1. PEOPLE V. US CURRENCY 22CV0916

Amended Petition for Forfeiture.

On July 13, 2022 the People filed an amended petition for forfeiture of cash and other property seized by the El Dorado County Sheriff's Department. The petition states: $178,829.01 in U.S. Currency and jewelry valued at approximately $31,340 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 jewelry is booked as evidence in the custody of the Sheriff's Office; 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 and jewelry 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).)

Petition for Forfeiture Proof of Service

"(c) The Attorney General or district attorney shall make service of process regarding this petition upon every individual designated in a receipt issued for the property seized. In addition, the Attorney General or district attorney shall cause a notice of the seizure, if any, and of the intended forfeiture proceeding, as well as a notice stating that any interested party may file a verified claim with the superior court of the county in which the property was seized or if

the property was not seized, a notice of the initiation of forfeiture proceedings with respect to any interest in the property seized or subject to forfeiture, to be served by personal delivery or by registered mail upon any person who has an interest in the seized property or property subject to forfeiture other than persons designated in a receipt issued for the property seized. Whenever a notice is delivered pursuant to this section, it shall be accompanied by a claim form as described in Section 11488.5 and directions for the filing and service of a claim." (Emphasis added.) (Health & Safety Code, § 11488.4(c).)

There is no proof of service of notice of the hearing and a copy of the amended or initial petition on respondents in the court's file. Therefore, the court can not consider the petition on its merits.

Hearing on Petition

"(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." (Emphasis added.) (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).)

The amended petition does not mention whether criminal charges are pending related to this case.

Absent proof of service of the amended petition and notice of this hearing on respondents, the court can not rule on the merits of the petition.

TENTATIVE RULING # 1: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, AUGUST 19, 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.

2. MATTER OF WOLFGANG 22CV0876

OSC Re: Name Change.

TENTATIVE RULING # 2: THE PETITION IS GRANTED.

3. MATTER OF GOLDMAN 22CV0858

OSC Re: Name Change.

TENTATIVE RULING # 3: THE PETITION IS GRANTED.

4. MATTER OF JOHNSON 22CV0821

OSC Re: Name Change.

TENTATIVE RULING # 4: THE PETITION IS GRANTED.

5. BELAND v. LAKE POINTE VIEW ROAD OWNERS ASSOC. PC-20200635

Motion for Leave to File 5th Amended Complaint.

Plaintiffs move for leave to file a 5th amended complaint to add allegations of fact concerning defendants never having filed for tax exempt status for the association or caused tax returns to be filed on behalf of the Association as an unincorporated association, which has exposed the Association and its members to a levy of taxes, fines, and penalties from the IRS and/or State FTB; to add allegations related to the 2020 vote to amend the C,C,&Rs; to add the individual defendants to the declaratory relief cause of action; and add a prayer for individual liability of the individual defendants for alleged future tax levies and fines. Plaintiffs argue that these facts were recently uncovered in discovery.

Defendants oppose the motion on the following grounds: the proposed additional allegations are repetitive and not necessary to the claims plaintiffs already have alleged; the allegations of failure to file tax returns and tax fines are improper, because the IRS/FTB have not levied any fines; and the new allegations do not support a claim for personal liability against the individual defendants.

Plaintiffs replied to the opposition.

"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.) "…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.)

The allegations regarding the 2020 election to amend the C,C,&Rs are related to plaintiffs' claims that defendants breached Civil Code, § 5100, et seq. by not conducting elections with the proper procedure. The allegation that members who were not subject to the 1986 C,C,&Rs were improperly allowed to vote is an allegation of an ultimate fact and it is not a conclusory allegation and need not be supported by additional factual allegations.

The IRS and FTB not having sought delinquent taxes and fines as of yet does not detract from the allegation that potential fines and taxes are due, which exposes the individual

association members to liability; and that the Association and individual Board members should be held liable for due to their breach of fiduciary duties related to operation of the association and non-payment of association taxes in a timely manner and they should be declared as liable for any such tax and fine exposure of the individual members of the association in the declaratory relief cause of action.

The motion is granted. Plaintiffs are granted leave to file the 5th amended complaint.

TENTATIVE RULING # 5: PLAINTIFFS' MOTION FOR LEAVE TO FILE 5TH AMENDED COMPLAINT IS GRANTED. PLAINTIFFS ARE TO FILE AN ORIGINAL, EXECUTED 5TH AMENDED COMPLAINT AND SERVE EXECUTED COPIES ON BOTH DEFENSE COUNSELS BY MAIL. 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 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.eldoradocourt.org/onlineservices/vcourt.html. 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, AUGUST 19, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

6. CALIFORNIA SPORTFISHING PROTECTION ALLIANCE v. LAHONTAN REGIONAL WATER QUALITY CONTROL BOARD 22CV0841

Review Hearing Re: Status of Service, Lodging of Administrative Record, and Briefing Schedule.

Proofs of service of the verified petition, petitioner's election to prepare record, notice of request for hearing, notice to attorney general, and proof of service by Acknowledgement of Receipt executed by Lahontan Regional Water Quality Control Board and substituted service were filed on July 15, 2022.

A proof of service on the agent for service of process for real party in interest Tahoe Keys Property Owners Association was filed on July 29, 2022.

The administrative record has not been lodged.

TENTATIVE RULING # 6: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, AUGUST 19, 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.

7. CHRISTENSEN v. MOORE 22CV0407

Plaintiff's Motion to Set Aside Default Judgment.

On March 18, 2022 plaintiff filed a request for civil harassment restraining order against defendant. Defendant responded to the request. A TRO was issued, which was extended to the trial date of June 14, 2022. The case was called for trial at 8:30 a.m. on June 14, 2022. Plaintiff was not present. At 8:30 a.m. the clerk cheeked both Zoom and VCourt even though no request for remote appearance had been received. The court trailed the case. At 8:45 a.m. the court resumed the trial. The court dismissed the case without prejudice due to lack of prosecution in that plaintiff failed to appear for trial. The court further ordered plaintiff to pay defendant the sum of $4,000 in attorney fees within 30 days.

On July 1, 2022 plaintiff filed a motion to set aside/vacate default judgment. Plaintiff seeks to vacate and set aside the dismissal on the ground that plaintiff was on Zoom on the date of trial and was not connected. She requests the TRO be reinstated and trial date reset.

Plaintiff declares in support of the motion: although the hearing was set for June 14, 2022 at 8:30 a.m., plaintiff had it noted in plaintiff's calendar as 8:45 a.m.; plaintiff felt the time was wrong, called the court and was told it was 8:30 a.m.; plaintiff got into her car, knew she would be late, redialed the court, spoke with a woman, explained she would be late, and asked if she would relay the message that she would be late; the woman said she would, plaintiff thanked her, and hung up; traveling to court plaintiff ended up in two construction zones that delayed her further; at 8:34 a.m. plaintiff asked her husband to call the court and ask for the Zoom information so she could appear; plaintiff called the number provided by someone at the court, plaintiff was not provided a password or meeting ID, and assumed that all she needed to do was call the phone number; at 8:37 a.m. plaintiff was not allowed to do anything further on

Zoom; plaintiff called the court at 8:39 a.m. to obtain further information and ask the court if the court knew she was attempting to appear by Zoom and obtain the Zoom information; plaintiff had to try twice to get linked to Zoom and was successful; Zoom then informed plaintiff that it would let her in when the meeting started and plaintiff remained in the "waiting room" until she arrived at the courthouse; upon arrival, the deputy at the door advised her that the court had already ended and she had been given a 15 minute window before the court began without her; and she was in the virtual courtroom within that window and diligently attempted to keep the court notified as to what was happening.

"The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken…" (Code of Civil Procedure, § 473(b).)

There is no proof of service of a notice of hearing and the moving papers on defense counsel in the court's file. It would violate the fundamental principles of due process to hear the motion without adequate notice being served on defendant and providing defendant an opportunity to be heard.

The appearance of plaintiff is required in order for plaintiff to advise the court when the defendant will be served notice of the hearing and the moving papers and to set a new hearing date and time that is to be included in the notice of hearing served on defense counsel.

TENTATIVE RULING # 7: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, AUGUST 19, 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.

8. CLARK v. WILLIAMS PC-20200469

(1) Motion to be Relieved as Counsel of Record for Plaintiff Kraig Clark.

(2) Motion to be Relieved as Counsel of Record for Plaintiff Clark's Corner Investments.

TENTATIVE RULING # 8: THE MOTION TO BE RELIEVED AS COUNSEL OF RECORD FOR PLAINTIFF KRAIG CLARK IS GRANTED. THE MOTION TO BE RELIEVED AS COUNSEL OF RECORD FOR PLAINTIFF CLARK'S CORNER INVESTMENTS IS GRANTED. WITHDRAWAL WILL BE EFFECTIVE AS OF THE DATE OF FILING PROOF OF SERVICE OF THE FORMAL, SIGNED ORDER UPON THE CLIENT. 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 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.eldoradocourt.org/onlineservices/vcourt.html. 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, AUGUST 19, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

9. STEPHENS v. WILLIAMS 22CV0694

OSC Re: Preliminary Injunction.

Plaintiff filed an action against defendant asserting a cause of action for interference with the quiet use and enjoyment of the easement road through defendant's land established by a grant deed created by the parties' predecessors in interest and recorded in 1973. On June 3, 2022 the court issued a TRO and OSC, which required defendant to appear in Department Nine at 8:30 a.m. on July 8, 2022 and show cause why he should not be enjoined in the following manner: to remove the fence and/or hard to access gate, together with the "KEEP OUT" sign currently installed across the Kanaka Valley easement road at the intersection of Kanaka Valley Road and Donkey Lane; to refrain from installing or erecting any other barrier or impediment on or across any portion of Kanaka Valley Road; to refrain from impeding in any way plaintiffs from using Kanaka Valley Road for any lawful purpose including, but not limited to, access the South Fork of the American River as it runs on or through defendant's property; and to refrain from yelling at or threatening plaintiffs for using Kanaka Valley Road to access the South Fork of the American River.

The proof of service filed on June 1, 2022 declares defendant was personally served the summons and complaint, verified complaint, ex parte application for TRO/OSC, OSC, and notice of related case on June 1, 2022

Plaintiffs assert the following in support of their application for a TRO and Preliminary injunction: the recorded deed of easements is evidence of the plaintiffs' irrefutable right to use the subject easement across defendant's land and defendant has no legal or equitable right to prevent their access to the easement by erecting a gate and by threatening them.

Defendant opposes the application for preliminary injunction on the following grounds: this is just one of a long parade of vexatious filings by neighbors intended to harass and punish the new resident, the defendant, who is making improvements to his own private real property; this case is duplicative to the lawsuit brought by other neighbors, the Grottas, under case number PC-20200421; this case has already been litigated and resolved in other civil cases against him and the injunction is unnecessary as defendant resolved the access issue by installing a new gate; the easement is not a public easement and can not be extended to the friends and neighbors of the other parcel owner, therefore, a gate and signage warning the public and unpermitted guests is proper; the grant of easement does not prohibit the installation of a gate or require the installation of a motorized gate; and if a restraining order is issued, it should be narrowly tailored and be reciprocal with severe consequences should the plaintiffs go off the easement road. Plaintiffs replied to the opposition.

At the hearing on July 8, 2022 the court granted the application for issuance of a preliminary injunction; stated that Mr. Williams can repair and maintain the easement; stated a date for the court to view the property on July 27, 2022 with all parties to be present; and allowed a supplemental brief of not more than ten pages to be filed by August 1, 2022 and any opposition supplemental brief of not more than ten pages was to be filed by August 9, 2022. The Court recognizes that there was no court viewing of the property on July 27, 2022, or any other date.

Plaintiffs' supplemental brief in support of the motion asserts that the court got it right when it issued the preliminary injunction and there has been no material change in the law or the facts to justify changing the preliminary injunction as issued.

Defendant's supplemental brief in opposition asserts: the easement has been potentially extinguished, because the easement was granted for the purpose of eventual development that did not occur and will not occur as ten of the parcels are now owned by the government as

an ecological preserve; the easement was never developed as a road or for utilities; the plaintiffs are not installing a public road, therefore, the public is not entitled to access to the easement; there is no per se right to use motorized vehicles that are ATVs on the easement; plaintiff has no right to use an ATV on the easement on the BLM property unless plaintiffs are transporting equipment and are approved or properly permitted by the BLM; the signage erected by the BLM that bars use of motor vehicles also bars motor vehicle use on the easement; the gates do not pose an unreasonable interference with the use of the easement; and disallowing gates on defendant's land is an unreasonable hardship to defendant's property rights as his livestock will have to be continually locked in a pen.

Duplicative Action

The complaint filed in this case states a cause of action against defendants that is personal to them and no other neighbor is prosecuting this action. Though there are related cases referenced in the complaint, there is no showing that the case is subject to being required to be consolidated. Plaintiffs Stephens were not required to engage in settlement negotiations of the related case.

Preliminary Injunction Principles

A preliminary injunction shall not be granted without notice to the opposing parties. (Code of Civil Procedure, § 527(a).)

"An injunction may be granted in the following cases: ¶ (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually. ¶ (2) When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action. ¶ (3) When it appears, during the litigation, that a

party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render the judgment ineffectual. ¶ (4) When pecuniary compensation would not afford adequate relief. ¶ (5) Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief. ¶ (6) Where the restraint is necessary to prevent a multiplicity of judicial proceedings. ¶ (7) Where the obligation arises from a trust." (Code of Civil Procedure, § 526(a).)

The general purpose of such an injunction is to preserve the status quo until there is a final determination of the matter on the merits. The term "status quo" has been defined to include the last actual peaceable, uncontested status which preceded the pending controversy. (Voorhies v. Greene (1983) 139 Cal.App.3d 989, 995.)

A preliminary injunction may be granted upon a verified complaint or upon affidavits which show that sufficient grounds exist for the issuance of such an injunction. (Code of Civil Procedure, § 527(a).) In deciding whether to issue a preliminary injunction, two factors must be weighed: the likelihood of the moving party ultimately prevailing on the merits and the relative interim harm to the parties from the issuance of a preliminary injunction. (Butt v. State of California (1992) 4 Cal.4th 668, 677-678.) "The latter factor involves consideration of such things as the inadequacy of other remedies, the degree of irreparable harm, and the necessity of preserving the status quo. The determination whether to grant a preliminary injunction generally rests in the sound discretion of the trial court. (Citation omitted.)" (Abrams v. St. John's Hospital & Health Center (1994) 25 Cal.App.4th 628, 636.)

"It is said: "To issue an injunction is the exercise of a delicate power, requiring great caution and sound discretion, and rarely, if ever, should (it) be exercised in a doubtful case. . . ." (*Willis v. Lauridson*, 161 Cal. 106, 117, 118 P. 530, 535; *West v. Lind*, 186 Cal.App.2d 563, 569, 9

Cal.Rptr. 288; *Mallon v. City of Long Beach*, 164 Cal.App.2d 178, 190, 330 P.2d 423.)" (Ancora-Citronelle Corp. v. Green (1974) 41 Cal.App.3d 146, 148.)

"The plaintiff bears the burden of presenting facts establishing the requisite reasonable probability: "[T]he drastic remedy of an injunction pendente lite may not be permitted except upon a sufficient factual showing, by someone having knowledge thereof, made under oath or by declaration under penalty of perjury." (*Ancora–Citronelle Corp. v. Green, supra,* 41 Cal.App.3d at p. 150, 115 Cal.Rptr. 879.)" (Fleishman v. Superior Court (2002) 102 Cal.App.4th 350, 356.)

Plaintiffs allege in the verified complaint: the signatories of the 1973 recorded "Deed of Easement" are plaintiffs' and defendant's predecessors in interest, Jacqueline and Louis Duncan, who owned three parcels of land, including the two 10 acre parcels now owned by plaintiffs and defendant, which are described in page 1 of the deed as parcel 2 and parcel 3; the easement granted by recorded deed is a non-exclusive right of way and easement for roadway and utilities along the described 50 foot wide strips of land across the subject parcels intended to be used for the mutual use and benefit of lands of the parties and for future divisions of the property and that the grantors mutually covenanted and agreed for themselves, their respective heirs, assigns and successors in interest that the described strips of land are for general public use; the easement road that was recognized, created and made pursuant to the recorded easement was named Kanaka Valley Road; Kanaka Valley Road has essentially existed as it currently runs from the date the easement was recorded up through to the present; consistent with the scope of the non-exclusive rights of way and easement as described in the recorded easement, the road terminates on public land at the South Fork of the American River; all parties to the recorded easement, and their successors in interest, have relied on the recorded easement to use to access the river; such deeded easement

access to the American River materially and substantially adds to the use enjoyment and value of plaintiffs' property; the easement road has been used consistent with the grant and terms of the easement and continuously used, enjoyed and relied on by the original parcel owners and each of their successors-in-interest, including plaintiffs, since its recording up through the present day, from where the easement road begins to its terminus at the South Fork of the American River; since 2018 when escrow closed on defendant's purchase of his 10 acre parcel he has consistently and repeatedly engaged in obnoxious, outrageous, malicious, and abhorrent behavior towards his neighbors' easement rights, including plaintiffs; despite the unequivocal and express terms of the easement and consistent use of the easement for nearly 50 years, defendant engaged in egregious conduct for which he knew or should have known that he had no plausible legal basis to do so and has resumed his malicious, oppressive and unlawful conduct that is now directed at plaintiffs and their right to quiet use and enjoyment of their easement rights; in early 2022, defendant erected a fence and difficult to open gate with a "KEEP OUT" sign across the easement road when there never was a gate or fence before and without any reasonable basis to erect a gate or fence at that location; the fence and gate was purposefully erected by defendant to prevent or impede plaintiffs and other neighbors from using the easement road; on May 7, 2022 while lawfully and properly exercising his right to use the easement road running through defendant's property, plaintiff Terry Stephens managed to pull back enough of the fence/gate to pass through on his way down to the river on his utility vehicle; on his way back from the river when he reached the gate/fence, defendant came running down to plaintiff and in a menacing manner defendant yelled and screamed at plaintiff Terry Stephens to get off the easement road, because he had no right to be on it; with anxiety and fear plaintiff attempted to extricate himself by the situation by hurriedly pulling back the fence/gate erected across the easement by defendant causing several cuts on his finger

resulting in an infection requiring medical treatment by a doctor, and a tetanus shot, antibiotics, and pain medication; during the time he was attempting to get away from the situation, defendant continued to yell and threaten him to stay off defendants' land; defendant's conduct created a condition to exist that unlawfully obstructed free passage or use of the recorded easement so as to unreasonably interfere with plaintiffs' comfortable enjoyment of their lives and their property; defendant's conduct was intentional and designed to interfere with plaintiffs' use and enjoyment of their land and to limit their easement rights; and the conduct was designed to intimidate plaintiffs from using the easement road that crosses defendant's property. (Complaint, paragraphs 6-12, 14, and 17-21; and also see Exhibit A – DEED OF EASEMENTS.)

Attached to the verified complaint as Exhibits B-D are an assessor's map and parcel maps, which allegedly depict the subject easement road, Kanaka Valley Road, that passes through plaintiffs' and defendant's properties.

Defendant declares in Opposition: he acquired the subject real property on Donkey Lane in 2018; the private easement only allows the resident neighbors access to the river; the easement path is located on the western side of the property consisting of a rough meandering path that cuts through brush and wood, which is impassable with a regular motorized vehicle such as a car, truck or emergency vehicle, such as a fire truck; currently the path can be traversed with a 4x4 or ATV or hiked/walked; after acquiring the property he made some improvements, including a partially completed two bedroom residence on the eastern side of the ten acre property; he intends to install an irrigation system and vineyard; he has a shelter for his sheep and goats that assist caring for the land such as feeding on native vegetation and reducing the amount of fuel, which reduces wildfire risk; to prevent livestock escaping the property and prevent predators a farm gate was installed at the southwest corner of the

property; the entire property is fenced along all four sides; while this is a private dirt path it is listed on Google maps as a public road called Kanaka Valley Road; he installed signs to dissuade trespassing and provide notice to the general public and guests; he also posted signs to request the gate to be kept closed by residents to prevent the escape of his livestock; the local residents have abused the private easement rights by deviating from the rough path and trespassing along the property; in particular, plaintiff Terry Stephens has deviated from the easement path and it is believed that he intentionally trespasses outside the easement to antagonize defendant and violate his right to privacy and quiet enjoyment of his land that remains exclusive of any easement; plaintiff Terry Stephens communicated to defendant that he trespassed to enjoy the views; and although he intended to remove the farm fence across the easement and replace it with a manual fence to comply with a settlement in another case, he had to act very quickly due to the June 3, 2022 hearing on the application for TRO and OSC and on June 2, 2022 he removed the old farm gate and replaced it with a hinged gate requiring five pounds of force to open and close, as depicted in Defense Exhibit D attached to the declaration. (Declaration of Joshua Williams in Opposition to Application for Preliminary Injunction, paragraphs 2-5 and 7.)

Plaintiff Terry Stephens declares in reply: plaintiffs purchased their property in 2017 and at the time of purchase they relied on the recorded easement, which was a material factor in their decision to purchase as a deeded easement down to the American River materially and substantially adds to their use and enjoyment of their property; ever since they purchased the property the plaintiffs and their invited friends and guests have used the easement road to get down to the river; from conversations with previous owners and neighbors, he has obtained information that the easement road has been in continuous use since the easement was granted in 1973; he has an audio recording of the May 7, 2022 incident when defendant

accosted and threatened him claiming that plaintiff had no right to be on the easement road, which substantiates the allegations of paragraph 19 of the complaint; he is 71 years old and he and his wife feel threatened and unsafe as a result of defendant's bullying and threats towards them as well as numerous threats made against the other neighbors; defendant's declaration in opposition contains several false statements; he emphatically denies that he trespassed on defendant's property outside the easement; he never attempted to antagonize defendant in any way; he only used the easement to access the river; even after issuance of the TRO, defendant has continued to obstruct the road as established by plaintiffs' Exhibit A attached to the reply declaration, which shows defendant installed a fence within the past two weeks that directly cuts into a portion of the easement road itself; as for the claim that defendant maintains sheep or goats on the property, plaintiff has not seen any and there could only be a few at most; even if there is a livestock issue to address, there a simple and reasonable solution by relocating the fence to the east side of the easement road, which would entirely remove any need for a gate; and defendant's assertion that his entire parcel is fully fenced on all four sides is not correct, because the west side where the easement exists is not fully fenced as it has many gaps and areas that are not enclosed due to terrain problems making it difficult to fence. (Declaration of Terry Stephens in Reply, paragraphs 2-8; and Exhibit A.)

"Easements are a type of servitude; the "extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired." (Civ. Code, § 806.) For express easements like those contained in the deed reservations, " 'only those interests expressed in the grant and those necessarily incident thereto pass from the owner of the fee.' " (*Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990) 51 Cal.3d 845, 867, 274 Cal.Rptr. 678, 799 P.2d 758 (*Camp Meeker*), superseded by statute on another ground, as

stated in *Pacific Bell v. Public Utilities Com.* (2000) 79 Cal.App.4th 269, 281, 93 Cal.Rptr.2d 910.)" (Pear v. City and County of San Francisco (2021) 67 Cal.App.5th 61, 71.)

"The scope of an easement is determined by the terms of its grant. (Civ.Code, s 806.) The grant of an unrestricted easement, not specifically defined as to the burden imposed upon the servient land, entitles the easement holder to a use limited by the requirement that it be reasonably necessary and consistent with the purpose for which the easement was granted. (*Pasadena v. California-Michigan etc. Co.*, Supra, 17 Cal.2d 576 at p. 582, 110 P.2d 983; *Wall v. Rudolph* (1961) 198 Cal.App.2d 684, 692, 18 Cal.Rptr. 123, 128, 129, 3 A.L.R.3d 1242.) This permits a use consistent with 'normal future development Within the scope of the basic purpose (citations), but not an abnormal development, one which actually increases the burden upon the servient tenement * * *. California courts have set their faces firmly against such increases in the burden upon the servient tenement.' (*Wall v. Rudolph*, Supra (italics added).) So long as an easement exists, both parties have the right to insist that it shall remain substantially the same as it was when granted, regardless of the relative benefit or damage that would ensue to the parties by reason of a change in the mode and manner of its enjoyment. (*Whalen v. Ruiz* (1953) 40 Cal.2d 294, 302, 253 P.2d 457 (quoted, with additional citations, in *Wall v. Rudolph*, Supra, at pp. 694—695, 18 Cal.Rptr. 123.))" (Emphasis added.) (Atchison, T. & S. F. Ry. Co. v. Abar (1969) 275 Cal.App.2d 456, 464-465.)

"The grant of an easement must "be interpreted liberally in favor of the grantee." (*Norris v. State of California ex rel. Dept. Pub. Wks*. (1968) 261 Cal.App.2d 41, 46–47, 67 Cal.Rptr. 595, citing Civ.Code, § 1069.) When an easement is based on a grant, as it is here, the grant gives the easement holder both "those interests expressed in the grant and those necessarily incident thereto." (*Pasadena v. California–Michigan etc. Co*. (1941) 17 Cal.2d 576, 579, 110 P.2d 983.) "Every easement includes what are termed 'secondary easements;' that is, the right

to do such things as are necessary for the full enjoyment of the easement itself." (*North Fork Water Co. v. Edwards* (1898) 121 Cal. 662, 665–666, 54 P. 69.) ¶ A secondary easement can be the right to make "repairs, renewals and replacements on the property that is servient to the easement" (*Donnell v. Bisso Brothers* (1970) 10 Cal.App.3d 38, 43, 88 Cal.Rptr. 645) "and to do such things as are necessary to the exercise of the right" (*Smith v. Rock Creek Water Corp*. (1949) 93 Cal.App.2d 49, 53, 208 P.2d 705). Thus, where the easement was for flood control purposes, one court held, it carried a secondary easement for repair of the channel including the right "to take earth, rock, sand and gravel for the purpose of excavating, widening and deepening or otherwise rectifying the channel and the maintenance and repair of embankments and other protection work." (*Haley v. L.A. County Flood Control Dist*. (1959) 172 Cal.App.2d 285, 290, 342 P.2d 476.) A right-of-way to pass over the land of another carries with it "the implied right ... to make such changes in the surface of the land as are necessary to make it available for travel in a convenient manner." (*Ballard v. Titus* (1910) 157 Cal. 673, 681, 110 P. 118.) ¶ Incidental or secondary easement rights are limited by a rule of reason. "The rights and duties between the owner of an easement and the owner of the servient tenement ... are correlative. Each is required to respect the rights of the other. Neither party can conduct activities or place obstructions on the property that unreasonably interfere with the other party's use of the property. In this respect, there are no absolute rules of conduct. The responsibility of each party to the other and the 'reasonableness' of use of the property depends on the nature of the easement, its method of creation, and the facts and circumstances surrounding the transaction." (6 Miller & Starr, Cal. Real Estate (3d ed.2011) § 15:63, p. 15-215 (rel. 8/2006).) ¶ As applied to dominant owners, the rule of reason allows them to exercise secondary easement rights "so long as the owner thereof uses reasonable care and does not increase the burden on or go beyond the boundaries of the servient tenement, or make any material

changes therein." (*Ward v. City of Monrovia* (1940) 16 Cal.2d 815, 821–822, 108 P.2d 425; see *North Fork Water Co. v. Edwards, supra,* 121 Cal. at p. 666, 54 P. 69; *Haley v. L.A. County Flood Control Dist.,supra,* 172 Cal.App.2d at p. 290, 342 P.2d 476.) A secondary easement may be exercised "only when necessary and in such reasonable manner as not to increase the burden needlessly on the servient estate or to enlarge it by alteration in the mode of operation." (*Smith v. Rock Creek Water Corp*., *supra,* 93 Cal.App.2d at p. 53, 208 P.2d 705.) The easement owner does not have the right to "so change the surface of the land as seriously to damage the usefulness of the servient estate ... [¶] 'It is well settled that the owner of an easement cannot change its character, or materially increase the burden upon the servient estate, or injuriously affect the rights of other persons, but within the limits named he may make repairs, improvements, or changes that do not affect its substance.' " (*White v. Walsh* (1951) 105 Cal.App.2d 828, 832, 234 P.2d 276, citing *Burris v. People's Ditch Co.* (1894) 104 Cal. 248, 252, 37 P. 922.) In *Herzog v. Grosso* (1953) 41 Cal.2d 219, 259 P.2d 429, the Supreme Court held that the trial court properly recognized a right in the easement holder to construct and maintain a wooden guardrail along the northerly boundary of the roadway because, "[b]y the grant of the easement ... [the easement holder] acquired the right to do such things as are reasonably necessary to their use thereof. [Citations.]" (*Id*. at p. 225, 259 P.2d 429.) Where the road adjoined a steep embankment, guardrails were "reasonably necessary and would not unduly burden the servient tenement." (*Ibid.*) ¶ Likewise, the servient owner "who holds the land burdened by a servitude" (Rest.3d Property, Servitudes, § 4.9, p. 582) is held to the same reasonableness standard. The servient owner is "entitled to make all uses of the land that are not prohibited by the servitude and that do not interfere unreasonably with the uses authorized by the easement... ." (*Ibid.*) "[T]he servient owner may use his property in any manner not inconsistent with the easement so long as it does not *unreasonably impede* the

dominant tenant in his rights." (*City of Los Angeles v. Howard* (1966) 244 Cal.App.2d 538, 543, 53 Cal.Rptr. 274, italics added.) "*Actions that make it more difficult to use an easement, that interfere with the ability to maintain and repair improvements built for its enjoyment, or that increase the risks attendant on exercise of rights created by the easement are prohibited ... unless justified by needs of the servient estate*. In determining whether the holder of the servient estate has unreasonably interfered with exercise of an easement, the interests of the parties must be balanced to strike a *reasonable accommodation* that maximizes overall utility to the extent consistent with effectuating the purpose of the easement ... and subject to any different conclusion based on the intent or expectations of the parties... ." (Rest.3d Property, Servitudes, § 4.9, com. c, p. 583, italics added.) ¶ Given that reasonableness depends on the facts and circumstances of each case, "[w]hether a particular use of the land by the servient owner ... is an unreasonable interference is a question of fact for the jury. [Citations.]" (*Pasadena v. California–Michigan etc. Co*., *supra,* 17 Cal.2d at pp. 579–580, 110 P.2d 983; see *Red Mountain, LLC v. Fallbrook Public Utility Dist*. (2006) 143 Cal.App.4th 333, 354, 48 Cal.Rptr.3d 875.)" (Dolnikov v. Ekizian (2013) 222 Cal.App.4th 419, 428–430.)

"The conveyance of an easement limited to roadway use grants a right of ingress and egress and a right of unobstructed passage to the holder of the easement. A roadway easement does not include the right to use the easement for any other purpose. (See *Marlin v. Robinson* (1932) 123 Cal.App. 373, 377, 11 P.2d 70.) When the easement is "nonexclusive" the common users "have to accommodate each other." (*Applegate v. Ota* (1983) 146 Cal.App.3d 702, 712, 194 Cal.Rptr. 331.) An obstruction which unreasonably interferes with the use of a roadway easement can be ordered removed "for the protection and preservation" of the easement. (*Id.* at pp. 712–713, 194 Cal.Rptr. 331.)" (Emphasis added.) (Scruby v. Vintage Grapevine, Inc. (1995) 37 Cal.App.4th 697, 703.)

"As Scruby emphasizes, when the width of an easement is definitely fixed by the grant or reservation creating the same, its use may be interpreted as commensurate with the entire width thereof. (See, e.g., *Ballard v. Titus* (1910) 157 Cal. 673, 681, 110 P. 118; *Tarr v. Watkins* (1960) 180 Cal.App.2d 362, 366, 4 Cal.Rptr. 293.) It is equally well settled, however, that "[t]he specification of width and location of surface rights-of-way does not always determine the extent of the burden imposed on the servient land." (*Gaut v. Farmer* (1963) 215 Cal.App.2d 278, 282, 30 Cal.Rptr. 94, citations omitted.) ¶ This point is aptly illustrated in *Heath v. Kettenhofen* (1965) 236 Cal.App.2d 197, 45 Cal.Rptr. 778, a case brought to our attention at oral argument which has been supplementally briefed by the parties. That case involved the proper interpretation of an easement almost identical to the one at issue here. Plaintiffs in *Heath* were granted an easement described as 40 feet in width for roadway and utility purposes. (*Id.* at p. 200, 45 Cal.Rptr. 778.) Notwithstanding the specifically described easement area, the trial court interpreted this language as granting plaintiffs the right to reasonable use of the easement for access to and from their property. The court further held that defendant, the owner of the servient tenement, was entitled to use portions of the described easement area for uses such as parking vehicles, so long as those uses did not unreasonably interfere with plaintiffs' use. Plaintiffs appealed, contending they had the "an absolute right to use the easement to the full extent of its width, free of any interference by the owner of the servient estate." (*Id.* at p. 204, 45 Cal.Rptr. 778.) ¶ The appellate court in *Heath* rejected this argument and upheld the trial court's interpretation. In doing so, the court noted that the precise specification of width and location of an easement does not always determine the extent of the burden placed upon the servient tenement; rather, that burden can properly be measured by the use and purpose for which the easement has been granted. (*Ibid.*) Furthermore, whether encroachments in the easement area constituted an unreasonable

interference with plaintiff's use presented "a question of fact, to be resolved in the first instance by the trial court, whose determination is to be upheld on appeal if supported by substantial evidence." (*Id.* at p. 205, 45 Cal.Rptr. 778.) ¶ When there is any ambiguity or uncertainty about the scope of an easement grant, the surrounding circumstances, including the physical conditions and character of the servient tenement and the requirements of the grantee, play a significant role in the determination of the controlling intent. (See *Buehler v. Oregon, supra,* 17 Cal.3d at p. 528, 131 Cal.Rptr. 394, 551 P.2d 1226.) We cannot say there is no ambiguity on the face of the easement grant here concerning the matter of the physical area over which Scruby has roadway use. The language of the easement does not specifically describe the intended roadway as 52 feet in width ending in a 100–foot cul-de-sac. Instead, it provides a "nonexclusive easement, 52 feet in width, for road and utility purposes." This kind of ambiguity is frequently found, and the pertinent rule is accurately stated in 28 California Jurisprudence Third, Easements and Licenses, section 58, page 200 "[i]n determining the scope of an easement, extrinsic evidence may be used as an aid to interpretation unless such evidence imparts a meaning to which the instrument creating the easement is not reasonably susceptible." (See also Annot. (1953) 28 A.L.R.2d 253, 265.) ¶ Resort to surrounding circumstances leaves no doubt in our minds, as it left no doubt for the trial court, that the easement before us can be reasonably construed as granting Scruby the right of ingress and egress to the property. The court's opinion provides a full history of this easement and notes: "The court finds that the initial grant of easement in 1966 was made in connection with a planned subdivision of the lands to which the easement was to provide access. Because these lands were never subdivided according to plan, the easement remained in place to service Parcel A [Scruby's property], but its dimensions were far greater than those contemplated or necessary for access to a single parcel, and were indeed far greater than that actually

employed by the dominant tenement over the history of its use." Where the court's "construction appears to be consistent with the true intent of the parties an appellate court will not substitute another although it may seem equally tenable." (*Moakley v. Los Angeles Pacific Ry. Co.* (1934) 139 Cal.App. 421, 426, 34 P.2d 218.) [FN 2.} ¶ FN2. No pro-tanto extinguishment of the granted easement results from this decision which determines that Grapevine's current use of a portion of the easement does not interfere with Scruby's right of ingress and egress to their property as presently developed." (Scruby v. Vintage Grapevine, Inc. (1995) 37 Cal.App.4th 697, 704-706.)

There is evidence and verified allegations of defendant yelling and screaming at plaintiff Terry Stephens to stay off defendants' land while he was on the express, deeded easement and that defendant erected a fence and difficult to open gate with a "KEEP OUT" sign across the easement road when there never was a gate of fence before and without an reasonable basis to erect a gate or fence at that location.

Plaintiff Terry Stephens declares in his supplemental declaration in support of the motion: he witnessed an emergency rescue on the American River on July 2, 2022 by the Rescue Fire Department and El Dorado Hills Fire Department; he learned from Fire Chief Johnson that the Rescue and El Dorado Hills Fire Departments use an Emergency Rescue Points map that shows the best access points to the American River; given the location of the July 2, 2022 emergency, Chief Johnson told him that the Kanaka Valley Road (the subject easement road) was identified as the best access road for the emergency taking place; while driving out, he observed that the Williams gate was in an open position, a fire truck was parked nearby, and the gate remained open for approximately three hours while the response team was dealing with the emergency; further down the easement road, the fire trucks had difficulties passing through due to the fence that cut through the easement that had been installed by defendant

Williams; eventually the fire trucks stopped farther down the road due to the current poor condition of the road; he offered his utility vehicle to transport the inflatable raft and response team to the river; on July 2 Chief Johnson told him that the fire department disfavors gates on emergency access roads, particularly in locations that defendant Williams installed his gate; after the issue of Kanaka Valley Road and importance of accessibility was discussed in a meeting of the Rescue Fire Department Board on July 20, 2022, the Board amended the CFC to provide that all automatic and manually gates installed over fire apparatus road are to comply with the District's gate standard and directed the gates installed along Kanaka Valley Road were to remain open until plans were submitted and approved by the RFPD and an inspection is completed approved; defendant continues to harass him concerning use of the easement in violation of the preliminary injunction in that he has called the California Department of Fish and Game and Bureau of Land Management to complain that plaintiff was using the easement, which required plaintiff to agents that he was lawfully using an easement as an easement owner; Exhibit B attached to the declaration is the recorded easement granted by the California Department of Fish and Game that expressly addresses the subject easement (Kanaka Valley Road) and provides that the easement include "the right to use the easement to transport persons and equipment by vehicle or on foot to the South Fork of the American River and back again"; and a BLM instruction memorandum expressly recognizes that "[i]f BLM acquires land subject to an existing easement, the BLM does not have the authority to require the holder to obtain BLM approval for activities in accordance with the rights granted by their existing agreements". (Supplemental Declaration of Terry Stephens in Support of Motion, paragraphs 2–11; and Exhibits A-C.)

Defendant William declares in his supplemental opposition declaration: since the July 8, 2022 hearing defendant has attempted to comply with the TRO and locked the metal gates in

an open position with chains; he peeled back the fence in one area where the path narrowed; there is no impediment to access BLM land to the West; all his goats and sheep are now enclosed in a small pen and not free to wander the property; since the July 8 2022 hearing he has observed the plaintiffs and the Grottas using their ATVs in concert on the easement and the BLM property, which is designated a nature preserve where motorized vehicles are not allowed; defendant notified the BLM concerning the use of motorized vehicles on the land during wildfire season without any perceived utilitarian use; BLM arrived and posted signage; on July 2, 2022 he observed the fire department attempt to gain access to the river through the easement; the firetruck went through the gate on defendant's property without any impediment and then stopped; the fire truck access issue had to do with the physical terrain that is impassible except by 4X4 vehicles with sufficient clearance; and the fire department has not communicated to him that his gate has posed any issues. (Supplemental Declaration of Joshua Williams in Opposition to Motion, paragraphs 8, 9, and 11.)

There is conflicting evidence concerning plaintiff Terry Stephens allegedly trespassing outside the easement on the defendant's and BLM land.

Contrary to defendant's statements in his declaration that the easement is for private use only and limited to a meandering path solely for the purpose of access to the American River, the easement granted by recorded deed is a non-exclusive right of way and easement for roadway and utilities along the described 50 foot wide strips of land across the subject parcels intended to be used for the mutual use and benefits of lands of the parties and for future divisions of the property and that the grantors mutually covenanted and agreed for themselves, their respective heirs, assigns and successors in interest that the described strips of land are for general public use. (Emphasis the court's.)

The court finds that plaintiffs have established a reasonable probability/likelihood of ultimately prevailing on the merits that establishes the easement is a public road open to members of the public, as well as invitees and guests of plaintiffs.

- Easement Over BLM Land

The court takes judicial notice that on August 23, 1994 an easement agreement between Bobby Dutta and the California Department of Fish and Game was executed and the easement agreement recorded on October 6, 1994. The recorded easement confirms the following: the easement shall be used for pedestrian or vehicular ingress and egress for recreational and related purposes, which includes the right to transport persons and equipment by vehicle or foot to the South Fork of the American River and back again; vehicular traffic is confined to the easement and existing turn arounds at terminus points; the California Department of Fish and Game and State of California acknowledges that it has no authority to, and by this agreement does not, grant an easement across adjacent property owned by the BLM; the right of way road is an existing road shall be 50 feet in width as the deed easement in favor of Dutta's predecessor in interest granted in the 1973 recorded deed; and Dutta has the right to place his own locks on California Department of Fish and Game gates. (Emphasis added.) (Supplemental Declaration of Terry Stephens in Support of Motion, Exhibit B – Recorded Easement Agreement, paragraph 1; Supplemental Declaration of Joshua Williams in Opposition to Motion, Exhibit H – Recorded Easement Agreement, paragraph 1.)

There is evidence that the BLM issued instruction memorandum number CA IM- 2018-005 on January 4, 2018 concerning pre-existing Third Party Rights on Acquire Public Lands. That instruction recognizes that the BLM has no authority to require an easement holders to obtain BLM approval to continue activities in accordance with the rights granted to them by their existing easement; the BLM must manage the acquired land in accordance with the FLPMA

and other federal laws but an not interfere with the rights of the pre-existing easement holder; the BLM can not require the easement holder or the holder's contractor to obtain BM permits or fieldwork authorizations to perform construction, maintenance, or operation within the geographic and substantive scope of the easement; however, the easement holder must comply with federal laws such as the endangered Species Act and Archeological Resources protection Act and where the activity occurs outside the easement a BLM permit or approval is required; while easement holder coordination of maintenance activities with the BLM is encouraged, the holder is not required to obtain BLM authorization prior to conducting activities allowed by the easement; and coordination is to ensure the easement holder does not inadvertently violate other federal laws in performing activities authorized by the easement. (Supplemental Declaration of Terry Stephens in Support of Motion, Exhibit C; and Supplemental Declaration of Joshua Williams in Opposition to Motion, Exhibit I.)

Defendant Williams declares that after he complained to BLM that plaintiffs were using motorized vehicles on the surrounding preserve during wildfire season, BLM thereafter posted signs stating that it is a rare plant area where no motor vehicles were allowed and persons were to stay on the trails. (Supplemental Declaration of Joshua Williams in Opposition to Motion, paragraph 9 and Exhibit F.)

In addition, there is a recorded El Dorado County Superior Court judgment in an action brought by Bobby Dutra under case number PV94-0124, which was entered on November 4, 1994 which states: a nonexclusive right of way and easement for road and utility purposes appurtenant to the dominant estate exists on the site of the present road; the easement is a strip of land 50 feet wide as measured from the centerline along the entire length of the roadway from the entry into the servient tenement to the exit from the servient tenement; neither party shall obstruct or otherwise erect any physical barrier across the easement; the

right of use of the easement can be granted by any one of the parties hereto to any person; nothing in the stipulation for judgment that is entered shall be construed to change or amend the terms of the 1973 recorded deed of easement; the existing gate shall be removed and be replaced by an electronic gate that shall be installed within 30 days after notice of entry of judgment, the gate shall be controlled on the north side by an electronic keypad activated by the same multiple digit numerical sequence activating the existing electronic gate at the entry to the community which code will open the gate; provision shall be made for opening with an electronic remote control; if the gate does not function it shall be left open; the driveway to the residence of the servient tenement shall not be blocked; the dominant tenement owner shall refrain from and will request his or her permittees to refrain from parking along the length of the easement, except only a single vehicle may park as close to the gate as possible; and the judgment shall not operate to waive any other easement rights Bobby Dutta may hold. (Emphasis added.) (Supplemental Declaration of Terry Stephens in Support of Motion, Exhibit D, - Court Judgment, paragraphs 3-5, 7, 10, and 12; and Supplemental Declaration of Joshua Williams in Opposition to Motion, Exhibit J - Court Judgment, paragraphs 3-5, 7, 10 and 12.)

The above-cited and previously cited evidence establishes a likelihood of success by plaintiff in establishing that plaintiffs, plaintiff's guests, and the public has a right to use of the 50 foot wide road easement as provided in the 1973 recorded easement, that defendant can not obstruct and/or prevent the public, the plaintiffs, or their guests from using the easement for vehicular and pedestrian access to the South Fork of the American River. Maintenance of gates by defendant or locking the California Department of Fish and Game gates with his own locks without providing the public, plaintiffs and their guests with the means to access the easement appears to interfere or obstruct the lawful use of the recorded easement. While intruding on BLM land outside the easement would potentially cause a violation of law, there is

no evidence before the court that merely driving or walking on the 50 foot wide easement violates any federal law and, in fact, the BLM and the California Department of Fish and Game acknowledge such use it allowable. Defendant's arguments to the contrary lack merit. The posted BLM sign depicted on the BLM land at the edge of the road easement is not evidence that plaintiffs and their guests can not use motor vehicles on the road easement as expressly allowed by the recorded documents and in light of the recorded easements and BLM instruction. The signs clearly only apply to use of the BLM property outside the easement. (Supplemental Declaration of Joshua Williams in Opposition to Motion, Exhibit F) It would appear the encouraged coordination with the BLM would come into play when maintenance or roadway improvement operations are engaged in on the easement across the BLM land.

- Gates

The court also find that the preliminary injunction should address the issue of enclosing the defendant's livestock, if any, on the property, such as by fencing limited to the eastern 50 foot wide boundary of the easement road, or by maintaining two gates at the North and South boundary lines of the defendant's parcel that are easily opened by the public, plaintiffs, and their guests at any time in order to allow access to the easement, and in compliance with the RFPD requirements. The gates can not be posted as no trespassing except for residents or guests.

The Third District Court of Appeal has held: "We recognize that " '[u]nless it is expressly stipulated that the way shall be an open one, or it appears from the terms of the grant or the circumstances that such was the intention, the owner of the servient estate may erect gates across the way, if they are constructed so as not unreasonably to interfere with the right of passage.' " (*McCoy v. Matich* (1954) 128 Cal.App.2d 50, 53, 274 P.2d 714, quoting 73 A.L.R. 779.) [FN 5.] However, "[w]here an easement under a grant is specific in its terms, '[i]t is

decisive of the limits of the easement' [citations]." (*Wilson v. Abrams, supra,* 1 Cal.App.3d at p. 1034, 82 Cal.Rptr. 272.) ¶ FN5. "[T]he grant of a way without reservation of the right to maintain gates does not necessarily preclude the servient estate owner from having such gates, and unless it is expressly stipulated in the grant that the way shall be an open one, or unless a prohibition of gates is implied from the circumstances, the servient owner may maintain a gate across the way if necessary for the use of the servient estate and if the gate does not unreasonably interfere with the right of passage." (Annot., Right to Maintain Gate or Fence Across Right of Way (1973) 52 A.L.R.3d 9, 15, § 2, and cases cited.)" (Van Klompenburg v. Berghold (2005) 126 Cal.App.4th 345, 350.)

Having read and considered the verified complaint, and the evidence submitted in support of, opposition to, and reply to the opposition, the court finds that weighing the likelihood of the moving party ultimately prevailing on the merits and the relative interim harm to the parties from the issuance of a preliminary injunction, the balance tips in favor of granting the application for a preliminary injunction as requested.

TENTATIVE RULING # 9: PLAINTIFFS' PRELIMINARY INJUNCTION SHALL REMAIN IN EFFECT. GATES MAINTAINED BY DEFENDANT ACROSS THE EASEMENT MUST BE ABLE TO BE OPENED BY MEMBERS OF THE PUBLIC, THE PLAINTIFFS, AND THEIR GUESTS AND MUST COMPLY WITH THE RFPD REQUIREMENTS. APPEARANCES ARE REQUIRED AT 2:30 P.M. ON FRIDAY, AUGUST 19, 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.

10. NORSETH v. MESCHI PC-20200444

Cross-Complainants' Motion for Summary Judgment, or, in the Alternative, Summary Adjudication of Cross-Complaint of Michael Meschi and Lisa Meschi.

TENTATIVE RULING # 10: THIS MATTER IS CONTINUED TO 8:30 A.M. ON FRIDAY, SEPTEMBER 30, 2022 IN DEPARTMENT NINE.

11. GOLDMAN SACHS v. WIDING PCL-20210327

Plaintiff's Motion for Summary Judgment.

On April 30, 2021 plaintiff filed a complaint for common counts of open book account; for money lent at defendant's request; for money paid, laid out, and expended to or for defendant at defendant's special instance and request; and for a loan issued by plaintiff to defendant upon defendant's request. The complaint alleges the sum of $18,023.82 remains due and unpaid despite plaintiff's demand.

Plaintiff moves for summary judgment on the ground that the undisputed material facts and evidence submitted in support of the facts establish as a matter of law that an open book account existed between plaintiff and defendant and that the sum of $18,023.82 remains due and unpaid by defendant.

Defendant opposes the motion on the following grounds: the motion should be denied as the plaintiff's legal operations analyst has not established that the facts stated in the declaration are based on personal knowledge, has not established the declarant's competency to declare such facts, and can not properly authenticate the business records attached to the declaration; as discovery as not yet closed, the motion is premature; plaintiff failed to prove the existence of an agreement between the parties; and the amount of debt remains at question.

Plaintiff replied to the opposition.

Defendant's Response to Plaintiff's Separate Statement of Undisputed Material Fact

Defendant responded to the plaintiff's separate statement of 11 undisputed material facts by a single paragraph in the body of the memorandum of points and authorities in opposition to the motion. (Memorandum of Points and Authorities in Opposition, page 3, line 21 to page 4,

line 3.) The response merely attacks the admissibility and personal knowledge of the plaintiff's declarant.

"The opposition papers shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts that the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion." (Emphasis added.) (Code of Civil Procedure, § 437c(b)(3).)

"The Separate Statement in Opposition to Motion must be in the two-column format specified in (h). ¶ (1) Each material fact claimed by the moving party to be undisputed must be set out verbatim on the left side of the page, below which must be set out the evidence said by the moving party to establish that fact, complete with the moving party's references to exhibits. ¶ (2) On the right side of the page, directly opposite the recitation of the moving party's statement of material facts and supporting evidence, the response must unequivocally state whether that fact is "disputed" or "undisputed." An opposing party who contends that a fact is disputed must state, on the right side of the page directly opposite the fact in dispute, the nature of the dispute and describe the evidence that supports the position that the fact is controverted. Citation to the evidence in support of the position that a fact is controverted must include reference to the exhibit, title, page, and line numbers. ¶ (3) If the opposing party contends that additional material facts are pertinent to the disposition of the motion, those facts must be set forth in the separate statement. The separate statement should include only material facts and not any facts that are not pertinent to the disposition of the

motion. Each fact must be followed by the evidence that establishes the fact. 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(f).)

Defendant made no effort whatsoever to comply with the mandates set forth by statute and court rule. Defendant's failure to comply with the opposing separate statement mandate of Section § 437c(b)(3) is an independent ground to grant plaintiff's motion for summary judgment. The court exercises it discretion to grant the motion due to the failure to comply with Section 437c(b)(3) and, in an abundance of caution, will also address the motion on its merits.

Defendant's Objections to Declaration in Support of the Motion

The defendant objects that the entire declaration of plaintiff's legal operations analyst, Shelly Knudtson, is inadmissible as evidence as it has not been authenticated by a witness with firsthand knowledge of the debits, credits, and payments associated with the alleged account, including the fees, charges, and interest from which to determine the amount purportedly due; the declarant has no firsthand knowledge about the loan agreement; and after the fact hearsay testimony concerning bank records is insufficient to establish that the alleged loan was made to defendant and is not testimony by a competent witness.

Defendant's objections are overruled.

"In reviewing the trial court's admission of the computer evidence, we acknowledge its wide discretion in determining whether sufficient foundation is laid to qualify evidence as a business record. On appeal, exercise of that discretion can be overturned only upon a clear showing of abuse. (*County of Sonoma v. Grant W.* (1986) 187 Cal.App.3d 1439, 1450–1451, 232 Cal.Rptr. 471; *Trans World Airlines, Inc. v. Alitalia–Linee Aeree Airlines* (1978) 85 Cal.App.3d 185, 192, 149 Cal.Rptr. 411.)" (People v. Lugashi (1988) 205 Cal.App.3d 632, 638–639.)

"Moreover, appellant assumes that only a computer expert, who could personally perform the programming, inspect and maintain the software and hardware, and compare competing products, could supply the required testimony. However, a person who generally understands the system's operation and possesses sufficient knowledge and skill to properly use the system and explain the resultant data, even if unable to perform every task from initial design and programming to final printout, is a "qualified witness" for purposes of Evidence Code section 1271." (People v. Lugashi (1988) 205 Cal.App.3d 632, 640.)

"Appellant argues that, while Norris identified the record and explained its mode of preparation, she was neither the custodian nor a qualified witness, and that the third statutory requirement was not satisfied. Norris admitted she was neither an official custodian of the records nor a computer expert. In essence, appellant claims Norris was incompetent to offer this testimony because she could not explain or evaluate Wells Fargo's hardware or software and could not physically perform each process from initial query to final printout. Appellant argues that Norris could not rely on hearsay and could testify only from personal knowledge. ¶ Appellant's argument is incorrect. Norris was an experienced credit card fraud investigator familiar with merchant authorization terminals, counterfeit cards, credit card sales, and the manner in which sales are recorded. She personally produced the printed records from the microfiche. Although she did not do the "dump" or physically convert the resulting tape into microfiche, she worked and spoke with those who did. She understood the records and interpreted them in great detail. She assembled the bank copies of the actual charges and compared them with the computer records. That some of her knowledge came from "hearsay" discussions with fellow workers employed and trained by the bank and its computer component suppliers no more renders her testimony incompetent than if it resulted from reading "hearsay" information manuals from the hardware or software manufacturers or Wells

Fargo computer management. If appellant were correct, only the original hardware and software designers could testify since everyone else necessarily could understand the system only through hearsay. ¶ If there were any question about the competence of the bank's other employees, they could be subpoenaed and examined. Much of the information on the printout could be verified by comparison with the bank copy of the actual charges. While Norris' testimony might not convince a factfinder of the records' accuracy beyond a reasonable doubt, it was more than adequate to render them admissible." (People v. Lugashi (1988) 205 Cal.App.3d 632, 641-642.)

Motion for Summary Judgment Principles

"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.)

"…[I]t is axiomatic that the party opposing summary judgment " 'must produce admissible evidence raising a triable issue of fact. [Citation.]' [Citation.]" (*Dollinger,supra,* 199 Cal.App.4th at pp. 1144–1145, 131 Cal.Rptr.3d 596.) This requirement is black letter law (Code Civ. Proc., § 437c, subd. (p)(2)) that applies whether the alleged cause of action is statutory or under the common law." (All Towing Services LLC v. City of Orange (2013) 220 Cal.App.4th 946, 960.)

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

Discovery Remains Open

Defendant argues the motion should be denied, because discovery is not yet closed, therefore, the motion is premature.

"If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just." (Code of Civil Procedure, § 437c(h).)

"Section 437c, subdivision (h) of the Code of Civil Procedure provides that a motion for summary judgment or adjudication shall be denied, or a continuance shall be granted, '[i]f it appears from the affidavits submitted in opposition ... that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented....' The nonmoving party seeking a continuance 'must show: (1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]' (*Wachs v. Curry* (1993) 13 Cal.App.4th 616, 623, 16 Cal.Rptr.2d 496.) The decision whether to grant such a continuance is within the discretion of the trial court. (*FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 72, 41 Cal.Rptr.2d 404.) But as this court recently noted, the interests at stake are too high to sanction the denial of a continuance without good reason. '[T]echnical compliance with the procedures of Code of Civil Procedure section 437c is required to ensure there is no infringement of a litigant's hallowed right to have a dispute settled by a jury of his or her peers.' (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395, 107 Cal.Rptr.2d 270.) Subdivision (h) was added to section 437c of the Code of Civil Procedure (herein section 437c) '[t]o mitigate summary judgment's harshness,' and it mandates a continuance for the nonmoving party ' " 'upon a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to the motion.' [Citation.]" [Citation.]' (*Bahl v. Bank of America*, supra, 89 Cal.App.4th at p. 395, 107 Cal.Rptr.2d 270.) Moreover, the affiant is not required to show that essential evidence does exist, but only that it may exist. This, and the language stating the continuance shall be granted upon such a showing, 'leaves little room for doubt that such continuances are to be liberally granted.' (Ibid.)" (Emphasis added.) (Frazee v. Seely (2002) 95 Cal.App.4th 627, 633-634.)

Failure to identify the information that might be obtained from the additional discovery that would shed light on a dispositive issue on summary judgment is a ground for denial of an opposing party's Section 437c(h) request to deny the motion for summary judgment or continue the hearing to allow additional discovery to take place. (Cheviot Vista Homeowners Ass'n v. State Farm Fire & Cas. Co. (2006) 143 Cal.App.4th 1486, 1501.)

Defendant filed an answer to the complaint over one year ago on June 17, 2020. While it is true that discovery remains open, defendant has had over one year to engage in discovery to support his defense against this action. Defendant has not requested a continuance of the motion in order to engage in discovery to obtain the facts essential to justify opposition that may exist but cannot, for reasons stated, be presented at this time. Defendant has not filed an affidavit/declaration of the facts anticipated to be obtained in discovery that are essential to opposing the motion, there is reason to believe such facts may exist, and the reasons why additional time is needed to obtain these facts. Defendant essentially argues that any motion for summary judgment brought while discovery remains open must be denied as premature. The court rejects the argument and defendant has not presented any evidence that justifies continuance of the motion to allow for additional discovery.

Open Book Account

"The term "book account" means a detailed statement which constitutes the principal record of one or more transactions between a debtor and a creditor arising out of a contract or some fiduciary relation, and shows the debits and credits in connection therewith, and against whom and in favor of whom entries are made, is entered in the regular course of business as conducted by such creditor or fiduciary, and is kept in a reasonably permanent form and manner and is (1) in a bound book, or (2) on a sheet or sheets fastened in a book or to backing

but detachable therefrom, or (3) on a card or cards of a permanent character, or is kept in any other reasonably permanent form and manner." (Code of Civil Procedure, § 337a.)

"A "book account" is defined as a " 'detailed statement, kept in a book, [[FN4]] in the nature of debit and credit, arising out of contract or some fiduciary relation.' It is, of course, necessary for the book to show against whom the charges are made. .... It must also be made to appear in whose favor the charges run." (*Joslin v. Gertz* (1957) 155 Cal.App.2d 62, 65, 317 P.2d 155, quoting *Wright v. Loaiza* (1918) 177 Cal. 605, 606-607, 171 P. 311.) A book account may furnish the basis for an action on a common count " '... when it contains a statement of the debits and credits of the transactions involved completely enough to supply evidence from which it can be reasonably determined what amount is due to the claimant.' " (*Tillson v. Peters* (1940) 41 Cal.App.2d 671, 678, 107 P.2d 434, quoted in *Robin v. Smith* (1955) 132 Cal.App.2d 288, 291, 282 P.2d 135.) A book account is described as "open" when the debtor has made some payment on the account, leaving a balance due. (For more on book accounts see generally, 1 Cal.Jur.3d (1972) Accounts and Accounting, § 3, pp. 214-217.) ¶ FN4. In this age of computer accounting, it is unlikely that a court would require that a book account actually be kept in a book; certainly computer memory is a reasonable substitute for the pages of a book, given that the data stored therein can always be reduced (or, more precisely, enlarged) to writing. ¶ For present purposes, the most important characteristic of a suit brought to recover a sum owing on a book account is that the amount owed is determined by computing all of the credits and debits entered in the book account. Accordingly, when a complaint alleges a common count to recover for a sum due on a book account, and, as occurred here, the complaint is answered by a general denial, this places in issue every entry in the book account. The defendant is therefore entitled to attack each of the entries "to show that the plaintiff has no right to recover or to recover to the extent that he claims." (*Aetna Carpet Co. v. Penzner*,

supra, 102 Cal.App.2d at p. 860, 228 P.2d 347; see also, *Bridges v. Paige*, supra, 13 Cal. at p. 641.)" (Emphasis added.) (Interstate Group Administrators, Inc. v. Cravens, Dargan & Co. (1985) 174 Cal.App.3d 700, 708.)

"A book account is created by the agreement or conduct of the parties in a commercial transaction. Nonetheless, the mere recording in a book of transactions or the incidental keeping of accounts under an express contract does not of itself create a book account. Parties to a written or oral contract may, however, provide that monies due under such contract shall be the subject of an account between them. (*Warda v. Schmidt* (1956) 146 Cal.App.2d 234, 237, 303 P.2d 762.)" (H. Russell Taylor's Fire Prevention Service, Inc. v. Coca Cola Bottling Corp. (1979) 99 Cal.App.3d 711, 728.)

"An open book account may consist of a single entry reflecting the establishment of an account between the parties, (*Robin v. Smith*, 132 Cal.App.2d 288, 291, 282 P.2d 135) and may contain charges alone if there are no credits to enter. *Tabata v. Murane*, 76 Cal.App.2d 887, 890, 174 P.2d 684." (Joslin v. Gertz (1957) 155 Cal.App.2d 62, 66.)

Shelly Knudtson declares in support of the motion: declarant is a legal operations analyst for plaintiff; the declaration is based upon the declarant's personal knowledge of the regular practices and procedures with respect to Goldman Sachs loans and is derived from the review of the attached business records of the loan; declarant has reviewed the attached records as they related to defendant's loan to ascertain the balance due on that loan and whether defendant made payments on the balance; the declaration is based upon those business records and declarant's personal review; in declarant's capacity as a legal operations analyst for plaintiff the declarant has knowledge regarding and access to records regarding the Goldman Sachs loan and defendant herein; plaintiff maintains these records in the ordinary course of business, the records are updated with information on events by individuals with

personal knowledge of those events or by automated processes that track such events at or near the time the events occur; the same systems that record this information also generate periodic statements that are provided to borrowers and store copies of these periodic statements; these same record keeping systems contain information about which version of Goldman Sachs' terms and conditions has been communicated to borrower and accepted by a borrower at the time of funding the loan; declarant has personally inspected the records pertaining to the loan taken out by the defendant, including the record of periodic statements provided to the defendant by plaintiff, the applicable terms and conditions, the balance due on the loan and the payments applied to defendant's loan; the records maintained by plaintiff reflect that defendant established a loan with plaintiff, the loan funds were disbursed to defendant's designated bank account electronically or sent by check, as requested by defendant, and defendant's loan with plaintiff is governed by the loan agreement, disclosure statement and terms and conditions which is attached as Exhibit A; the plaintiff's records reflect that defendant's loan is in default, because defendant has not paid the amount due and owing to plaintiff on the loan; by virtue of such default the entire balance on the loan is presently due and owing; attached to the declaration as Exhibit B is a true and accurate record retrieved from plaintiff's record keeping system of an account statement provided by plaintiff to defendant; attached as Exhibit C is a true and accurate history of the loan retrieved from the plaintiff's record keeping system that shows the current balance due and owing on the loan; as the Exhibit C loan history reflects activity occurring after the Exhibit B loan statement was created, the loan balance in Exhibit C differs from Exhibit B balance; after applying all payments, credits, and adjustments, there is now due and owing to plaintiff from defendant the principal sum of $18,023.82; no part of this sum has been paid; and there are no offsets or

credits due on defendant's account. (Declaration of Shelly Knudtson in Support of Motion, paragraphs 1-9.)

Strictly construing the moving party's evidence, liberally construing the evidence submitted in opposition to the motion, resolving doubts as to the propriety of granting the motion in favor of the party resisting the motion, and considering all of the evidence and all of the inferences reasonably drawn therefrom in the light most favorable to the opposing party (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843; and Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal.App.4th 1509, 1524.), the court finds that the above-cited evidence meets plaintiff's initial burden to establish that defendant owes plaintiff the principal sum of $18,023.82 on an open book account common count. Defendant has not submitted any evidence in opposition to the motion raising a triable issue of material fact as to the common count. Therefore, it is appropriate to grant plaintiff's motion for summary judgment.

TENTATIVE RULING # 11: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IS GRANTED. 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 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.eldoradocourt.org/onlineservices/vcourt.html. 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, AUGUST 19, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

12. GLINES v. KABIRINASSAB PC-20190655

(1) Defendants' Motion to Compel Plaintiff to Attend Independent Neuropsychological Evaluation.

(2) Defendants' Motion to Compel Plaintiff to Attend Independent Medical Examination.

Defendants' Motion to Compel Plaintiff to Attend Independent Neuropsychological Evaluation.

At the ex parte hearing on August 8, 2020 the court granted defendants' application to shorten time to hear defendants' motions to compel plaintiff's attendance at an independent neuropsychological evaluation and to attend an independent medical examination.

Defendants move to compel the neuropsychological evaluation on the following grounds: plaintiff contends that as a result of the subject motor vehicle accident he sustained various injuries and experienced balance issues, memory loss, headache, dizziness/vertigo, weakness, fatigue, and mood swings; he was diagnosed with post-concussive disorder, chronic neck pain, chronic low back pain and anxiety; adjustment disorder was also suspected; inasmuch as plaintiff contends he has cognitive difficulties due to the accident, he placed his mental state at issue; plaintiff's retained expert and treating physician has recommended a neuropsychological evaluation; good cause exists to compel the neuropsychological evaluation; and plaintiff's sole objection to the evaluation that the date set for the evaluation is untimely as it is too close to discovery cut-off is entirely without merit.

The proofs of service declare that on August 11, 2022 notice of the hearing date and the moving papers were served by email on plaintiff's counsel.

There was no opposition to the motion in the court's file at the time this ruling was prepared.

"If any party desires to obtain discovery by a physical examination other than that described in Article 2 (commencing with Section 2032.210), or by a mental examination, the party shall obtain leave of court." (Code of Civil Procedure, § 2032.310(a).)

"A motion for an examination under subdivision (a) shall specify the time, place, manner, conditions, scope, and nature of the examination, as well as the identity and the specialty, if any, of the person or persons who will perform the examination. The motion shall be accompanied by a meet and confer declaration under Section 2016.040." (Code of Civil Procedure, § 2032.310(b).)

"The court shall grant a motion for a physical or mental examination under Section 2032.310 only for good cause shown." (Code of Civil Procedure, § 2032.320(a).)

Defendants' counsel declares: counsel caused to be served a demand for independent Neuropsychological evaluation of plaintiff; trial is set to commence on October 11, 2022; on August 2, 2022 counsel received plaintiff's objection to the demand on the ground it was untimely, because it was too close to the discovery cut-off date; and a string of meet and confer emails followed without resolution of the dispute.

The demand for independent neuropsychological evaluation of plaintiff stated the exam was to take place at a specified location within 75 miles of plaintiff's residence on August 26, 2022 from 9 a.m. to 4 p.m. and was to be conducted by Eliot Henderson, Ph.D. (Declaration of Gayle Kono in Support of Motion to Compel, Exhibit A.) The sole ground stated in plaintiff's objection to the demand was that the August 26, 2022 "evacuation is untimely as it is too close to discovery cut-off." (Declaration of Gayle Kono in Support of Motion to Compel, Exhibit B.) There was no objection that there was no good cause to require a neuropsychological exam under the claims of injuries asserted by plaintiff as arising from the subject accident.

"Except as otherwise provided in this chapter, any party shall be entitled as a matter of right to complete discovery proceedings on or before the 30th day, and to have motions concerning discovery heard on or before the 15th day, before the date initially set for the trial of the action." (Code of Civil Procedure, § 2024.020(a).)

The court takes judicial notice that trial is set to commence on October 11, 2022 and that August 26, 2022 is 46 days prior to the commencement of trial. The defendants are entitled as a matter of right to complete discovery proceedings on or before September 12, 2022. The plaintiff's objection to the properly noticed demand for neuropsychological exam of plaintiff is overruled. The motion is granted.

Sanctions not having been requested, monetary sanctions are not awarded.

Defendants' Motion to Compel Plaintiff to Attend Independent Medical Examination.

At the ex parte hearing on August 8, 2020 the court granted defendants' application to shorten time to hear defendants' motions to compel plaintiff's attendance at an independent neuropsychological evaluation and to attend an independent medical examination.

Defendants move to compel the plaintiff to submit to a medical examination on the following grounds: plaintiff contends that as a result of the subject motor vehicle accident he sustained various injuries; plaintiff complains of continuing neck and back pain, among other things; and plaintiff's sole objection to the medical examination is that the date set for the examination is untimely as it is too close to discovery cut-off is entirely without merit. Defendants also request an award of monetary sanctions in the amount of $675 to $1,230 be imposed against plaintiff and plaintiff's counsel.

The proofs of service declare that on August 11, 2022 notice of the hearing date and the moving papers were served by email on plaintiff's counsel.

There was no opposition to the motion in the court's file at the time this ruling was prepared.

"In any case in which a plaintiff is seeking recovery for personal injuries, any defendant may demand one physical examination of the plaintiff, if both of the following conditions are satisfied: ¶ (1) The examination does not include any diagnostic test or procedure that is painful, protracted, or intrusive. ¶ (2) The examination is conducted at a location within 75 miles of the residence of the examinee." (Code of Civil Procedure, § 2032.220(a).)

"A defendant may make a demand under this article without leave of court after that defendant has been served or has appeared in the action, whichever occurs first." (Code of Civil Procedure, § 2032.220(b).)

"If a defendant who has demanded a physical examination under this article, on receipt of the plaintiff's response to that demand, deems that any modification of the demand, or any refusal to submit to the physical examination is unwarranted, that defendant may move for an order compelling compliance with the demand. This motion shall be accompanied by a meet and confer declaration under Section 2016.040." (Code of Civil Procedure, § 2032.250(a).)

Defendants' counsel declares: counsel caused to be served a demand for independent medical examination of plaintiff; trial is set to commence om October 11, 2022; on August 2, 2022 counsel received plaintiff's objection to the demand on the ground it was untimely, because it was too close to the discovery cut-off date; and a string of meet and confer emails followed without resolution of the dispute.

The demand for independent medical examination of plaintiff stated the exam was to take place at a specified location within 75 miles of plaintiff's residence on September 9, 2022 from 9 a.m. to 4 p.m. and was to be conducted by Dr. Lyman Whitlatch. (Declaration of Gayle Kono in Support of Motion to Compel, Exhibit A.) The sole ground stated in plaintiff's objection to the demand was that the September 9, 2022 "examination is untimely as it is too close to discovery cut-off." (Declaration of Gayle Kono in Support of Motion to Compel, Exhibit B.)

"Except as otherwise provided in this chapter, any party shall be entitled as a matter of right to complete discovery proceedings on or before the 30th day, and to have motions concerning discovery heard on or before the 15th day, before the date initially set for the trial of the action." (Code of Civil Procedure, § 2024.020(a).)

The court takes judicial notice that trial is set to commence on October 11, 2022 and that September 9, 2022 is 32 days prior to the commencement of trial. The defendants are entitled as a matter of right to complete discovery proceedings on or before September 12, 2022. The plaintiff's objection to the properly noticed demand for a medical exam of plaintiff is overruled. The motion is granted.

Sanctions

"The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel compliance with a demand for a physical examination, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (Code of Civil Procedure, § 2032.250(b).)

The court finds that it is appropriate to award sanctions in the amount of $675 to defendants payable by plaintiff within ten days.

TENTATIVE RULING # 12: DEFENDANTS' MOTION TO COMPEL PLAINTIFF TO ATTEND INDEPENDENT NEUROPSYCHOLOGICAL EVALUATION IS GRANTED. PLAINTIFF IS ORDERED TO ATTEND THE INDEPENDENT NEUROPSYCHOLOGICAL EVALUATION SET FOR AUGUST 26, 2022 AT THE LOCATION AND TIME PREVIOUSLY NOTICED. DEFENDANTS' MOTION TO COMPEL PLAINTIFF TO ATTEND INDEPENDENT MEDICAL EXAMINATION IS GRANTED. PLAINTIFF IS ORDERED TO ATTEND THE INDEPENDENT MEDICAL EXAMINATION SET FOR SEPTEMBER 9, 2022 AT THE LOCATION AND TIME

PREVIOUSLY NOTICED. THE COURT FURTHER ORDERS THAT PLAINTIFF PAY DEFENDANTS $675 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 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.eldoradocourt.org/onlineservices/vcourt.html. 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, AUGUST 19, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

13. KATZAKIAN v. SUN RIDGE RANCH HOA PC-20190048

Defendants' Motion for Summary Judgment.

In January 2021 the court held a six day bifurcated Court trial on the declaratory relief and breach of statutory duty causes of action, which concluded on January 14, 2021. The court entered its statement of decision on the bifurcated Court trial on April 19, 2021. The court found that the defendant HOA had authority to enact the Large Animal Rule, the Large Animal Rule is reasonable; the notice was valid, because the notice had the text of the proposed rule change and a description of the purpose and effect; the plaintiffs were improperly found in violation of the rule, improperly assessed fines, and the HOA improperly changed plaintiffs' status in the HOA to "not in good standing", because due to a conflict of interest Board Member Janet Gamboa was required to disqualify herself from voting on any matter related to the plaintiffs before the HOA Board, including when she voted to fine the plaintiffs for violations concerning a trailer on their property, debris on the property, having more than one large animal on the property, and to change the plaintiffs' HOA membership to not in good standing: there remains no actual controversy regarding plaintiff's' commercial business, because plaintiffs were not fined and not violated by the HOA for operating a commercial business on their property, at the time of trial they were not operating a business on their property, they only indicated they may want to sell beef out of their home in the future, and a judgment declaring rights to operate a commercial business on the property under such circumstances would be an improper advisory opinion, thereby making a determination under the declaratory relief statute not necessary or proper; and the HOA did not unreasonably withhold documents requested by plaintiffs.

On August 27, 2021 plaintiffs filed a motion for leave to amend by adding HOA Board President Julia Earle as a defendant and to assert the following additional allegations: allegations related to the March 2020 Board executive session meeting purportedly rescinding the fines levied against plaintiffs and restoring plaintiffs' good standing, which was not communicated to plaintiffs; plaintiffs first learned of those facts during the bifurcated trial that took place in January 2021; for almost a full year the HOA led plaintiffs to believe they could not vote, request special elections, file complaints about C,C,&R violations, they had not right to improve their property with architectural committee approval, had no right to nominate anyone to the Board, and/or had no right to run for the Board due to their lack of good standing; on March 9, 2020 the HOA purportedly decided to waive the fines against plaintiffs with no explanation, without returning plaintiffs to good standing, and without reversing the actual violations; at no time were the plaintiffs ever informed by the HOA of the purported return of their good standing or reversal of the violations; defendant HOA and Earle engaged in constructive fraud by concealment of a material fact equating to a breach of fiduciary duty; as a direct and proximate result of the HOA's and Earle's breach of duty, plaintiffs suffered and continue to suffer damages including, but not limited to, loss of use, damages to their property, diminished value to their property, and unnecessary emotional distress and attorney fees; and punitive damages are supported by the facts that the HOA has informed the membership that it won this case and no further claims will be litigated, despite the fact that plaintiffs proved at trial that defendant HOA engaged in improper conduct through Janet Gamboa's improper conduct and there remains breach of contract and breach of fiduciary duty causes of action pending trial. (1st Amended Complaint, paragraphs 46-49, 58, 59, 64, 65, and 68.)

On October 1, 2021 the court granted plaintiffs leave to amend the complaint to add Julia Earle as a defendant in the action, add a claim for punitive damages, and to add the other

proposed allegations. The 1st amended complaint was filed on that same date. On January 14, 2022 the court denied defendants' motion to strike the punitive damages allegations. The 1st amended complaint is the operative complaint. The only cause of action asserted against defendant Erle is the cause of action for breach of fiduciary duty.

The breach of contract and breach of fiduciary duty causes of action remain to be tried in this case. A long cause jury trial is set to commence on the remainder of the action on September 27, 2022.

Defendant Earle moves for entry of summary judgment in her favor on the entire 1st amended complaint pled against her on the ground that the business judgment rule protected defendant Earle, thereby barring the entire 1st amended complaint being prosecuted against defendant Earle. Defendants also move for summary adjudication of the following causes of action and requests for damages on the following grounds: the plaintiffs can not establish defendant Earle's conduct amounted to oppression, fraud or malice, therefore, plaintiffs can not recover punitive damages against defendant Earle; the breach of fiduciary duty cause of action asserted against defendant Earle must be summarily adjudicated in favor of defendant Earle as defendant is protected by the business judgment rule and plaintiffs can not recover damages for statements made in the HOA's financial statement because plaintiff can not demonstrate a causal connection between defendant Earle's conduct and the damaging statements; the breach of fiduciary duty cause of action brought against defendant Earle is barred by the litigation privilege; the plaintiffs can not establish defendant the HOA's conduct amounted to oppression, fraud or malice, therefore, plaintiffs can not recover punitive damages against the HOA; and the litigation privilege bars the breach of fiduciary duty cause of action asserted against the HOA.

Plaintiffs' Objections to Defendant Julia Earle's Declaration in Support of Motion

Objection numbers 4-6 and 8-10 are overruled.

Objection number 7 to the portion of paragraph 27 wherein defendant Earle states that she believed she had no obligation to communicate with plaintiffs as she was the Board President is sustained and the remainder of the objection overruled.

The court does not reach the remaining objections to the declaration of defendant Earle asserted by plaintiffs, because the court finds that the evidence objected to is not material to its disposition of the motion. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code of Civil Procedure, 437c(q).)

Plaintiffs' Objections to Defense Counsel Thomas Ware's Declaration in Support of the Motion

The court does not reach the objections to portions of defense counsel's declaration in support of the motion asserted by plaintiffs, because the court finds that the evidence objected to is not material to its disposition of the motion. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code of Civil Procedure, 437c(q).)

Defendants' Objections to Plaintiffs' Counsel's Declaration in Opposition to the Motion

Objection numbers 1, 3, 5, and 6 are overruled.

Objection number 2 to a portion of paragraph 3 of the declaration is sustained.

The court does not reach the remaining objections to the declaration of plaintiff' counsel in opposition to the motion asserted by defendants, because the court finds that the evidence

objected to is not material to its disposition of the motion. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code of Civil Procedure, 437c(q).)

Motion for Summary Judgment Principles

"For purposes of motions for summary judgment and summary adjudication: ¶ * * * (2) A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff or cross-complainant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (Code of Civil Procedure, § 437c(p)(2).)

"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.)

"A moving party defendant is entitled to summary judgment if it establishes a complete defense to the plaintiff's causes of action, or shows that one or more elements of each cause of action cannot be established. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 849, 107 Cal.Rptr.2d 841, 24 P.3d 493.)" (Eriksson v. Nunnink (2011) 191 Cal.App.4th 826, 847.)

"A defendant has met its burden of showing a cause of action has no merit if it 'has shown that one or more elements of the cause of action ... cannot be established, or that there is a complete defense to that cause of action. Once the defendant ... has met that burden, the burden shifts to the plaintiff ... to show ... a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff ... may not rely upon the mere allegations or denials of its pleading to show ... a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists ....' (*Id.*, subd. (o)(2); *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 464 & fn. 4 [63

Cal.Rptr.2d 291, 936 P.2d 70].)" (Scheiding v. Dinwiddie Constr. Co. (1999) 69 Cal.App.4th 64, 69.)

"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.)

"To create a triable issue of material fact, the opposition evidence must be directed to issues raised by the pleadings. (*Zavala v. Arce*, supra, 58 Cal.App.4th at p. 926, 68 Cal.Rptr.2d 571.) If the opposing party's evidence would show some factual assertion, legal theory, defense or claim not yet pleaded, that party should seek leave to amend the pleadings before the hearing on the summary judgment motion. (See *580 Folsom Associates v. Prometheus Development Co.* (1990) 223 Cal.App.3d 1, 18, 272 Cal.Rptr. 227*; City of Hope Nat. Medical Center v. Superior Court* (1992) 8 Cal.App.4th 633, 639, 10 Cal.Rptr.2d 465; & Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2000) ¶¶ 10:257 & 10:257.2, pp. 10-96 & 10-97 (rev.# 1, 2000).)" (Distefano v. Forester (2001) 85 Cal.App.4th 1249, 1264-1265.)

"…[I]t is axiomatic that the party opposing summary judgment " 'must produce admissible evidence raising a triable issue of fact. [Citation.]' [Citation.]" (*Dollinger,supra,* 199 Cal.App.4th at pp. 1144–1145, 131 Cal.Rptr.3d 596.) This requirement is black letter law (Code Civ. Proc., § 437c, subd. (p)(2)) that applies whether the alleged cause of action is statutory or under the common law." (All Towing Services LLC v. City of Orange (2013) 220 Cal.App.4th 946, 960.)

With the above-cited principles in mind, the court will rule on defendants' motion for summary judgment.

Breach of Fiduciary Duty Cause of Action – Defendant Earle

The Third District Court of Appeal has stated: "To state a cause of action for breach of fiduciary duty, a plaintiff must show "the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." (*Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1101, 3 Cal.Rptr.2d 236.)" (Roberts v. Lomanto (2003) 112 Cal.App.4th 1553, 1562.)

"Directors of nonprofit corporations such as the Association are fiduciaries who are required to exercise their powers in accordance with the duties imposed by the Corporations Code. (*Raven's Cove Townhomes, Inc. v. Knuppe Development Co.* (1981) 114 Cal.App.3d 783, 799, 171 Cal.Rptr. 334.) This fiduciary relationship is governed by the statutory standard that requires directors to exercise due care and undivided loyalty for the interests of the corporation. (*Mueller v. MacBan* (1976) 62 Cal.App.3d 258, 274, 132 Cal.Rptr. 222; Corp.Code, § 309, subd. (a), § 7231, subd. (a); 6 Witkin, Summary of Cal.Law, *supra,* § 80, p. 4378.)" (Frances T. v. Village Green Owners Assn. (1986) 42 Cal.3d 490, 513.)

The Third District Court of Appeal recently held: "The trial court correctly set out the three elements of the cause of action at issue: existence of a fiduciary relationship, breach of fiduciary duty, and damages. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820, 124 Cal.Rptr.3d 256, 250 P.3d 1115 (*Oasis West Realty*).) And as it further explained, the directors of a nonprofit mutual benefit corporation, like the Association here, are fiduciaries who must act for the benefit of the corporation and its members. (*Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 513, 229 Cal.Rptr. 456, 723 P.2d 573 (*Frances T.*) ["Directors of nonprofit corporations ... are fiduciaries who are required to exercise their powers in accordance with the duties imposed by the Corporations Code"]; *Cohen v. S & S Construction Co.* (1983) 151 Cal.App.3d 941, 945, 201 Cal.Rptr. 173 ["This fiduciary duty extends to individual homeowners, not just the

homeowners association"].) ¶ The court also correctly applied these principles to the facts. It found the directors Murch and Donovan owed a fiduciary duty to the Association and its members—satisfying the first element for breach of fiduciary duty. It then concluded they breached their fiduciary duties by voting, inconsistent with the CC&Rs, to (1) raise the Patio owners' share of the security services from 50 percent to 83.3 percent, and (2) require the Patio owners alone, and not also the Lodge owners, to cover certain legal fees—satisfying the second element. It found Murch further breached his fiduciary responsibility by disclosing the Association's privileged communications with its counsel. Finally, the court found Coley suffered damages as a result of the directors' breaches of their fiduciary duties—satisfying the third and final element for breach of fiduciary duty." (Coley v. Eskaton (2020) 51 Cal.App.5th 943, 958.)

Plaintiffs allege in the breach of contract cause of action: the HOA never informed plaintiffs at any point prior to January 2021 trial that their good standing was restored, thus forcing plaintiffs to continue to litigate the issue for nearly an additional year prior to defendant Earle's testimony at the bifurcated trial that the HOA reversed the fines and violations and returned plaintiffs to good standing in March 2020; the failure to disclose the alleged material information concerning the plaintiffs' violations, fines and good standing status violated the HOA Bylaws Article 6, Civil Code, § 4935 and the C,C,&R Clarifications, Rules, and Enforcement Policy, Chapter 1, Section 2(j); for almost a full year the HOA continued to cause plaintiffs to believe that as a result of their loss of good standing they did not have the right to vote, the right to request special meetings, the right to run for the Board, the right to nominate Board members, the right to submit complaints about CC&R violations, or right to improve their property with architectural committee approval; and plaintiffs wished to engage in conduct prevented by their loss of rights. (1st Amended Complaint paragraphs 46-49.)

These allegations are incorporated in the breach of fiduciary duties cause of action by operation of paragraph 51 of the 1st amended complaint.

Plaintiffs further alleged: the HOA never produced any correspondence, resolutions, Board meeting minutes, or any other documents evidencing the Board had reversed the violations and fines and returned the plaintiffs to good standing status, despite their fiduciary duty of full disclosure of all material facts to the plaintiffs; the HOA and defendant Earle never informed the plaintiff at any point prior to trial that their good standing was restored; the HOA continued to have the plaintiffs believe they were not in good standing thus forcing them to litigate the issue for nearly an additional year prior to defendant Erle's testimony during the first trial and endure the humiliation and emotional distress resulting from such a designation; the HOA and defendant Earle misled plaintiffs to continue to litigate an issue allegedly resolved a year prior by failure to disclose material information concerning the violations, fines, and good standing status; for almost a full year the HOA and defendant Earle continued to cause plaintiffs to believe that due to their loss of good standing they did not have the right to vote, right to request special meetings, right to run for the Board, right to nominate anyone for the Board, right to submit complaints about C,C,&R violations, or right to improve their property with architecture committee approval; the plaintiffs wished to engage in such conduct that was prevented by their loss of rights; clear and convincing evidence establishes the defendants engaged in constructive fraud based upon concealment of a material fact, which is a breach of their fiduciary duties; and plaintiffs suffered damages to include causing further unnecessary emotional distress to plaintiffs and legal fees. (1st Amended Complaint, paragraphs 59-65.)

"To create a triable issue of material fact, the opposition evidence must be directed to issues raised by the pleadings. (*Zavala v. Arce*, supra, 58 Cal.App.4th at p. 926, 68 Cal.Rptr.2d 571.)" (Distefano v. Forester (2001) 85 Cal.App.4th 1249, 1264-1265.)

Therefore, a triable issue of material fact as to whether defendants breached their fiduciary duty to the plaintiffs as HOA members would arise and prevent entry of summary judgment if the evidence submitted by defendants was strictly construed and the evidence of the plaintiffs liberally construed and resolving doubts as to the propriety of granting the motion in favor of the plaintiffs there is evidence that defendant Earle and the HOA engaged in constructive fraud and violation of their duty to timely advise them of the Board's purported action in restoring them to good standing in the HOA and instead waited for nearly nine months before defendant Earle disclosed that fact in testimony in the middle of the first trial and/or defendants failed to follow the HOA Bylaws regarding maintaining and published minutes of Board actions.

The HOA Bylaws list the Board Responsibilities in Article 6, which all directors are charged with accomplishing, including the following responsibilities: provide all violation notifications in accordance with the SRR Enforcement Policy and applicable state and federal laws; maintain a community bulletin board where community information and Board meeting agendas, minutes and notifications may be posted; and <u>be responsible for posting all public notification, minutes, etc. on the community bulletin board unless otherwise specified within the Governing Documents or as determined by the Board</u>. (Emphasis added.) (Defense Exhibit 1 – HOA Bylaws, Article 6, paragraphs 1.a., 14, and 20.)

The court is unable to find any material fact statement in the defendants' Separate Statement of Undisputed Material Facts or any evidence presented by defendants whatsoever that the Board and its members, including defendant Earle, discharged their Bylaw duty to post the minutes of the March 9, 2020 Board meeting that included the Board action waiving the fines against plaintiffs and restoring them to good standing status.

"(a) Except as provided in subdivision (b), the association shall give notice of the time and place of a board meeting at least four days before the meeting. ¶ * * * (d) Notice of a board meeting shall contain the agenda for the meeting." (Civil Code, §§ 4920(a) and 4290(c).)

The court is unable to find any material fact statement in the defendants' Separate Statement of Undisputed Material Facts or any evidence presented by defendants whatsoever that the Board discharged its statutory duty to duly notice the March 9, 2020 Board meeting and give notice of the Agenda of the meeting, which purportedly included the issue of waiver of fines and restoration of plaintiffs' good standing.

"(a) The board may adjourn to, or meet solely in, executive session to consider litigation, matters relating to the formation of contracts with third parties, member discipline, personnel matters, or to meet with a member, upon the member's request, regarding the member's payment of assessments, as specified in Section 5665." (Civil Code, § 4935(a).)

"(e) Any matter discussed in executive session shall be generally noted in the minutes of the immediately following meeting that is open to the entire membership." (Emphasis added.) (Civil Code, § 4935(e).)

"(a) The minutes, minutes proposed for adoption that are marked to indicate draft status, or a summary of the minutes, of any board meeting, other than an executive session, shall be available to members within 30 days of the meeting. The minutes, proposed minutes, or summary minutes shall be distributed to any member upon request and upon reimbursement of the association's costs for making that distribution." (Civil Code, § 4950(a).)

Therefore, defendants had a statutory obligation to generally note the result of the March 9 2020 executive session regarding waiving plaintiffs' fines and restoring them to good standing in the minutes of the very next Board meeting open to the public and then make those minutes

available to members within 30 days of the that meeting. The evidence that follows shows that defendants utterly failed to meet those statutory obligations.

Plaintiffs' counsel declares: having reviewed all discovery responses and documents produced in this litigation, to date, the HOA has not produced any final meeting minutes for the alleged March 9, 2020 executive session wherein defendant Earle and the defendant HOA assert good standing of plaintiffs was discussed; despite having subpoenaed the documents and having propounded document requests this year, neither the management company (Both Helsing Group and its successor Management Alternatives) nor the HOA have produced any emails whereby draft meeting minutes for the March 9, 2020 Executive Session meeting were sent; the emails have been specifically requested in discovery; on March 25, 2020 he had an email exchange with defense wherein counsel asked whether the waiver of fines against the plaintiffs restored them to good standing and the only response he received from defense counsel was a citation to Civil Code, §§ 5105(b)-(e) and 5105(g).(Declaration of Mahdi Ibrahim in Opposition to Motion, paragraphs 3, 4, and 6.)

Defense counsel declares: on March 25 2020 he and plaintiffs' counsel exchanged emails concerning the Board's waiver of all fines against plaintiffs on March 9, 2020; plaintiffs' counsel expressly asked whether the waiver of the fines restored the plaintiffs to good standing; rather than directly answering the question, defense counsel instead referred counsel to Civil Code, §§ 5105(b)-(e) and 5105(g); and he stated that "I am not inclined to answer argumentative interrogatories such as when did you stop beating your wife." (Declaration of Thomas Ware II in Support of Motion, paragraphs 5, 6, and 8; and Exhibits 6-8.)

Defendant Earle declares: on March 9, 2020 she attended an executive session of the HOA Board; seven members were present; a motion was passed by the Board to waive all fines for the trailer and LAR violations levied on the Katkazians and return them to members in good

standing; the draft minutes are attached as Exhibit 2; in March 2020 the HOA was managed by a professional company, the Helsing Group; she understood them to be qualified professional HOA managers with extensive background in managing HOAs; they had specialized knowledge that she did not have with regard to legal requirements of the Board and she regularly relied on their expertise; in March 2020 the HOA management company prepared draft minutes and presented them to the Board within 30 days; the Helsing Group also acted as the HOA custodian of records; in March 2020 the draft minutes were prepared by and obtained from the Helsing Group; she believed her vote to remove the fines and restore plaintiffs' good standing was in the best interests of the HOA and would serve as a "olive branch" and help facilitate resolution of the instant lawsuit; as president the Board she ordinarily relies on the HOA management company with respect to communications between the HOA and homeowners; the management company typically prepares any necessary correspondence or notices to homeowners arising out of Board actions at meetings; it is the custom and practice during her time on the Board to not engage in meticulous oversight over the management communications with the members; the Board members do not monitor every communication that Management sends to members; she relies on the management company's expertise and background and experience when it comes to communications with homeowners; in March 2020 plaintiffs had filed this litigation and it was her understanding that given the Board was involved in litigation, all communications with plaintiffs were be through defense counsel, Mr. Ware; due to the custom and practice of the HOA, she believed any necessary correspondence with plaintiffs arising from the Board decision to rescind the fines and restore plaintiffs' good standing would be communicated to plaintiffs by the HOA management or defense counsel; she relied on Helsing Management and defense counsel to convey the information regarding the March 2020 executive session; she never intended to

mislead or hide the restoration of good standing or waiver of fines; she never attempted to conceal restoration of good standing; she did not ask the management or the HOA counsel not to advise plaintiffs about restoration of good standing; from March 2020 to January 2021 plaintiffs did not request from her directly information regarding their good standing; between March 2020 and trial in January 2021 plaintiffs never made any request to the HOA for executive session minutes; she first became aware that plaintiffs had questions about their good standing status at trial; and she is unaware of any governing documents that she has a duty to advise homeowners when good standing is reinstated. (Declaration of Julia Earle in Support of Motion, paragraphs 20-35.)

"(b) An association shall disqualify a person from a nomination as a candidate for not being a member of the association at the time of the nomination. ¶ (1) This subdivision does not restrict a developer from making a nomination of a nonmember candidate consistent with the voting power of the developer as set forth in the regulations of the Department of Real Estate and the association's governing documents. ¶ (2) If title to a separate interest parcel is held by a legal entity that is not a natural person, the governing authority of that legal entity shall have the power to appoint a natural person to be a member for purposes of this article. ¶ (c) Through its bylaws or election operating rules adopted pursuant to subdivision (a) of Section 5105 only, an association may disqualify a person from nomination as a candidate pursuant to any of the following: ¶ (1) Subject to paragraph (2) of subdivision (d), an association may require a nominee for a board seat, and a director during their board tenure, to be current in the payment of regular and special assessments, which are consumer debts subject to validation. If an association requires a nominee to be current in the payment of regular and special assessments, it shall also require a director to be current in the payment of regular and special assessments. ¶ (2) An association may disqualify a person from nomination as a

candidate if the person, if elected, would be serving on the board at the same time as another person who holds a joint ownership interest in the same separate interest parcel as the person and the other person is either properly nominated for the current election or an incumbent director. ¶ (3) An association may disqualify a nominee if that person has been a member of the association for less than one year. ¶ (4) An association may disqualify a nominee if that person discloses, or if the association is aware or becomes aware of, a past criminal conviction that would, if the person was elected, either prevent the association from purchasing the insurance required by Section 5806 or terminate the association's existing insurance coverage required by Section 5806 as to that person should the person be elected. ¶ (d) An association may disqualify a person from nomination for nonpayment of regular and special assessments, but may not disqualify a nominee for nonpayment of fines, fines renamed as assessments, collection charges, late charges, or costs levied by a third party. The person shall not be disqualified for failure to be current in payment of regular and special assessments if either of the following circumstances is true: ¶ (1) The person has paid the regular or special assessment under protest pursuant to Section 5658. ¶ (2) The person has entered into and is in compliance with a payment plan pursuant to Section 5665. ¶ (e) An association shall not disqualify a person from nomination if the person has not been provided the opportunity to engage in internal dispute resolution pursuant to Article 2 (commencing with Section 5900) of Chapter 10." (Civil Code, § 5105(b)-(e).)

"(g) Notwithstanding any other law, the rules adopted pursuant to this section shall do all of the following: ¶ (1) Prohibit the denial of a ballot to a member for any reason other than not being a member at the time when ballots are distributed. (2) Prohibit the denial of a ballot to a person with general power of attorney for a member. ¶ (3) Require the ballot of a person with general power of attorney for a member to be counted if returned in a timely manner. ¶ (4)

Require the inspector or inspectors of elections to deliver, or cause to be delivered, at least 30 days before an election, to each member both of the following documents: ¶ (A) The ballot or ballots. ¶ (B) A copy of the election operating rules. Delivery of the election operating rules may be accomplished by either of the following methods: ¶ (i) Posting the election operating rules to an internet website and including the corresponding internet website address on the ballot together with the phrase, in at least 12-point font: "The rules governing this election may be found here:" ¶ (ii) Individual delivery." (Civil Code, § 5105(g).)

Defense counsel was nonresponsive to the question posed – was good standing restored by waiver of the fines? The cited subdivisions of Section 5105 do not address all the claimed disabilities imposed on plaintiffs by a lack of good standing status. While the statute prohibits HOA disqualification of a person from nomination as a candidate for HOA office for nonpayment of fines, there is no provision in the stated statutes that prohibits the HOA from barring plaintiffs from requesting special elections, filing complaints about C,C,&R violations, or seeking to improve their property with architectural committee approval while the plaintiffs were penalized for the alleged C,C,&R violations by the HOA changing their status to not in good standing.

Defendant Earle testified during trial on the bifurcated causes of action in this action on January 12, 2021 that that in March 2020 the fines were waived against the plaintiffs and that meant they were returned to good standing in the HOA; other than an impression that the HOA management company would send notice to plaintiffs, she had no correspondence as evidence to prove notice was ever provided to plaintiffs; she approves the Board minutes and the management company acts as Secretary; she has to assume the management company is doing the best job it can and she takes responsibility; she hoped the board minutes of the executive session waiving the fines were prepared; and she just knows that the management

company took it upon themselves to send the appropriate letter to plaintiffs. (Plaintiffs' Exhibit F – Transcript of Julia Earle's Testimony at Trial on January 12, 2021, page 51, line 14 to page 52, line 10; page 52, line 20 to page 53, line 16; page 53, line 25 to page 54, line 19; and page 55, lines 7-16.) Defendant Earle later testified at her April 28, 2022 deposition: the Board has a process of drafting minutes of executive sessions or board meetings wherein the HOA management company takes down the notes/minutes of the meeting and unusually about two days to one week after the meeting she would receive the draft minutes of the meeting; the draft minutes are usually sent to her by email; executive session draft minutes are usually approved at the following board meeting; to her knowledge there has never been an instance where the executive session minutes were not approved at the next Board meeting; if there are a few executive sessions between Board meetings, the minutes for those sessions would be approved at the next Board meeting; she does not recall receiving the subject draft minutes until much later; she is not aware of the management company ever sending documentation to the plaintiffs about good standing; the March 9, 2020 meeting minutes were not reviewed at the June 30, 2020, August 4, 2020, or October 13, 2020, Board meetings; it was probably a good chance that due to COVID the June 30, 2020 meeting was the first Board meeting after the March 9, 2020 executive session meeting and the March 9 2020 meeting minutes were not approved until June 15, 2021, many months after the conclusion of the bifurcated first part of the trial of this action. (Plaintiffs' Exhibit G – Transcript of Defendant Erle's April 28, 2022 Deposition Testimony, page 8, lines 5-19; page 9, lines 4-10; page 26, line 23 to page 27, line 4; page 85, lines 4-7; and page 98, line 10 to page 100, line 16.)

Defendant Earle has admitted in her deposition testimony that she and the Board did nothing to insure that the March 9, 2020 draft minutes were timey reviewed and finalized within 30 days and included in the minutes at the immediately next Board meeting; and, in fact, the

March 9, 2020 meeting minutes were not approved until June 15, 2021, more than one year later and more than four months after the first part of the trial of this action. A reasonable inference that can be drawn from the evidence is that knowing the litigation involved the validity of the finding of violations of the C,C,&Rs, the fines imposed for the violations and the imposition of the penalty of removal of the plaintiffs' good standing in the HOA, the long delayed finalization of the draft minutes, the resultant delay that prevented any publication of the Board action in the minutes of the Board meeting on the bulletin board as mandated, and defense counsel's refusal to disclose whether the plaintiffs' good standing was reinstated was designed to keep them in the dark on the good standing issue until trial.

Board Member Terri Martz testified during her June 16 2022 deposition to the following regarding the March 9, 2020 Board Meeting Executive Session related to the plaintiffs: Board Member Martz remembers that all late fees levied against the plaintiffs were going to be waived; Board Member Terri Martz does not recall whether the term "good standing" member was mentioned at all during that meeting; the deponent does not recall ever seeing the March 9, 2020 draft meeting minutes; and the deponent does not recall that the verbiage of returning the plaintiffs to good standing was ever used. (Plaintiffs' Exhibit E – Transcript of Deposition Testimony of Terri Martz, page 15, lines 5-11; page 17, lines 2-10; and page 32, line 23 to page 33, line 2.)

The HOA's person most knowledgeable, Kathleen Westover testified at her June 16, 2022 deposition to the following: following the March 9, 2020 meeting "we" told the management company to send something to their attorney since they are involved in a lawsuit and can not directly contact the plaintiffs; she did not know who told the management company and it was just discussed at the meeting; and she doesn't believe the HOA Board ever told the management company to send something directly to the plaintiffs as attorneys were involved

and the HOA was not allowed to directly contact plaintiffs. (Plaintiffs' Exhibit J – Transcript of Deposition Testimony of Kathleen Westover, page 29, lines 1-6 and 11-23; and page 31, lines 1-15.)

Plaintiff Michelle Katzakian testified in her April 6, 2022 deposition: while she did not request board meeting minutes where the HOA waived their fines, she didn't know they even existed in order to ask for them, and she did not see anything posted, meeting minutes, on the bulletin board. (Defense Exhibit 10 – Transcript of Deposition of Michelle Katzakian, page 24, lines 8-18.)

Unexecuted draft minutes of the executive session on March 9, 2020 are submitted by defendants as Defense Exhibit 2, which purportedly waived the fines and returned plaintiffs to good standing, yet did not vacate or expunge the violations found to have occurred. There is no evidence that defendants complied with the statutory requirements to generally note what was discussed in the March 9, 2020 executive session wherein the fines imposed on plaintiffs were purportedly waived and they were returned to good standing in the minutes of the immediately following meeting that is open to the entire membership and then posted those minutes. In fact, there is evidence to the contrary.

Defendant Earle has essentially admitted that the HOA failed to discharge its responsibilities under law regarding preparation of the minutes, posting the minutes, and making available to the HOA member plaintiffs the minutes regarding the Board action purportedly waiving the fines imposed on plaintiffs and restoring their HOA memberships to good standing. The waiver of fines and restoration of plaintiffs' good standing was mandated by the HOA Bylaws to have been generally noted in the minutes of the Board and within 30 days of that Board meeting draft or approved minutes be made available to the members by means of the HOA website and/or public bulletin board. (Defense Exhibit 1 – HOA Bylaws,

Article 9, paragraphs 9.a. and 9.b.) Also, as stated earlier in this ruling, defendant Earle and the HOA were required by statute to generally note the waiver of fines and restoration of plaintiffs' good standing in the executive session in the minutes of the immediately following meeting that is open to the entire membership (Civil Code, § 4935(e).), which was not done for more than one year after the executive session.

In addition, while the previously cited evidence could be reasonably construed as showing though a series of errors related to notice and publication of the March 9, 2020 meeting minutes or that publication of the results never made it to a forum where plaintiffs could have been timely informed of the waiver of fines and restoration of good standing, the previously cited evidence just as easily raises a reasonable inference that plaintiffs were intentionally kept in the dark and then ambushed at the first trial where the issue of penalties being wrongfully imposed on plaintiffs were alleged and at issue in the initial complaint and brought up at trial. (See Defendants' Request for Judicial Notice Exhibit A – Initial Complaint, paragraphs 29, 42, and 44.) Defendant HOA and defendant HOA President Earle must have been on notice and reasonably knew that the plaintiffs were challenging the entire disciplinary proceeding and penalties imposed. In fact, the issue of monetary and good standing penalties was the subject of the first trial and the court's statement of decision. (See Defense Request for Judicial Notice, Exhibit D – Court's Statement of Decision – Page 30, line 10 to page 32, line 27.)

Strictly construing the moving party's evidence, liberally construing the evidence submitted in opposition to the motion, resolving doubts as to the propriety of granting the motion in favor of the party resisting the motion, and considering all of the evidence and all of the inferences reasonably drawn therefrom in the light most favorable to the opposing party (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843; and Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal.App.4th 1509, 1524.), the court finds there remains triable issues of material fact

concerning whether defendants breached their fiduciary duties related to disclosure of the Board actions and preparation of minutes of proceedings wherein the Board purportedly waived the fines and reinstated the plaintiffs to good standing and then concealed that Board action until trial nearly one year later to the detriment of plaintiffs.

The question then becomes, whether defendants are protected by the business judgment rule.

- Business Judgment Rule

"'The common law business judgment rule has two components--one which immunizes [corporate] directors from personal liability if they act in accordance with its requirements, and another which insulates from court intervention those management decisions which are made by directors in good faith in what the directors believe is the organization's best interest.' (*Lee v. Interinsurance Exchange* (1996) 50 Cal.App.4th 694, 714, 57 Cal.Rptr.2d 798, citing 2 Marsh & Finkle, Marsh's Cal. Corporation Law (3d ed., 1996 supp.) § 11.3, pp. 796-797.) A hallmark of the business judgment rule is that, when the rule's requirements are met, a court will not substitute its judgment for that of the corporation's board of directors. (See generally, *Katz v. Chevron Corp.* (1994) 22 Cal.App.4th 1352, 1366, 27 Cal.Rptr.2d 681.) As discussed more fully below, in California the component of the common law rule relating to directors' personal liability is defined by statute. (See Corp.Code, §§ 309 [profit corporations], 7231 [nonprofit corporations].)" (Lamden v. La Jolla Shores Clubdominium Homeowners Assn. (1999) 21 Cal.4th 249, 257.) "The business judgment rule is '"a judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions."' (*Barnes*, supra, 16 Cal.App.4th at p. 378, 20 Cal.Rptr.2d 87; *Gaillard v. Natomas Co.*, supra, 208 Cal.App.3d at p. 1263, 256 Cal.Rptr. 702.) The rule is based on the premise that those to whom the management of a business organization has been entrusted,

and not the courts, are best able to judge whether a particular act or transaction is helpful to the conduct of the organization's affairs or expedient for the attainment of its purposes. (*Barnes*, supra, 16 Cal.App.4th at p. 378, 20 Cal.Rptr.2d 87; *Eldridge v. Tymshare* (1986) 186 Cal.App.3d 767, 776, 230 Cal.Rptr. 815.) The rule establishes a presumption that directors' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the directors in good faith and in the absence of a conflict of interest. (*Katz v. Chevron Corp.* (1994) 22 Cal.App.4th 1352, 1366, 27 Cal.Rptr.2d 681; *Barnes*, supra, 16 Cal.App.4th at pp. 379-380, 20 Cal.Rptr.2d 87.)" (Lee v. Interinsurance Exchange (1996) 50 Cal.App.4th 694, 711.)

On the other hand, "This is not to say that directors of California corporations may immunize themselves simply by acquiring information. It is clear that the rule does not protect a director in certain situations, such as where there is a conflict of interest, fraud, oppression, or corruption. See *Barnes*, 20 Cal.Rptr.2d at 95." (F.D.I.C. v. Castetter (9th Cir.1999) 184 F.3d 1040, 1046.) "It is, of course, true that the business judgment rule does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest. (*Gaillard v. Natomas*, supra, 208 Cal.App.3d at p. 1263-1264, 256 Cal.Rptr. 702; *Eldridge v. Tymshare, Inc.*, supra, 186 Cal.App.3d at pp. 776-777, 230 Cal.Rptr. 815.)" (Lee v. Interinsurance Exchange (1997) 50 Cal.App.4th 694, 715.) "The business judgment rule is premised on the notion that "those to whom the management of the corporation has been entrusted are primarily responsible for judging whether a particular act or transaction is one which is helpful to the conduct of corporate affairs or expedient for the attainment of corporate purposes...." (*Marsili v. Pacific Gas & Elec. Co.* (1975) 51 Cal.App.3d 313, 324, 124 Cal.Rptr. 313.) It sets up a presumption that directors' decisions are based on sound business judgment. This presumption can be rebutted only by a factual showing of fraud, bad faith or gross

overreaching. (*Beehan v. Lido Isle Community Assn.* (1977) 70 Cal.App.3d 858, 865, 137 Cal.Rptr. 528.)" (Eldridge v. Tymshare, Inc. (1987) 186 Cal.App.3d 767, 776.)

"….the case law is clear that conduct contrary to governing documents may fall outside the business judgment rule. (See, e.g., *Nahrstedt, supra,* 8 Cal.4th at p. 374, 33 Cal.Rptr.2d 63, 878 P.2d 1275.)" (Palm Springs Villas II Homeowners Assn., Inc. v. Parth (2016) 248 Cal.App.4th 268, 282–283.)

There is evidence that despite the HOA being involved in litigation over the validity of the disciplinary action taken against plaintiffs, including finding plaintiffs violated the C,C,&Rs, assessing fines, and revoking their good standing in the HOA as a penalty, defendants, including defendant Earle, held a Board executive session wherein they purportedly waived the fines and restored plaintiffs' good standing in the HOA without complying with statutory and governing document mandates regarding Board minutes and publishing such minutes. (See HOA Bylaws, Article 6, paragraphs 1.a., 14, and 20; and Civil Code, §§ 4935(a) and 4935(e).) This failure falls outside the business judgment rule.

In addition, while the business judgment rule establishes a presumption that directors' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the directors in good faith and in the absence of a conflict of interest, the failure to advise plaintiffs of the Board's purported action nearly one year prior to the court trial restoring plaintiffs' good standing in the HOA, which is a key issue in this litigation, or produce the purported draft minutes prior to trial, then bringing it up in the court trial in an apparent defensive manner against the claims related to the discipline imposed, does not implicate a challenge to the Board's business decision itself, but instead the plaintiffs challenge the timing of disclosure as a constructive fraud (See 1st Amended Complaint, paragraph 64.).

If defendants contend that there was a business judgment decision that delayed the publication of the Board action and disclosure to plaintiffs until trial, which is protected by the business judgment rule, then the previously cited evidence and timing of the disclosure at trial raises a reasonable inference that the decision was made by the HOA Board members, including defendant Earle, in bad faith to ambush the plaintiffs at trial with the information in defense against the plaintiffs' claims concerning the propriety of the disciplinary proceedings, findings, and the penalties imposed.

Only management decisions which are made by directors in good faith in what the directors believe is the organization's best interest are protected by the business judgment rule.

Strictly construing the moving party's evidence, liberally construing the evidence submitted in opposition to the motion, resolving doubts as to the propriety of granting the motion in favor of the party resisting the motion, and considering all of the evidence and all of the inferences reasonably drawn therefrom in the light most favorable to the opposing party (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843; and Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal.App.4th 1509, 1524.), the court finds there remains triable issues of material fact concerning whether the business judgment rule bars the breach of fiduciary duty cause of action.

The next question to resolve is whether the litigation privilege applies under the circumstances presented.

- Litigation Privilege

The purposes of the litigation privilege are to promote access to the courts without the fear of subsequent harassment by derivative tort actions and to avoid an unending roundelay of litigation derived from prior litigation. (Sacramento Brewing Co. v. Desmond, Miller & Desmond (1999) 75 Cal.App.4th 1082, 1091.)

The Third District Court of Appeal has stated: “The litigation privilege is absolute, which means it applies regardless of the existence of malice or intent to harm. (*Abraham v. Lancaster Community Hospital* (1990) 217 Cal.App.3d 796, 810, 266 Cal.Rptr. 360.) "Although originally enacted with reference to defamation actions alone [citation], the privilege has been extended to any communication, whether or not it is a publication, and to all torts other than malicious prosecution. [Citations.]" (Edwards v. Centex Real Estate Corp. (1997) 53 Cal.App.4th 15, 29, 61 Cal.Rptr.2d 518, italics in original.) The privilege vindicates several public policies: "The principal one is ensuring free access to the courts by prohibiting derivative tort actions. [Citation.] The privilege also promotes complete and truthful testimony, encourages zealous advocacy, gives finality to judgments, and avoids unending litigation. [Citation.]" (Budwin v. American Psychological Assn. (1994) 24 Cal.App.4th 875, 880, 29 Cal.Rptr.2d 453.) In the landmark case of Silberg v. Anderson (1990) 50 Cal.3d 205, 212, 266 Cal.Rptr. 638, 786 P.2d 365 (Silberg), the California Supreme Court formulated the rule as follows: "[T]he privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.’" (Wise v. Thrifty Payless, Inc. (2000) 83 Cal.App.4th 1296, 1302.)

The Third District Court of Appeal has held: “Additionally, the Supreme Court in *Silberg* articulated the policies furthered by the litigation privilege. The chief function of the privilege is to afford litigants and witnesses free access to the courts without the threat of derivative litigation. [Footnote omitted.] ¶ Because the policy goal of encouraging free access to the courts by discouraging derivative litigation is paramount, California courts have extended the litigation privilege beyond the defamation context to preclude numerous other tort actions. For example, abuse of process, fraud, intentional inducement of breach of contract, intentional

infliction of emotional distress, intentional interference with prospective economic advantage, invasion of privacy, negligence, and negligent misrepresentation are all subject to the privilege. [Footnote omitted.] Malicious prosecution is the only tort not subject to the litigation privilege. [Footnote omitted.] Yet, the threshold issue in determining whether the privilege applies is whether the injury resulted from communicative acts or noncommunicative conduct. [Footnote omitted.] The litigation privilege applies only to torts arising from communicative acts; it does not protect purely noncommunicative tortious conduct. [Footnote omitted.] Because the privilege applies without regard to malice or evil motives, it has been characterized as "absolute." [Footnote omitted.]" (Emphasis added.) (Brown v. Kennard (2002) 94 Cal.App.4th 40, 45.)

The counsels' communications concerning waiver of the fines do not establish as a matter of law that defendants communicated to plaintiffs that they were restored to good standing as well. Plaintiffs do not seek to hold defendants Earle and the HOA liable for communications during the litigation. They seek to hold defendants liable for withholding information concerning the restoration of their good standing in the HOA for a period of time, thereby restoring to them various rights as members. In other words, the communication between the parties counsels relating to the litigation is not the basis for defendants' liability asserted in this litigation and, therefore, the litigation privilege does not apply as the action is not premised upon causes of action arising from those communicative acts and does not further in any way the purposes of the litigation privilege to promote access to the courts without the fear of subsequent harassment by derivative tort actions and to avoid an unending roundelay of litigation derived from prior litigation.

- Defendant Earle's Conduct Regarding the Financial Statement and Causation of Damages to Plaintiffs

Plaintiffs allege that an award of punitive damages against defendants is also supported by the HOA falsely informing the membership in the HOA's financial statement that the HOA was victorious in the litigation in 2020 and it has been settled; the true facts are that plaintiffs did prove at trial that the disciplinary proceeding, imposition of fines and removal of their good standing was found to have been improper and that there remained a further trail on the breach of contract and breach of fiduciary duty causes of action. (1st Amended Complaint, paragraph 68.)

Defendants argue that plaintiffs can not recover damages for statements made in the HOA's financial statement because plaintiff can not demonstrate a causal connection between defendant Earle's conduct and damages to plaintiffs.

The 1st amended complaint does allege damages were incurred relating to the allegations of concealment of the purported Board action nearly one year prior to the first part of the trial of this action restoring plaintiffs' good standing. (See 1st Amended Complaint, paragraphs 60-62 and 65.)

As stated earlier in this ruling: the Third District Court of Appeal has stated: "To state a cause of action for breach of fiduciary duty, a plaintiff must show "the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." (*Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1101, 3 Cal.Rptr.2d 236.)" (Roberts v. Lomanto (2003) 112 Cal.App.4th 1553, 1562.)

Damage proximately caused by the breach of fiduciary duty is a critical element of the cause of action. It is defendants' initial burden of proof to establish with the evidence presented that one or more elements of the cause of action cannot be established, or that there is a

complete defense to that cause of action. (Scheiding v. Dinwiddie Constr. Co. (1999) 69 Cal.App.4th 64, 69.)

In general, only an entire cause of action, an entire claim for punitive damages, and/or an issue of duty can be the subject of summary adjudication. (Code of Civil Procedure, § 437c(f)(1).)

In concluding that summary adjudication of an issue of damages not involving punitive damages is improper, unless the summary adjudication completely disposes of a cause of action, the 2nd District Court of Appeal has stated: "Petitioners, who are defendants in an action for legal malpractice, seek a writ of mandate to compel the superior court to vacate its March 11, 1996, order denying summary adjudication on the issue of plaintiffs' entitlement to "lost opportunity" damages, and to compel the superior court to grant their motion for summary adjudication of that issue. The primary issue presented on this proceeding is whether Code of Civil Procedure section 437c, subdivision (f)(1), permits summary adjudication with respect to only one of two or more components of compensatory damages claimed by plaintiff, so that the granting of the motion will not completely dispose of a cause of action. We conclude that section 437c, subdivision (f)(1), does not permit summary adjudication under such circumstances, and the trial court properly denied defendants' motion for summary adjudication on that ground." (Emphasis added.) (DeCastro West Chodorow & Burns, Inc. v. Superior Court (1996) 47 Cal.App.4th 410, 412.) "Thus, despite the more awkward sentence structure of the 1993 amendment, we can only conclude that the first sentence of subdivision (f)(1) was amended only to provide clarity and not to alter the meaning of the prior version of the sentence. Accordingly, the current version of the statute, like the former version, contains parallel independent and dependent clauses which must be read together. Thus, when the independent clause is read in conjunction with its corresponding qualifying clause, the statute

provides that a party may move for summary adjudication as to "one or more claims for damages" if that party contends that "there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code." The reference to "one or more claims for damages" in the first part of the sentence is thus still qualified by, and limited to, punitive damages. We submit that there is no other reasonable interpretation of the sentence which gives effect to all of its words. Petitioners' reading of the statute renders the reference to punitive damages, as well as the reference to "one or more causes of action" mere surplusage, a result to be avoided. ¶ We also conclude that in order to give effect to the first sentence of subdivision (f)(1), the second sentence must also be read in conjunction with the first sentence, so that the reference to "a claim for damages" must be qualified as referring to the previously defined claim for punitive damages. ¶ Petitioners assert that their interpretation of the statutory language is supported by caselaw, but the two cases they cite do not support their arguments. In *Lilienthal & Fowler v. Superior Court*, supra, 12 Cal.App.4th 1848, 16 Cal.Rptr.2d 458, the court held that where a plaintiff had alleged within one "cause of action" two separate and distinct obligations relating to two separate and distinct claims, the trial court could not refuse to rule on the merits of a motion for summary adjudication filed by defendants which related only to one of the obligations. In that case, plaintiff sued defendants for legal malpractice in connection with two separate and distinct legal matters, which had nothing to do with each other, and the court concluded that the two matters involved separate and distinct causes of action regardless of how pled in the complaint. (Id. at p. 1854, 16 Cal.Rptr.2d 458.) The court also pointed out that a leading treatise noted that the phrase "cause of action" is unclear, in a broad sense referring to the invasion of a primary right, but in more common usage, a group of related paragraphs in a complaint is often labeled as a "cause of action," to reflect a separate theory of liability. The treatise concludes that: " '... As used in CCP § 437c(f), "cause of action" should be interpreted

in the latter sense (theory of liability).' (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 1992) § 10:39, p. 10-12.1....)" (*Lilienthal & Fowler v. Superior Court*, supra, 12 Cal.App.4th at p. 1853, 16 Cal.Rptr.2d 458.) *Lilienthal* offers no support to petitioners' arguments because what was at issue in their motion was a single item of compensatory damage which did not dispose of the entire cause of action, no matter how defined. ¶ Nor does *Hood v. Superior Court*, supra, 33 Cal.App.4th 319, 39 Cal.Rptr.2d 296, support petitioners' interpretation of the statute. Hood involved a complaint alleging breach of a noncompetition clause of a contract, and a cross-complaint alleging breach of contract and fraudulent inducement to enter the contract; after the court denied the plaintiff's motion for summary adjudication with respect to defendants' cross-complaint, plaintiff amended its complaint to add a cause of action for declaratory relief, seeking a determination of its rights under the termination clause of the contract, issues which were already fully engaged by other causes of action. The trial court granted plaintiff's motion for summary adjudication. The court of appeal issued a writ of mandate directing the trial court to set aside its order, stating that "The adjudication of the declaratory relief cause of action did not purport, by itself, to adjudicate the entirety of any cause of action. Because it did not (and did not adjudicate any of the specific matters still within the scope of summary adjudication), it was prohibited by section 437c, subdivision (f)(1). The trial court should have denied the motion, and its failure to do so was an abuse of discretion." (33 Cal.App.4th at p. 324, 39 Cal.Rptr.2d 296; see also *Belio v. Panorama Optics, Inc.* (1995) 33 Cal.App.4th 1096, 1102-1103, 39 Cal.Rptr.2d 737; but see *Southern Cal. Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 846, 44 Cal.Rptr.2d 227.) ¶ We conclude that Code of Civil Procedure section 437c, subdivision (f)(1), does not permit summary adjudication of a single item of compensatory damage which does not dispose

of an entire cause of action." (DeCastro West Chodorow & Burns, Inc. v. Superior Court (1996) 47 Cal.App.4th 410, 421-422.)

Therefore, even assuming for the sake of argument that defendants have met their initial burden to prove that the damages from the HOA's financial statement were not proximately caused by defendant Earle's conduct, the defendants have not met their initial burden to prove that the remaining damages component of the breach of fiduciary duties cause of action that asserts plaintiffs were damaged by concealment of the purported Board action nearly one year prior to the first part of the trial of this action restoring plaintiffs' good standing was not proximately cause by the concealment. To meet the initial burden of proof establishing the defendants are entitled to summary adjudication on the ground that the evidence shows that plaintiffs were not damaged by the breach of fiduciary duty requires evidence showing all damages asserted in the operative complaint can not be recovered by plaintiffs as a matter of law. Defendants not having met that initial burden, the plaintiffs were not required to submit evidence that those damages were incurred and defendants have not met their burden to establish as a matter of law that the plaintiffs were not damaged by the breaches of fiduciary duty by defendants, thereby leaving a triable issue of material fact concerning damages incurred.

The motion for summary judgment/summary adjudication of the breach of fiduciary cause of action is denied.

However, to the extent that the publication of the HOA financial statement is asserted as a basis for an award of punitive damages, it can be summarily adjudicated provided that defendants meet their initial burden to prove with the evidence submitted in support of the motion that all the alleged conduct by defendants did not meet the requirements for imposition of punitive damages and plaintiffs have not submitted evidence raising a triable issue of

material fact as to the alleged conduct that meets the requirements for imposition of punitive damages.

Breach of Fiduciary Duty Cause of Action – Defendant HOA

For the same reasons as articulated in the above ruling on the motion for summary adjudication of the breach of fiduciary duty cause of action against defendant Earle and considering the same evidence cited earlier, strictly construing the moving party's evidence, liberally construing the evidence submitted in opposition to the motion, resolving doubts as to the propriety of granting the motion in favor of the party resisting the motion, and considering all of the evidence and all of the inferences reasonably drawn therefrom in the light most favorable to the opposing party (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843; and Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal.App.4th 1509, 1524.), the court finds there remains triable issues of material fact concerning the breach of fiduciary duty cause of action maintained against the HOA, which prevents entry of summary adjudication.

Punitive Damages – Defendants Earle and HOA

Plaintiffs allege that they are entitled to an award of punitive damages against defendants as the alleged conduct amounted to malice, fraud, and oppression; and such conduct included constructive fraud by concealment of the Board's purported action waiving the penalties imposed on plaintiffs and restoring their good standing for nearly a full year and then springing it on them during the middle of the first part of a bifurcated trial of this action, as well as publishing the HOA financial statement that falsely stated the HOA was victorious in the instant action and the action has been settled. (1st Amended Complaint, paragraphs 58-64, 67, and 68.)

"In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or

malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." (Civil Code, § 3294(a).)

" 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civil Code, § 3294(c)(1).)

" 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civil Code, § 3294(c)(2).)

" 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civil Code, § 3294(c)(3).)

Under the statute, "malice does not require actual intent to harm. [Citation.] Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences. [Citation.] Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. [Citation.]" (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1228, 44 Cal.Rptr.2d 197.)" (Pfeifer v. John Crane, Inc. (2013) 220 Cal.App.4th 1270, 1299.)

The Third District Court of Appeal has stated: "The adjective "despicable" connotes conduct that is " '... so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people.' " (*Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 331, 5 Cal.Rptr.2d 594, quoting BAJI No. 14.72.1 (1989 rev.); *Cloud v. Casey* (1999) 76 Cal.App.4th 895, 912, 90 Cal.Rptr.2d 757.) " '[A] breach of a fiduciary duty alone without malice, fraud or oppression does not permit an award of punitive damages. [Citation.] The wrongdoer " 'must act with the intent to vex, injure, or annoy, or with a

conscious disregard of the plaintiff's rights. [Citations.]' " Punitive damages are appropriate if the defendant's acts are reprehensible, fraudulent or in blatant violation of law or policy. The mere carelessness or ignorance of the defendant does not justify the imposition of punitive damages.... Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate.' " (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1287, 31 Cal.Rptr.2d 433.) ¶ The definition of malice has not always included the requirement of willful and despicable conduct. Prior to 1980, section 3294 did not define malice. It was construed to mean malice in fact, which could be proven directly or by implication (*Taylor v. Superior Court* (1979) 24 Cal.3d 890, 894, 157 Cal.Rptr. 693, 598 P.2d 854 (*Taylor*); 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1335, p. 793) and could be established by conduct that was done only with "a conscious disregard of the safety of others...." (*Taylor, supra,* at p. 895, 157 Cal.Rptr. 693, 598 P.2d 854.) Relying on the reasoning in *G.D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 122 Cal.Rptr. 218, the *Taylor* court recognized that recklessness alone is insufficient to sustain an award of punitive damages because " '[t]he central spirit of the exemplary damage statute, the demand for evil motive, is violated by an award founded upon recklessness alone.' " (24 Cal.3d at p. 895, 157 Cal.Rptr. 693, 598 P.2d 854.) The court concluded that "[i]n order to justify an award of punitive damages on this basis, the plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct, and that he willfully and deliberately failed to avoid those consequences." (*Id.* at pp. 895-896, 157 Cal.Rptr. 693, 598 P.2d 854.) Applying that test, the Supreme Court directed the trial court to reinstate a claim for punitive damages where it was alleged the defendant was operating a motor vehicle while intoxicated, under circumstances which disclosed a conscious disregard of the probable dangerous consequences. [FN 14.] ¶ FN14. The circumstances

alleged in *Taylor* were that a car driven by the defendant collided with plaintiff's car causing him serious injuries, that at the time of the collision, the defendant was drinking an alcoholic beverage and under its influence, he had been an alcoholic for a substantial period of time and was well aware of the serious nature of his alcoholism, he had a history and practice of driving a motor vehicle while under the influence of alcohol, he had previously caused a serious automobile accident while under the influence of alcohol, and had been convicted numerous times for driving under the influence of alcohol. (*Id.* at p. 893, 157 Cal.Rptr. 693, 598 P.2d 854.) ¶ In 1980, the Legislature amended section 3294 by adding the definition of malice stated in *Taylor, supra,* 24 Cal.3d 890, 157 Cal.Rptr. 693, 598 P.2d 854. (Stats.1980, ch. 1242, § 1, pp. 4217-4218; *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 713, 34 Cal.Rptr.2d 898, 882 P.2d 894.) That definition was amended in 1987. As amended, malice, based upon a conscious disregard of the plaintiff's rights, requires proof that the defendant's conduct is "despicable" and "willful." (Stats.1987, ch. 1498, § 5.) The statute's reference to "despicable conduct" represents "a new substantive limitation on punitive damage awards." (*College Hospital, Inc. v. Superior Court, supra,* 8 Cal.4th at p. 725, 34 Cal.Rptr.2d 898, 882 P.2d 894.) ¶ Additionally, the 1987 amendment increased the burden of proof. Malice or oppression must now be established "by clear and convincing evidence." (Stats.1987, ch. 1498, § 5.) That standard "requires a finding of high probability .... ' "so clear as to leave no substantial doubt"; "sufficiently strong to command the unhesitating assent of every reasonable mind." ' [Citation.]" (*In re Angelia P.* (1981) 28 Cal.3d 908, 919, 171 Cal.Rptr. 637, 623 P.2d 198, superseded by statute on other grounds as stated in *Orange County Social Services Agency v. Jill V.* (1994) 31 Cal.App.4th 221, 229, 36 Cal.Rptr.2d 848; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 891, 93 Cal.Rptr.2d 364.)" (Lackner v. North (2006) 135 Cal.App.4th 1188, 1211-1213.)

The Third District Court of Appeal has also stated: “" 'The wrongdoer " 'must act with the intent to vex, injure, or annoy, or with a conscious disregard of the plaintiff's rights. [Citations.]' " Punitive damages are appropriate if the defendant's acts are reprehensible, fraudulent or in blatant violation of law or policy. The mere carelessness or ignorance of the defendant does not justify the imposition of punitive damages.... Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate.' " (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1287, 31 Cal.Rptr.2d 433.)” (George F. Hillenbrand, Inc. v. Insurance Co. of North America (2002) 104 Cal.App.4th 784, 815.) The Third District Court of Appeal further stated: “" ' "Despicable conduct" is conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people.' " (*Mock*, supra, 4 Cal.App.4th at p. 331, 5 Cal.Rptr.2d 594.)” (George F. Hillenbrand, Inc. v. Insurance Co. of North America (2002) 104 Cal.App.4th 784, 817.)

Under the totality of the circumstances presented in the evidence previously cited in this ruling, the court find that there are reasonable inferences from the evidence and the circumstances presented that raises a triable issue of material fact as to whether the conduct that resulted in concealment of the plaintiffs’ restoration to good standing that directly led to plaintiffs continuing to litigate the issue for nearly one year amounted to a level of extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate, such that an award of punitive damages is appropriate.

The motion for summary adjudication of the issue of punitive damages is denied.

TENTATIVE RULING # 13: DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION 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 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.eldoradocourt.org/onlineservices/vcourt.html. 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, AUGUST 19, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

14. BRANDON v. NORCAL WATER SYSTEMS PC-20190311

Defendants' Motion to Reopen Discovery.

This action was filed on June 4, 2019. A jury trial is set to commence in this action on October 25, 2022 in Department Nine.

Both parties were present at the ex parte hearing on August 12, 2022. Defendants moved to shorten time to hear defendants' motion to reopen discovery and allow discovery to be completed by October 25, 2022, the trial date set in this action. The court set the matter for hearing at 8:30 a.m. on Friday, August 19, 2022 in Department Nine. The court further directed that briefs are due on August 16, 2022 and oppositions are due on August 18, 2022.

At the time this tentative ruling was prepared, the moving papers and oppositions were not in the courts file.

"Except as otherwise provided in this chapter, any party shall be entitled as a matter of right to complete discovery proceedings on or before the 30th day, and to have motions concerning discovery heard on or before the 15th day, before the date initially set for the trial of the action." (Code of Civil Procedure, § 2024.020(a).)

"On motion of any party, the court may grant leave to complete discovery proceedings, or to have a motion concerning discovery heard, closer to the initial trial date, or to reopen discovery after a new trial date has been set. This motion shall be accompanied by a meet and confer declaration under Section 2016.040." (Code of Civil Procedure, § 2024.050(a).)

"A meet and confer declaration in support of a motion shall state facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion." (Code of Civil Procedure, § 2016.040.)

"In exercising its discretion to grant or deny this motion, the court shall take into consideration any matter relevant to the leave requested, including, but not limited to, the following: ¶ (1) The necessity and the reasons for the discovery. ¶ (2) The diligence or lack of diligence of the party seeking the discovery or the hearing of a discovery motion, and the reasons that the discovery was not completed or that the discovery motion was not heard earlier. ¶ (3) Any likelihood that permitting the discovery or hearing the discovery motion will prevent the case from going to trial on the date set, or otherwise interfere with the trial calendar, or result in prejudice to any other party. ¶ (4) The length of time that has elapsed between any date previously set, and the date presently set, for the trial of the action." (Code of Civil Procedure, § 2024.050(b).)

"The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to extend or to reopen discovery, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (Code of Civil Procedure, § 2024.050(c).)

"…decisions about whether to grant a continuance or extend discovery "must be made in an atmosphere of substantial justice. When the two policies collide head-on, the strong public policy favoring disposition on the merits outweighs the competing policy favoring judicial efficiency." (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 398–399, 107 Cal.Rptr.2d 270.)" (Hernandez v. Superior Court (2004) 115 Cal.App.4th 1242, 1246.)

Appearances are required.

TENTATIVE RULING # 14: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, AUGUST 19, 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.