alone justifies the court denying the motion.

"A motion for summary judgment may be made at any time after the answer is filed upon giving five days notice. Summary judgment shall be granted or denied on the same basis as a motion under Section 437c." (Code of Civil Procedure, § 1170.7.)

"For purposes of motions for summary judgment and summary adjudication: ¶ (1) A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto…" (Code of Civil Procedure, § 437c(p)(1).)

"The moving party "bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar, supra,* 25 Cal.4th at p. 850, 107 Cal.Rptr.2d 841, 24 P.3d 493, fn. omitted.) "In moving for summary judgment, a 'plaintiff ... has met' his 'burden of showing that there is no defense to a cause of action if' he 'has proved each element of the cause of action entitling' him 'to judgment on that cause of action. Once the plaintiff ... has met that burden, the burden shifts to the defendant ... to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant ... may not rely upon the mere allegations or denials' of his 'pleadings to show that a triable issue of material fact exists but, instead,' must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.' [Citation.]" (*Id.* at p. 849, 107 Cal.Rptr.2d 841, 24 P.3d 493, quoting Code Civ. Proc., § 437c, subd. (*o*)(1); see also Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2004) ¶ 10:224.1, p. 10–81.)" (Law Offices of Dixon R. Howell v. Valley (2005) 129 Cal.App.4th 1076, 1091-1092.)

"The purpose of summary judgment is to penetrate through pleadings to ascertain, by means of affidavits, the presence or absence of triable issues of material fact. (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107 [252 Cal.Rptr. 122, 762 P.2d 46].) The trial judge determines whether triable issues of fact exist by examining the affidavits and evidence, including any reasonable inferences which may be drawn from the facts. (*People v. Rath Packing Co.* (1974) 44 Cal.App.3d 56, 61-64 [118 Cal.Rptr. 438].) 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 resisting the motion. (*Stationers Corp. v. Dun & Bradstreet, Inc*. (1965) 62 Cal.2d 412, 417 [42 Cal.Rptr. 449, 398 P.2d 785].)" (Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal.App.4th 1509, 1524.)

"In ruling on the motion, the court must "consider all of the evidence" and "all" of the "inferences" reasonably drawn therefrom (id., § 437c, subd. (c)), and must view such evidence (e.g., *Molko v. Holy Spirit Assn.*, supra, 46 Cal.3d at p. 1107, 252 Cal.Rptr. 122, 762 P.2d 46; *Stationers Corp. v. Dun & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 417, 42 Cal.Rptr. 449, 398 P.2d 785) and such inferences (see, e.g., *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1520, 80 Cal.Rptr.2d 94 [review on appeal]; *Ales-Peratis Foods Internat., Inc. v. American Can Co.* (1985) 164 Cal.App.3d 277, 280, 209 Cal.Rptr. 917, fn. * [same]), in the light most favorable to the opposing party." (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843.)

"The pleadings determine the issues to be addressed by a summary judgment motion. (*Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848, 885, 164 Cal.Rptr. 510, 610 P.2d 407, revd. on other grounds *Metromedia, Inc. v. San Diego* (1981) 453 U.S. 490, 101 S.Ct.

2882, 69 L.Ed.2d 800.)" (Oakland Raiders v. National Football League (2005) 131 Cal.App.4th 621, 629.)

"The first step in analyzing a motion for summary judgment is to identify the issues framed by the pleadings. It is these allegations to which the motion must respond by showing there is no factual basis for relief or defense on any theory reasonably contemplated by the opponent's pleading. (Citations omitted.)" (6 Witkin, California Procedure (5th ed. 2008) Proceedings Without Trial, § 212, page 650.)

With the above-cited principles in mind, the court will rule on plaintiff's motion for summary judgement.

Separate Statement Requirement

"…The supporting papers shall include a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence. The failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for denial of the motion." (Code of Civil Procedure, § 437c(b)(1).)

"(1) The Separate Statement of Undisputed Material Facts in support of a motion must separately identify: ¶ (A) Each cause of action, claim for damages, issue of duty, or affirmative defense that is the subject of the motion; and ¶ (B) Each supporting material fact claimed to be without dispute with respect to the cause of action, claim for damages, issue of duty, or affirmative defense that is the subject of the motion. ¶ (2) The separate statement should include only material facts and not any facts that are not pertinent to the disposition of the motion. ¶ (3) The separate statement must be in the two-column format specified in (h). The statement must state in numerical sequence the undisputed material facts in the first column followed by the evidence that establishes those undisputed facts in that same column. Citation

to the evidence in support of each material fact must include reference to the exhibit, title, page, and line numbers." (Rules of Court, Rule 3.1350(d).)

"The requirement of a separate statement from the moving party and a responding statement from the party opposing summary judgment serves two functions: to give the parties notice of the material facts at issue in the motion and to permit the trial court to focus on whether those facts are truly undisputed. (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 31, 21 Cal.Rptr.2d 104.) As explained by Division One of this court in *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 335, 282 Cal.Rptr. 368 (*United Community Church*), ¶ "Separate statements are required not to satisfy a sadistic urge to torment lawyers, but rather to afford due process to opposing parties and to permit trial courts to expeditiously review complex motions for ... summary judgment to determine quickly and efficiently whether material facts are in dispute."" (Emphasis added.) (Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co. (2005) 133 Cal.App.4th 1197, 1210.)

"Contrary to what may be a widespread belief among the bench and bar of this District, we do not gleefully go about fabricating ad hoc, "technical" reasons to overturn every grant of summary judgment presented to this court for review. Section 437c is a complicated statute. There is little flexibility in the procedural imperatives of the section, and the issues raised by a motion for summary judgment (or summary adjudication) are pure questions of law. As a result, section 437c is unforgiving; a failure to comply with any one of its myriad requirements is likely to be fatal to the offending party. ¶ Section 437c thus does not furnish the trial courts with a convenient procedural means, to which only "lip service" need be given, by which to clear the trial calendar of what may appear to be meritless or weak cases. (See *Whitaker v. Coleman* (5th Cir.1940) 115 F.2d 305, 307 [A "catch penny contrivance to take unwary litigants into its toils and deprive them of a trial"].) Any arbitrary disregard of the statutory commands in

order to bring about a particular outcome raises procedural due process concerns. (*Chevron U.S.A., Inc. v. Superior Court*, supra, 4 Cal.App.4th at p. at p. 553, 5 Cal.Rptr.2d 674.) Motions for summary judgment cannot therefore properly be decided by employing a sort of detached "smell test." The success or failure of the motion must be determined, as we have done here, by application of the required step-by-step evaluation of the moving and opposing papers (*Zuckerman v. Pacific Savings Bank*, supra, 187 Cal.App.3d 1394, at pp. 1400- 1401, 232 Cal.Rptr. 458.) In that way, "due regard" will be given to the right of those persons asserting claims "that are adequately based in fact to have those claims ... tried to a jury" as well as to the "rights of persons opposing such claims ... to demonstrate in the manner provided by [section 437c] that the claims ... have no factual basis." (*Celotex Corp. v. Catrett*, supra, 477 U.S. at p. 327, 106 S.Ct. at p. 2554.)" (Emphasis added.) (Brantley v. Pisaro (1996) 42 Cal.App.4th 1591, 1607.)

The motion is fatally defective in that plaintiff has not filed and served a separate statement of undisputed material facts in support of the motion, which deprives the defendant of fundamental due process, because he has not been given notice of the evidence and facts that are material to the plaintiff's motion.

Failure to file and serve a separate statement alone is independent grounds to deny the motion.

Evidence

Plaintiff has not submitted any evidence in support of the motion and, therefore, has failed to meet his initial burden to prove each element of the unlawful detainer cause of action entitling him to judgment on that cause of action with the evidence presented.

Plaintiff's motion for summary judgment is denied.

TENTATIVE RULING # 11: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IS DENIED. 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) 621-6551 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. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, JULY 15, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.