1. KLINGER V. COLOMA COTTAGES PC-20210186

Motion for Leave to Amend.

Plaintiff moved for leave to amend the complaint. The notice of hearing and moving papers, which stated the hearing was to take place on August 12, 2022, were served by email on July 1, 2022.

On August 17, 2022 the court by ex parte minute order the court stated that due to clerical error the motion filed on July 5, 2022 was not placed on the calendar for August 12, 2022 and the court ordered the motion was set for hearing on 8:30 a.m. on October 7, 2022 in Department Nine. The court directed that notice be given by plaintiff. The August 17, 2022 minute order was only served to plaintiff's counsel by email.

There is no proof of service of notice of the re-setting of the hearing date and time on the motion on the other parties in this action. The court can not consider the merits of the motion in the absence of proof that the other parties to this action was provided adequate notice of this re-set hearing.

TENTATIVE RULING # 1: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, OCTOBER 7, 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. NORSETH v. MESCHI PC-20200444

(1) Cross-Defendants Meschi's Motion for Summary Judgment or Summary Adjudication on Cross-Complainant Coyle's Cross-Complaint.

(2) Cross-Complainants Meschi's Motion for Summary Judgment or Summary Adjudication on Cross-Complainant Meschi's Cross-Complaint.

(3) Cross-Defendants TC Fabrication and Welding, LLC's and William Coyle d.b.a. TC Welding and Fabrication's Motion for Summary Judgment or Summary Adjudication of Causes of Action on Cross-Complainant Meschi's Cross-Complaint.

Cross-Defendants Meschi's Motion for Summary Judgment or Summary Adjudication on Cross-Complainant Coyle's Cross-Complaint.

Cross-Complainants Coyle d.b.a. TC Welding and Fabrication filed a cross-complaint against defendants/cross-defendants Meschi for implied indemnity, partial indemnity/contribution and declaratory relief concerning claims asserted against cross-complainant Coyle in the underlying complaint for premises liability for injuries plaintiff Christine Norseth sustained in a fall in the parking lot of a commercial building owned by defendants/cross-defendants Meschi.

Cross-Defendants Meschi move for summary judgment on the entire cross-complaint or summary adjudication of each of the three causes of action in the cross-complaint on the following grounds: the 1st cause of action for equitable indemnity and 2nd cause of action for equitable contribution are not actionable, because a written contract/Commercial Multi-Tenant Lease between cross-complainant Coyle and cross-defendants Meschi included an express indemnity provision wherein Lessee William Coyle expressly agreed to indemnify, protect, defend and hold harmless the premises, lessors Meschi as trustees of their Trust, and its

agents, lessor Meschi's master or ground lessor, partners and lenders, from and against any and all claims, damages, and etc. arising out of, involving or in connection with, the use and occupancy of the premises by lessee Willaim Coyle; the indemnification clause was triggered by cross-defendants' uses of the parking lot common area to store materials in parking spaces, install a camera system, install a propane tank and gas line, pile scrap metal on top of trash enclosures and parking spaces, parking and unloading UTVs from trucks and trailers in the parking area, and use of the parking lot to demonstrate how to load an ATV on the rack product fabricated by cross-defendants that was just installed on plaintiffs' truck at the time that plaintiff Christine Norseth fell and was injured in the common area parking lot, because plaintiff Christine Norseth's injuries arose out of, involved, or was in connection with, the use and/or occupancy of the premises by lessees, which is defined by the contracts as limited to 6192 Enterprise Drive, Suite G; and the 3rd cause of action for declaratory relief also fails as it is undisputed that plaintiff Christine Norseth was injured while conducting business with cross-complainant William Todd Coyle by and through his son Christopher Coyle as the Coyles were using the property's common area in connection with and as an integral part of their use and occupancy of the leased premises, therefore cross-complainant William Todd Coye owes the trustee cross-defendants Meschi indemnity and not the other way around.

Cross-Complainant William Coyle opposes the motion on the following grounds: the express indemnity clause in the lease does not apply to the common areas and only applies to indemnity for incidents occurring on the "premises", which is defied in the lease as the interior of Suite G and not the common area where the lease placed the sole an exclusive duty to control and manage on cross-defendants Meschi; and there remain triable issues of material fact as to whether cross-defendants Meschi were grossly negligent, which is excluded from the

indemnity provision; and cross-defendants Meschi have not established they are entitled to summary adjudication of the declaratory relief cause of action.

Defendants/Cross-Defendants Meschi replied to the opposition: the court should strike the Coyle's additional material facts due to failure to submit a separate statement in opposition; cross-complainant Coyle's request for judicial notice is defective, because the court may not take judicial notice if motions, supporting evidence other related filings with the court; the facts are not are not of such common knowledge that they can not reasonably be the subject of dispute and are not capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy; the express indemnity clause of the contract permits the doctrine of equitable indemnity; cross-defendants' use of the common area is not so remote as to prevent the operation of the indemnity clause in the agreement requiring indemnity for claims and liabilities arising out of, involving, or in connection with, the use and/or occupancy of the premises; as a matter of law cross-defendants Meschi could not be grossly negligent regarding the railing under the facts presented; and since the Coyles believed the railing was unnecessary, cross-defendants Meschi could not have been grossly negligent.

Defendants/Cross-Defendants Meschi also objected to certain evidence submitted in opposition.

Defendants/Cross-Defendants Meschi's Objections to Evidence Submitted in Opposition

Defendants/Cross-Defendants Meschi objected to consideration of TC Fabrication's and Coyle's Exhibit F, page 69, lines 21-23 and page 70, lines 18-20 concerning what was stated by an insurance agent concerning replacement of a railing on the ground of hearsay. These statements and page and line numbers are not found in Exhibit F, which are various documents produced by cross-defendant Meschi in discovery. They are however, found in TC

Fabrication's and Coyle's Exhibit B – Transcript of Deposition Testimony of Cross-Defendant Michael Meschi.

Cross-Defendant Michael Meschi states in those portions of the deposition transcript that when he made a claim on his insurance related to the incident that is the subject of the complaint, he was advised by his insurance agent that the subject area would benefit from a railing, regardless of whether the Code required it or not.

"(a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. ¶ (b) Except as provided by law, hearsay evidence is inadmissible. ¶ (c) This section shall be known and may be cited as the hearsay rule." (Evidence Code, § 1200.)

"Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." (Evidence Code, § 1221.)

It appears that the insurance agent's out of court statement was not offered for the truth of the matter asserted therein and was instead submitted to support an argument that the later replacement of the railing was in response to the insurance agent's statement and this conduct manifested Michael Meschi's .adoption of the statement or belief it was true

The objections are overruled.

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 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 cross-defendants Meschi's motion for summary judgment or summary adjudication of causes of action of the William Coyle cross-complaint.

Cross-Complainant Coyle's Request for Judicial Notice

Defendants/Cross-Defendants Meschi object to cross-complainant Coyle requesting that the court take judicial notice of the separate statement of undisputed material facts and supporting evidence in support of TC Fabrication and Welding, LLC's, and Coyle's motion for summary judgment on the Meschi cross-complaint, which was filed on July 15, 2022 and the proof of service declares was electronically served on counsels for the Norseths and Meschis on July 13, 2022.

""Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter." (2 Jefferson, Cal. Evidence Benchbook, supra, § 47.1, at pp. 1064-1065.) The court may in its discretion take judicial notice of any court record in the United States. (Evid.Code, § 451.) This includes any orders, findings of facts and conclusions of law, and judgments within court records. (See, e.g., Columbia Cas. Co. v.

Northwestern Nat'l Ins. Co. (1991) 231 Cal.App.3d 457, 282 Cal.Rptr. 389; Day v. Sharp (1975) 50 Cal.App.3d 904, 123 Cal.Rptr. 918.) However, while courts are free to take judicial notice of the existence of each document in a court file, including the truth of results reached, they may not take judicial notice of the truth of hearsay statements in decisions and court files. (Williams v. Wraxall (1995) 33 Cal.App.4th 120, 130, fn. 7, 39 Cal.Rptr.2d 658.) Courts may not take judicial notice of allegations in affidavits, declarations and probation reports in court records because such matters are reasonably subject to dispute and therefore require formal proof. (See, e.g., *Magnolia Square Homeowners Ass'n v. Safeco Ins.* (1990) 221 Cal.App.3d 1049, 1056-1057, 271 Cal.Rptr. 1.) ¶ The underlying theory of judicial notice is that the matter being judicially noticed is a law or fact that is not reasonably subject to dispute. (Evid.Code, § 451, subd. (f); *Post v. Prati* (1979) 90 Cal.App.3d 626, 633, 153 Cal.Rptr. 511.) "By making an order establishing the law of the case, it seems that the facts are no longer in dispute and can therefore be considered true as set forth in an order, findings of fact, or conclusions of law." (2 Jefferson, Cal. Evidence Benchbook, supra, § 47.12, at p. 1068.) Such facts would not be the proper subject of judicial notice. (Ibid.) ¶ The appropriate setting for resolving facts reasonably subject to dispute is the adversary hearing. It is therefore improper for courts to take judicial notice of any facts that are not the product of an adversary hearing which involved the question of their existence or nonexistence. (2 Jefferson, Cal. Evidence Benchbook, supra, § 47.13, at p. 1069.) "A litigant should not be bound by the court's inclusion in a court order of an assertion of fact that the litigant has not had the opportunity to contest or dispute." (Ibid.)" (Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort (2001) 91 Cal.App.4th 875, 882.)

Judicial notice of the truth of the facts set forth in the matters filed related to TC Fabrication and Welding, LLC's, and Coyle's motion for summary judgment on the Meschi cross-complaint that is in the court record in this case is not appropriate.

"Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451: ¶ * * * (g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute." (Evidence Code, § 452(g).)

"Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451: ¶ * * * (h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evidence Code, § 452(h).)

Judicial notice of the facts set forth in the proffered additional facts and evidence offered in opposition to this motion that are in the file for consideration of TC Fabrication and Welding, LLC's, and Coyle's motion for summary judgment on the Meschi cross-complaint do not satisfy the requirements for judicial notice under Section 452(g or 452(h).

Although the court can not take judicial notice of the truth of the matters set forth in the separate statement of undisputed material facts and supporting evidence in support of TC Fabrication and Welding, LLC's and Coyle's motion for summary judgment on the Meschi cross-complaint, the court can construe the cross-complainant's request for judicial notice is, in reality, a request that the court consider that this separate statement filed on July 15, 2022 is additional material facts and supporting evidence to be considered in opposition to defendants/cross-defendants Meschi's motion for summary judgment, which the cross-complainant is statutorily entitled to submit for the court's consideration in response to defendants/cross-defendants Meschi's separate statement of undisputed material facts in support of the motion, which was filed on May 31, 2022 and served on the interested parties by email on May 12, 2022. The court just does not take everything established as true in that document by judicial notice.

In the interests of ruling on this potentially cross-complaint case dispositive motion on its merits, the court will consider the separate statement of undisputed material facts and supporting evidence in support of TC Fabrication and Welding, LLC's and Coyle's motion for summary judgment on the Meschi cross-complaint as additional material facts and supporting evidence to be considered in opposition to defendants/cross-defendants Meschi's motion for summary judgment on the cross-complaint.

Coyles' Additional Material Facts in Opposition

Cross-Complainant argues in reply that pursuant to the provisions of Code of Civil Procedure, § 437c(b)(3) the court should exercise its discretion to disregard the additional material facts in opposition set forth in the opposition and in the separate statement of undisputed material facts and supporting evidence in support of TC Fabrication and Welding, LLC's and Coyle's motion for summary judgment on the Meschi cross-complaint, which cross-complainant Coyle requested the court to take judicial notice of, because the additional asserted material facts in opposition were not formally set forth in cross-complainant Coyle's response to defendants/cross-defendants Meschi's separate statement of undisputed material facts.

"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." (Code of Civil Procedure, § 437c(b)(3).)

While not in compliance with Section 473c(b)(3), the court finds that the failure to formally set forth the asserted additional undisputed material facts in opposition in the response to defendants/cross-defendants Meschi's separate statement of undisputed material facts did not prejudice defendants/cross-defendants Meschi in any way as to the additional material facts asserted in opposition and evidence relied on by cross-complainant Coyle to oppose the motion. The separate statement of undisputed material facts and supporting evidence in support of TC Fabrication and Welding, LLC's and Coyle's motion for summary judgment on the Meschi cross-complaint adheres to the requirements for a separate statement of additional material facts in opposition as it sets forth plainly and concisely any other material facts that the opposing party contends are disputed and each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. In addition, on August 12, 2022 defendants/cross-defendants Meschi filed a response to the separate statement of undisputed material facts and supporting evidence in support of TC Fabrication and Welding, LLC's and Coyle's motion for summary judgment.

The court exercises its discretion to consider the separate statement of undisputed material facts and supporting evidence in support of TC Fabrication and Welding, LLC's and Coyle's motion for summary judgment on the Meschi cross-complaint as the separate statement of additional material facts in opposition.

Implied Indemnity and Partial Indemnity/Contribution Causes of Action

"The right to indemnity flows from payment of a joint legal obligation on another's behalf. (Civ.Code, § 1432; *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 114, 32 Cal.Rptr.2d 263, 876 P.2d 1062.) The elements of a cause of action for indemnity are (1) a showing of *fault* on the part of the indemnitor and (2) resulting damages to the indemnitee for which the indemnitor is contractually or equitably responsible. (Gouvis

Engineering v. Superior Court (1995) 37 Cal.App.4th 642, 646, 43 Cal.Rptr.2d 785.)" (Expressions at Rancho Niguel Ass'n v. Ahmanson Developments, Inc. (2001) 86 Cal.App.4th 1135, 1139.)

"" '[I]n the case law of equitable indemnity ... one point stands clear: there can be no indemnity without liability. In other words, unless the prospective indemnitor and indemnitee are jointly and severally liable to the plaintiff there is no basis for indemnity. [Citation.]' [Citation.] '[A] fundamental prerequisite to an action for partial or total equitable indemnity is an actual monetary loss through payment of a judgment or settlement.' [Citations.] 'It is well settled that a cause of action for implied indemnity does not accrue or come into existence until the indemnitee has suffered actual loss through payment. [Citations.]' " (*Major Clients Agency v. Diemer* (1998) 67 Cal.App.4th 1116, 1130, 79 Cal.Rptr.2d 613 (*Major Clients*).)" (Forensis Group, Inc. v. Frantz, Townsend & Foldenauer (2005) 130 Cal.App.4th 14, 28-29.)

"California permits an action between concurrent tortfeasors for equitable indemnity on a comparative fault basis. (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 591, 146 Cal.Rptr. 182, 578 P.2d 899.) The purpose is to assure liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault. (Ibid.) It is also established a settling defendant may assert a claim for equitable indemnity against a concurrent tortfeasor not named by the plaintiff. (*Sears, Roebuck & Co. v. International Harvester Co.* (1978) 82 Cal.App.3d 492, 494, 147 Cal.Rptr. 262.)" (Mullin Lumber Co. v. Chandler (1986) 185 Cal.App.3d 1127, 1131.)

- Applicability of the Indemnity Provision in the Subject Lease

"Under California law, an "[i]ndemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties or of some other person." (Civ.Code, § 2772.) "An indemnity against claims, or demands, or liability, expressly, or in

other equivalent terms, embraces the costs of defense against such claims, demands, or liability incurred in good faith, and in the exercise of a reasonable discretion...." (Civ.Code, § 2778, subd. 3.) An indemnitor in an indemnity contract generally undertakes to protect the indemnitee against loss or damage through liability to a third person. (*Somers v. U.S. Fidelity & Guaranty Co.* (1923) 191 Cal. 542, 547, 217 P. 746.) ¶ An indemnity agreement is to be interpreted according to the language and contents of the contract as well as the intention of the parties as indicated by the contract. (*Widson v. International Harvester Co., Inc.* (1984) 153 Cal.App.3d 45, 59, 200 Cal.Rptr. 136.) The extent of the duty to indemnify is determined from the contract. (*Herman Christensen & Sons, Inc. v. Paris Plastering Co.* (1976) 61 Cal.App.3d 237, 245, 132 Cal.Rptr. 86.) The indemnity provisions of a contract are to be construed under the same rules governing other contracts with a view to determining the actual intent of the parties. (*Ibid.*) ¶ A clause which contains the words "indemnify" and "hold harmless" is an indemnity clause which generally obligates the indemnitor to reimburse the indemnitee for any damages the indemnitee becomes obligated to pay third persons. (*Varco–Pruden, Inc. v. Hampshire Constr. Co.* (1975) 50 Cal.App.3d 654, 660, 123 Cal.Rptr. 606.) Indemnification agreements ordinarily relate to third-party claims. (*Ibid.*)" (Myers Building Industries, Ltd. v. Interface Technology, Inc. (1993) 13 Cal.App.4th 949, 968–969.)

"The question here is not alone what could be used by defendants as appurtenant to the leased portion of the building but particularly as to what places the indemnity provision would apply. In determining this question and in interpreting the lease, it must be borne in mind that the terms of the lease must be construed strictly against plaintiff, first because the lease was prepared by plaintiff (see Basin Oil Co. v. Baasch-Ross Tool Co., 125 Cal.App.2d 578, 271 P.2d 122; Pacific Lumber Co. v. Industrial Accident Comm., 22 Cal.2d 410, 422, 139 P.2d 892; E. A. Strout Western Realty Agency v. Gregoire, 101 Cal.App.2d 512, 517, 225 P.2d 585);

and secondly, because the indemnity provision purports to indemnify plaintiff against the results of its own negligence. [Footnote omitted] '* * * the law does not look with favor upon attempts to avoid liability or secure exemption for one's own negligence, and such provisions are strictly construed against the person relying upon them. * * * [W]here the language of an instrument purporting to exculpate one of the parties for its future negligence was prepared entirely by the party relying on its terms, words clearly and explicitly expressing that this was the intent of the parties are required. [Citations.]', Basin Oil Co. v. Baasch-Ross Tool Co., supra, 125 Cal.App.2d at pages 594, 595, 271 P.2d at page 131. ¶ In Hollander v. Wilson Estate Co., 214 Cal. 582, 7 P.2d 177, the tenant leased the fourth floor of a 7 story building. The lease contained a provision indemnifying the landlord against all claims for damages to persons or property "in or about or connected with this tenancy or the occupancy of said demised premises." 214 Cal. at page 584, 7 P.2d at page 178. The court held that while no mention was made in the lease of the tenant's right to use the elevator, such right was an appurtenance of the lease. However, as to the indemnity clause, although the elevator was in a sense 'connected with' the tenancy, 'It is contrary to sound construction to say that said instrument had in contemplation the release from liability for damages for personal injuries arising from the negligent operation or maintenance of this public elevator.' 214 Cal. at page 585, 7 P.2d at page 179. ¶ In Pacific Indemnity Co. v. California Electric Works, Ltd., 29 Cal.App.2d 260, 84 P.2d 313, the court was construing the indemnity provision of a building contract. It held that to construe the provision as applying to the indemnity of one of the parties against its own wrong, '* * * the language of the contract must be of such a nature as to compel that interpretation, and to accomplish such a result the language used must be clear and explicit.' 29 Cal.App.2d at page 274, 84 P.2d at page 320. It then quoted from Murray v. Texas Co., 172 S.C. 399, 174 S.E. 231, to the effect that 'broad and comprehensive' language alone

is not enough. The language indemnifying against the parties' own wrong must nevertheless be clear and explicit and as the defendant there wrote the indemnity provision into the contract for its own benefit, it should have 'plainly stated, if such was the understanding of the parties, that the plaintiff agreed to relieve it in the matter from all liability for its own negligence.' 29 Cal.App.2d at page 274, 84 P.2d at page 320. ¶ Applying such rules to the lease here, it would appear that while as appurtenant to the portion of the building leased there necessarily followed the right to use all portions of the building and even the walkway necessary for ingress to and egress from the Arena,-[Footnote omitted.] the indemnity provision only applied to the 'premises' as strictly defined in the lease. Paragraph 12 limits the indemnity to claims resulting from 'the use and occupation of the premises * * *' The parties have specifically defined 'the premises' as 'the Arena * * * (and no other space or accommodation except as may be hereinafter expressly provided for) * * *' While, of course, people going to the Arena would be entitled to use the walkways and driveways around the building and parking areas, if any, it would be unreasonable, in view of the very restrictive language of the lease, to hold that the indemnity applied to injuries incurred by conditions in those areas, particularly conditions over which defendants would have no control but plaintiff would. The mere fact that plaintiff made no charge to defendants for the use of the Arena would not broaden the terms of the indemnity. While the trial court did not characterize the walkway other than to say that it provides ingress to and egress from the building, the Herd complaint charged that the walkway 'was, and now is, dedicated to and set apart for the use of the general public and of individual persons in general, while in, upon and about said 'Municipal Auditorium." Under the lease defendants had the exclusive use of the Arena for the specified evening. Its use, however, of means of ingress and egress was not exclusive. Those means would have to be shared with the general public. That fact is another reason for construing strictly the indemnity provision

and not applying it to all areas owned by plaintiff which the patrons of the Music Festival would use in coming to the affair. If it was to be understanding of the parties that the pathway outside the building was to be included in the indemnity clause, it would have been a very simple matter for plaintiff in drawing the lease to so provide. ¶ Plaintiff has cited cases like Werner v. Knoll, 89 Cal.App.2d 474, 201 P.2d 45, and Barkett v. Brucato, 122 Cal.App.2d 264, 264 P.2d 978, as upholding clauses similar to paragraph 12. There is no question but that the indemnity provision is a valid one. The only question is as to what part of plaintiff's property it applied to. This question was not involved in the cited cases. The language of the lease is clear and unambiguous. It defines 'premises' and limits the indemnity to the premises defined. The fact that the parties 'understood,' if they did so, that defendants were to use more than the defined premises, did not extend the indemnity to more than the expressly defined limits." (Emphasis added.) (City of Oakland v. Oakland Unified School Dist. of Alameda County (1956) 141 Cal.App.2d 733, 735–738.)

"The tenant agreed to indemnify the landlords for claims "arising out of, involving or in connection with" his use or occupancy of the dental suite. The landlords contend the term "arising out of" should be liberally construed in favor of the promisee (here, the landlords). For this proposition, the landlords cite *Vitton Construction Co., Inc. v. Pacific Ins. Co.* (2003) 110 Cal.App.4th 762, 766, 2 Cal.Rptr.3d 1 (and many other insurance cases), where the court observed that " 'California courts have consistently given a broad interpretation to the terms "arising out of" or "arising from" in various kinds of insurance provisions.' " Here, the landlords say, "[w]ere it not for [the tenant's] use of the leased premises to operate his dental office, including his hiring of Arax to clean the carpet within the leased premises, [plaintiff] would not have been ascending the stairwell and would not have been injured." ¶ But this is not an insurance case. And as the Supreme Court instructs, "[t]hough indemnity agreements

resemble liability insurance policies, rules for interpreting the two classes of contracts do differ significantly." (*Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541, 552, 79 Cal.Rptr.3d 721, 187 P.3d 424 (*Crawford*) [a "public policy concern influences to some degree the manner in which noninsurance indemnity agreements are construed"].) "For example, it has been said that if one seeks, in a noninsurance agreement, to be indemnified ... regardless of the indemnitor's fault ... language on the point must be particularly clear and explicit, and will be construed strictly against the indemnitee." (*Ibid.*) In accordance with this principle, the indemnification clause cannot be read as the landlords suggest. ¶ Of course, "[i]n a remote sense," the accident would not have occurred if the tenant had not hired Arax to clean the carpets in his dental suite, and in that sense, the accident could be said to arise from the tenant's use of the suite. (See *Hollander v. Wilson Estate Co.* (1932) 214 Cal. 582, 584, 585, 7 P.2d 177 [construing the tenant's agreement to indemnify for claims " 'arising ... in or about or connected with' " the demised premises; "[i]n a remote sense, of course, the elevator [which dropped to the basement injuring the tenant] is a means of 'connection' between the street and the demised premises"; but elevator was "owned, controlled, operated and maintained exclusively by the defendant" and "can hardly be supposed to have been a subject within the scope of the lease"]; see also *City of Oakland v. Oakland etc. Sch. Dist.* (1956) 141 Cal.App.2d 733, 735, 737, 297 P.2d 752 (*City of Oakland*) [construing the lessee's agreement to indemnify the lessor for claims " 'arising out of the use and occupation of *the premises* by the lessee' "; the indemnity clause did not apply to an injury incurred when a third party stepped in a hole in a walkway used for ingress and egress to and from the leased premises].)" (Emphasis added.) (Morlin Asset Management LP v. Murachanian (2016) 2 Cal.App.5th 184, 190–191.) The appellate court concluded: "We hold that under the indemnity clause in this case, the injury to a third party that occurred outside the dental suite, in a common area over which the landlords

have exclusive control, did not arise out of the tenant's use of the dental suite. It does not matter that the accident would not have happened but for the tenant hiring the third party to clean the carpets in the dental suite, and that the third party may have been at fault. The connection between the tenant's use of his suite and the accident in the stairwell over which the tenant had no control is too remote to have been within the contemplation of the parties when they entered into the lease. This construction of the indemnity clause is fully consistent with the law governing the interpretation of indemnification provisions (*Crawford, supra,* 44 Cal.4th at p. 552, 79 Cal.Rptr.3d 721, 187 P.3d 424), and with the *Hollander* and *City of Oakland* cases construing similar language, albeit in distinguishable circumstances. The trial court properly granted summary judgment." (Morlin Asset Management LP v. Murachanian (2016) 2 Cal.App.5th 184, 193.)

The subject lease defines the premises as a certain portion of the project commonly known as 6192 Enterprise Drive, Suite G, generally described as 5,000 square feet of warehouse space, including one office and one bathroom, and in addition to the lessee's right to use and occupy the premises, lessee shall have non-exclusive rights to any utility raceways of the building containing the premises(Building) and to the common areas as defined in paragraph 2.7; and the premises, the building, common areas, and land upon which they are located, along with all other buildings and improvements are collectively referred to as the project. (Defendants/Cross-Defendants Meschi's Exhibit B, paragraph 1.2(a).) The lease also defines the common areas as all areas and facilities outside the premises and within the exterior boundary line of the project and interior utility raceways and installations within the unit that are provided and designated by the lessor from time to time for the general non-exclusive use of the lessor, lessee, and other tenants of the project, suppliers, shipper, customer, contractor, and invitees, including parking areas, loading and unloading areas, trash areas, roadways,

walkways, driveways, and landscaped areas; and the lease further provides that the lessor or other persons as lessor may appoint have the exclusive control and management of the common areas. (Emphasis added.) (Defendants/Cross-Defendants Meschi's Exhibit B, paragraphs 2.7 and 2.9.) The indemnity provision of the lease provides: except for lessor's gross negligence or willful misconduct, lessee shall indemnify, protect, defend, and hold harmless the premises, lessor and its agents, lessor's master or ground lessor, partners and lender, from and against any and all claims, loss of rents, and/or damages, liens, judgments, penalties, attorneys' and consultants' fees, expenses and/or liabilities arising out of, involving, or in connection with, the use and/or occupancy of the premises by lessees; if any action or proceeding is brought against lessor by reason of any of the foregoing matters, lessee shall upon notice defend the same at lessee's expense by counsel reasonably satisfactory to the lessor and lessor shall cooperate with lessee in such defense; and lessor need not have first paid any such claim in order to be defended or indemnified. (Emphasis added.) (Defendants/Cross-Defendants Meschi's Exhibit B, paragraph 8.7.)

Plaintiff Christine Norseth testified in her deposition that at the time she took the subject fall, she was in the parking lot while Chris Coyle demonstrated how to load an ATV on the rack just installed on plaintiff's truck. (Defendants/Cross-Defendants Meschi's Exhibit K, Transcript of Deposition Testimony of Christine Norseth, page 14, lines 1-10; page 21, line 24 to page 22, line 1, page 22, lines 7-9; page 23, line 24 to page 24, line 1; page 24, lines 12-17.)

The following evidence was also submitted: as plaintiff Christine Norseth was watching she walked along the side of the truck and fell off the edge of a ledge. (TC Fabrication's and Coyle's Exhibit E – Transcript of Deposition Testimony of Christine Norseth,, page 7, lines 1-14; page 31, lines 11-13.); originally there was a long guardrail that was on top of the sloped retaining wall; the railing went missing in January 2018 when it was backed over by a

Sacramento Bee delivery truck in the middle of the night; there was a railing there through late December 2017; photo exhibit 1-003 depicts the subject ramp when it was missing the railing, which was in the common area; and Michael Meschi did not replace the railing until after plaintiff Christine Norseth fell in October 2018. (TC Fabrication's and Coyle's Exhibit B – Transcript of Deposition Testimony of Michael Meschi, page 50, lines 12-23; page 59, lines 3-7; and page 76, lines 11-15; and Exhibit 1-003)

The lease has specific provisions defining the meaning of the words premises and common area used in that document. The indemnity provision is expressly and strictly limited to all claims, loss of rents, and/or damages, liens, judgments, penalties, attorneys' and consultants' fees, expenses and/or liabilities arising out of, involving, or in connection with, the use and/or occupancy of the premises by lessees. (Emphasis the court's.) The parking lots are in the common area, which is not the premises defined in the lease – Suite G, 5,000 square feet of warehouse space, including one office and one bathroom. The lessors expressly retained exclusive control and management of the parking lots and areas outside the very limited definition of "premises". It was anticipated that the lessees in the project, including William Coyle, and his employees, customers and invitees had non-exclusive use of the common areas, including the parking lots (Defendants/Cross-Defendants Meschi's Exhibit B, paragraphs 2.7.), yet the indemnity clause was strictly limited to the "premises". If it was to be the understanding of the parties that common area parking areas were to be included in the indemnity clause, it would have been a very simple matter for cross-defendants lessors Meschi to draft the lease to so provide. The drafting party, cross-defendants Meschi, appear to have engaged in great effort to specifically limit the scope of the specifically defined "premises" and did not provide that lessee cross-complainant Coyle agreed to be liable to indemnify cross-defendant Meschi for injuries in the common areas arising from claims for injuries incurred

from a condition/dangerous condition of the common area while exercising the right to non-exclusive use of the common areas, including parking areas, which cross-defendants Meschi expressly retained exclusive control and management under the terms of the lease. Strictly construing the terms of the lease against the cross-defendants Meschi, any evidence that cross-complainant used portions of the common area parking lots to store materials in parking spaces, install a camera system, install a propane tank and gas line, pile scrap metal on top of trash enclosures and parking spaces, park and unload UTVs from trucks and trailers in the parking area, and to demonstrate how to load an ATV on the rack just installed on plaintiff's truck does not establish as a matter of law that the specific subject incident where plaintiff Christine Norseth fell off an unguarded ledge in the parking area where a guard railing had existed for a long period of time prior to the incident, but was absent at the time of the incident, arose out of, involved, or was in connection with, the use and/or occupancy of the Suite G premises by cross-defendant lessees.

"…the terms of the lease must be construed strictly against plaintiff, first because the lease was prepared by plaintiff… (Citations omitted.) and secondly, because the indemnity provision purports to indemnify plaintiff against the results of its own negligence. (Citations omitted.)" (City of Oakland v. Oakland Unified School Dist. of Alameda County (1956) 141 Cal.App.2d 733, 735-736.)

Construing the terms of the indemnity clause strictly against the drafting lessors cross-defendants Meschi, the face of the subject commercial lease does not include the common area where the subject incident occurred within the term "premises", the lease did not provide that lessee cross-complainant Coyle agreed to be liable to indemnify cross-defendant Meschi for injuries in the common areas arising from claims for injuries incurred from a condition/dangerous condition of the common area while exercising the right to non-exclusive

use of the common areas, including parking areas, which cross-defendants Meschi expressly retained exclusive control and management under the terms of the lease, there is no evidence presented in support of the motion that the claimed incident and injuries resulted from the demonstration, and, therefore, the cross-complainants Meschi have not established as a matter of law with the evidence presented that the claim for injuries sustained in the common area by plaintiffs does not arise out of, involve, or is in connection with the use and/or occupancy of the premises by lessee Coyle. (See Defendants/Cross-Defendants Meschi's Exhibit B, paragraphs 1.2(a), 2.7, 2.9, and 8.7.)

"…it would be unreasonable, in view of the very restrictive language of the lease, to hold that the indemnity applied to injuries incurred by conditions in those areas, particularly conditions over which defendants would have no control but plaintiff would." (City of Oakland v. Oakland Unified School Dist. of Alameda County (1956) 141 Cal.App.2d 733, 737.)

The evidence submitted in support of defendants/cross-defendants Meschi's contention that the indemnification provision of the Commercial Lease (Defendants/Cross-Defendants Meschi's Exhibit B.) bars cross-complainant Coyle's implied indemnity and partial indemnity/contribution causes of action does not meet defendants/cross-defendants Meschi's initial burden to establish as a matter of law that the indemnification provision applies to the incident that is the subject of the underlying complaint. Therefore, the burden did not shift to cross-complainant Coyle to present any evidence in opposition to raise a triable issue of material fact as to the assertion the indemnification provision barred the cross-complaint' implied indemnity and partial indemnity/contribution causes of action.

- Gross Negligence

"…to set forth a claim for "gross negligence" the plaintiff must allege extreme conduct on the part of the defendant. (*Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th

1175, 1185–1186, 7 Cal.Rptr.3d 552, 80 P.3d 656 (*Eastburn*).) The conduct alleged must rise to the level of "either a ' " 'want of even scant care' " ' or ' " 'an extreme departure from the ordinary standard of conduct.' " ' [Citations.]" (*Santa Barbara, supra,* 41 Cal.4th at p. 754, 62 Cal.Rptr.3d 527, 161 P.3d 1095, fn. omitted.)" (Rosencrans v. Dover Images, Ltd. (2011) 192 Cal.App.4th 1072, 1082.)

""Generally it is a triable issue of fact whether there has been such a lack of care as to constitute gross negligence [citation] but not always." (*Decker v. City of Imperial Beach* (1989) 209 Cal.App.3d 349, 358, 257 Cal.Rptr. 356; accord, *Santa Barbara, supra,* 41 Cal.4th at p. 767, 62 Cal.Rptr.3d 527, 161 P.3d 1095.) In *Santa Barbara,* our Supreme Court "emphasize[d] the importance of maintaining a distinction between ordinary and gross negligence, and of granting summary judgment on the basis of that distinction in appropriate circumstances." (*Santa Barbara, supra,* at p. 767, 62 Cal.Rptr.3d 527, 161 P.3d 1095.)" Chavez v. 24 Hour Fitness USA, Inc. (2015) 238 Cal.App.4th 632, 640.)

Defendants/Cross-Defendants Meschi submitted evidence that plaintiff Christine Norseth testified in her deposition that at the time she took the subject fall, she was in the parking lot. (Defendants/Cross-Defendants Meschi's Exhibit K, Transcript of Deposition Testimony of Christine Norseth, page 14, lines 1-10.)

The following evidence was also submitted: as plaintiff Christine Norseth was watching she walked along the side of the truck and fell off the edge of a ledge. (TC Fabrication's and Coyle's Exhibit E – Transcript of Deposition Testimony of Christine Norseth, page 7, lines 1-14; page 31, lines 11-13.); the subject accident occurred in October 2018. (Defendants/Cross-Defendants Meschi's Exhibit L, Transcript of Deposition Testimony of Michael Norseth, page 55, lines 10-14.); originally there was a long guardrail that was on top of the sloped retaining wall; the railing went missing in January 2018 when it was backed over by a Sacramento Bee

delivery truck in the middle of the night; there was a railing there through late December 2017; Michael Meschi received an estimate to regarding the railing and then makes a claim with the Sacramento Bee in February 2018, which was paid in a relatively short time thereafter, such as March or April 2018; photo exhibit 1-003 depicts the subject ramp when it was missing the railing, which was in the common area; and Michael Meschi did not replace the railing until after plaintiff Christine Norseth fell in October 2018 (TC Fabrication's and Coyle's Exhibit B – Transcript of Deposition Testimony of Michael Meschi, page 50, lines 12-23; page 59, lines 3-7; page 76, lines 1-15; and page 112, lines 8-22; and Exhibit 1-003).

Cross-Complainant has submitted sufficient evidence to raise a triable issue of material fact as to whether defendants/cross-defendants Meschi failure to timely replace the railing on the ledge that plaintiff fell off from causing plaintiff injury was gross negligence that prevents application of the indemnity provision by its own terms, which is an independent reason to deny the motion for summary adjudication of the implied indemnity and partial indemnity/contribution causes of action.

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 the moving cross-defendants have not met their initial burden of proof and there remains a triable issue of material fact that prevent entry of summary judgment or summary adjudication in cross-defendants' favor.

Defendants/Cross-Defendants Meschi's motion for summary adjudication of the implied indemnity and partial indemnity/contribution causes of action is denied.

Declaratory Relief Cause of Action

Cross-Defendants Meschi assert that cross-complainant William Coyle is not entitled to declaratory relief in his favor on his request for a declaration that cross-defendants Meschi must assume his defense in this action under a theory of implied indemnity and he is entitled to contribution from cross-defendants Meschi for any payment of the judgment or assessment against cross-complainant.

"Any person interested under a written instrument, excluding a will or a trust, or under a contract, or who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a watercourse, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and the declaration shall have the force of a final judgment. The declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought." (Code of Civil Procedure, § 1060.)

"A complaint for declaratory relief should show the following: ¶ (1) A proper subject of declaratory relief within the scope of C.C.P. 1060. (See infra, §858 et seq.) ¶ (2) An actual controversy involving justiciable questions relating to the rights or obligations of a party. (See

Tiburon v. Northwestern Pac. R. Co. (1970) 4 C.A.3d 160, 170, 84 C.R. 469; infra, §817.)" (5 Witkin, California Procedure (5th ed.2008) Pleading, § 853, page 268.)

As stated earlier in this ruling, the previously cited evidence does not meet defendants/cross-defendants Meschi's initial burden to establish as a matter of law that the indemnification provision applies to the incident that is the subject of the underlying complaint and a there remains a triable issue of material fact as to whether the lease indemnification provision does not apply under the circumstances of the subject incident as a result of grossly negligent conduct by defendants/cross-defendants Meschi.

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 the moving cross-defendants have not met their initial burden of proof and there remains a triable issue of material fact that prevents entry of summary judgment or summary adjudication in cross-defendants Meschi's favor on the declaratory relief cause of action.

Defendants/Cross-Defendants Meschi's motion for summary adjudication of the declaratory relief cause of action and motion for summary judgment on the entire cross-complaint is denied.

Cross-Complainants Meschi's Motion for Summary Judgment or Summary Adjudication on Cross-Complainant Meschi's Cross-Complaint.

On February 8, 2022 Cross-Complainants Meschi filed a cross-complaint against cross-defendants TC Fabrication and Welding, LLC, William Coyle an individual d.b.a. TC Welding

and Fabrication, and Christopher Coyle an individual d.b.a. Alpine Designs asserting causes of action for contractual indemnity, breach of contract, equitable indemnity, apportionment of fault, and declaratory relief.

Cross-complainants Meschi move for summary adjudication of the 1st and 3rd causes of action for contractual indemnity, 2nd and 4th causes of action for breach of contract, and the 7th cause of action for declaratory relief on the following grounds: the indemnification clause was triggered by cross-defendants' uses of the parking lot common area to store materials in parking spaces, install a camera system, install a propane tank and gas line, pile scrap metal on top of trash enclosures and parking spaces, parking and unloading UTVs from trucks and trailers in the parking area, and use of the parking lot to demonstrate how to load an ATV on the rack product fabricated by cross-defendants that just installed on plaintiff's truck at the time that plaintiff Christine Norseth fell and was injured in the common area parking lot, because plaintiff Christine Norseth's injuries arose out of, involved, or was in connection with, the use and/or occupancy of the premises by lessees, which is defined by the contracts as limited to 6192 Enterprise Drive, Suite K and 6192 Enterprise Drive, Suite G; cross-defendants' failure and refusal of cross-complainants Meschi's tender of defense and request for indemnification breached the indemnification clause of both leases; and since the cross-complainants Meschi have established with the evidence presented that they are entitled to cross-defendants defending them and indemnifying them against the claims of plaintiff and that their refusal to defend and indemnify breaches the indemnity provision of the two leases, cross-complainants are entitled to summary adjudication of the declaratory relief cause of action.

Cross-Defendants TC Fabrication and Welding, LLC, William Coyle an individual d.b.a. TC Welding and Fabrication, and Christopher Coyle an individual d.b.a. Alpine Designs (Cross-Defendants Coyle) oppose the motion on the following grounds: the express indemnity clause

in the lease does not apply to the common areas and only applies to indemnity for incidents occurring on the ”premises”, which is defied in the lease as the interior of Suites G and K and not the common area where the lease placed the sole and exclusive duty to control and manage on lessor cross-complainants Meschi; there remain triable issues of material fact as to whether cross-defendants Meschi were grossly negligent, which is excluded from the indemnity provision; and cross-complainants have not established they are entitled to summary adjudication of the declaratory relief cause of action concerning the cross-complainants' assertion of entitlement to a defense and indemnity under the indemnity clauses.

Cross-Complainants Meschi replied to the opposition: the court should strike the Coyle's additional material facts due to failure to submit a separate statement in opposition; cross-defendants Coyles' request for judicial notice is defective, because the court may not take judicial notice of motions, supporting evidence and other related filings with the court; the facts are not are not of such common knowledge that they can not reasonably be the subject of dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy; use of the common area by cross-defendants Coyle is not so remote as to prevent the operation of the indemnity clause in the agreement requiring indemnity for claims and liabilities arising out of, involving, or in connection with, the use and/or occupancy of the premises; as a matter of law cross-complainants Meschi could not be grossly negligent regarding the railing under the facts presented; since cross-defendants Coyle believed the railing was unnecessary, cross-defendants Meschi could not have been grossly negligent.

Cross-Complainants Meschi also objected to certain evidence submitted in opposition.

<u>Cross-Complainants Meschi's Objections to Evidence</u>

Cross-Complainants Meschi objected to consideration of TC Fabrication's and Coyle's Exhibit F, page 69, lines 21-23 and page 70, lines 18-20 concerning what was stated by an insurance agent concerning replacement of a railing on the ground of hearsay. These statements and page and line numbers are not found in Exhibit F, which are various documents produced by cross-defendant Meschi in discovery. They are however, found in TC Fabrication's and Coyle's Exhibit B – Transcript of Deposition Testimony of Cross-Defendant Michael Meschi.)

Cross-Complainant Michael Meschi states in those portions of the deposition transcript that when he made a claim on his insurance related to the incident that is the subject of the complaint, he was advised by his insurance agent that the subject area would benefit from a railing, regardless of whether the Code required it or not.

"(a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. ¶ (b) Except as provided by law, hearsay evidence is inadmissible. ¶ (c) This section shall be known and may be cited as the hearsay rule." (Evidence Code, § 1200.)

"Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." (Evidence Code, § 1221.)

It appears that the insurance agent's out of court statement was not offered for the truth of the matter asserted therein and was instead submitted to support an argument that the later replacement of the railing was in response to the insurance agent's statement and this conduct manifested Michael Meschi's adoption of the statement or belief it was true

The objections are overruled.

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 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.)

"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 **[*1092]** 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.)

"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.)

"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 cross-defendants Meschi's motion for summary judgment or summary adjudication of causes of action of the William Coyle cross-complaint.

Cross-Defendants' Request for Judicial Notice

Cross-Complainants Meschi object to cross-defendants Coyle's request that the court take judicial notice of the separate statement of undisputed material facts and supporting evidence in support of TC Fabrication and Welding, LLC's, and Coyle's motion for summary judgment on

the Meschi cross-complaint, which was filed on July 15, 2022 and the proof of service declares was electronically served on counsels for the Norseths and Meschis on July 13, 2022.

“"Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter." (2 Jefferson, Cal. Evidence Benchbook, supra, § 47.1, at pp. 1064-1065.) The court may in its discretion take judicial notice of any court record in the United States. (Evid.Code, § 451.) This includes any orders, findings of facts and conclusions of law, and judgments within court records. (See, e.g., Columbia Cas. Co. v. Northwestern Nat'l Ins. Co. (1991) 231 Cal.App.3d 457, 282 Cal.Rptr. 389; Day v. Sharp (1975) 50 Cal.App.3d 904, 123 Cal.Rptr. 918.) However, while courts are free to take judicial notice of the existence of each document in a court file, including the truth of results reached, they may not take judicial notice of the truth of hearsay statements in decisions and court files. (Williams v. Wraxall (1995) 33 Cal.App.4th 120, 130, fn. 7, 39 Cal.Rptr.2d 658.) Courts may not take judicial notice of allegations in affidavits, declarations and probation reports in court records because such matters are reasonably subject to dispute and therefore require formal proof. (See, e.g., *Magnolia Square Homeowners Ass'n v. Safeco Ins.* (1990) 221 Cal.App.3d 1049, 1056-1057, 271 Cal.Rptr. 1.) ¶ The underlying theory of judicial notice is that the matter being judicially noticed is a law or fact that is not reasonably subject to dispute. (Evid.Code, § 451, subd. (f); *Post v. Prati* (1979) 90 Cal.App.3d 626, 633, 153 Cal.Rptr. 511.) "By making an order establishing the law of the case, it seems that the facts are no longer in dispute and can therefore be considered true as set forth in an order, findings of fact, or conclusions of law." (2 Jefferson, Cal. Evidence Benchbook, supra, § 47.12, at p. 1068.) Such facts would not be the proper subject of judicial notice. (Ibid.) ¶ The appropriate setting for resolving facts reasonably subject to dispute is the adversary hearing. It is therefore improper for courts to take judicial

notice of any facts that are not the product of an adversary hearing which involved the question of their existence or nonexistence. (2 Jefferson, Cal. Evidence Benchbook, supra, § 47.13, at p. 1069.) "A litigant should not be bound by the court's inclusion in a court order of an assertion of fact that the litigant has not had the opportunity to contest or dispute." (Ibid.)" (Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort (2001) 91 Cal.App.4th 875, 882.)

Judicial notice of the truth of the facts set forth in the matters filed related to TC Fabrication and Welding, LLC's, and Coyle's motion for summary judgment on the Meschi cross-complaint that is in the court record in this case is not appropriate.

"Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451: ¶ * * * (g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute." (Evidence Code, § 452(g).)

"Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451: ¶ * * * (h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evidence Code, § 452(h).)

Judicial notice of the facts set forth in the proffered additional facts and evidence offered in opposition to this motion that are in the file for consideration of TC Fabrication and Welding, LLC's, and Coyle's motion for summary judgment on the Meschi cross-complaint do not satisfy the requirements for judicial notice under Section 452(g or 452(h).

Although the court can not take judicial notice of the truth of the matters set forth in the separate statement of undisputed material facts and supporting evidence in support of TC Fabrication and Welding, LLC's and Coyle's motion for summary judgment on the Meschi cross-complaint, the court can construe the cross-defendants' request for judicial notice as, in

reality, a request that the court consider that this separate statement filed on July 15, 2022 is additional material facts and supporting evidence to be considered in opposition to cross-complainants Meschi's motion for summary judgment, which the cross-defendants are statutorily entitled to submit for the court's consideration in response to cross-complainants Meschi's separate statement of undisputed material facts in support of the motion, which was filed on May 31, 2022 and served on the interested parties by email on May 12, 2022. The court just does not take everything established as true in that document by judicial notice.

In the interests of ruling on this potentially cross-complaint case dispositive motion on its merits, the court will consider the separate statement of undisputed material facts and supporting evidence in support of TC Fabrication and Welding, LLC's and Coyle's motion for summary judgment on the Meschi cross-complaint as additional material facts and supporting evidence to be considered in opposition to cross-complainants Meschi's motion for summary adjudication of causes of action of the Meschi cross--complaint.

Cross-Defendants' Additional Material Facts in Opposition

Cross-Defendants argue in reply that pursuant to the provisions of Code of Civil Procedure, § 437c(b)(3) the court should exercise its discretion to disregard the additional material facts in opposition set forth in the opposition and in the separate statement of undisputed material facts and supporting evidence in support of TC Fabrication and Welding, LLC's and Coyle's motion for summary judgment on the Meschi cross-complaint, which cross-complainant Coyle request the court to take judicial notice of, because the additional asserted material facts in opposition were not formally set forth in cross-complainant Coyle's response to defendants/cross-defendants Meschi's separate statement of undisputed material facts.

"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." (Code of Civil Procedure, § 437c(b)(3).)

While not in compliance with Section 473c(b)(3), the court finds that the failure to formally set forth the asserted additional undisputed material facts in opposition in the response to the Meschis' separate statement of undisputed material facts did not prejudice the Meschis in any way as to the additional material facts asserted in opposition and evidence relied on by cross-complainant Coyle to oppose the motion. The separate statement of undisputed material facts and supporting evidence in support of TC Fabrication and Welding, LLC's and Coyle's motion for summary judgment on the Meschi cross-complaint adheres to the requirements for a separate statement of additional material facts in opposition as it sets forth plainly and concisely any other material facts that the opposing party contends are disputed and each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. In addition, on August 12, 2022 defendants/cross-defendants Meschi filed a response to the separate statement of undisputed material facts and supporting evidence in support of TC Fabrication and Welding, LLC's and Coyle's motion for summary judgment.

The court exercises its discretion to consider the separate statement of undisputed material facts and supporting evidence in support of TC Fabrication and Welding, LLC's and Coyle's motion for summary judgment on the Meschi cross-complaint as the separate statement of additional material facts in opposition.

Contractual Indemnity Cause of Action

Cross-Complainants Meschi argue that they are entitled to summary adjudication of the two contractual indemnity causes of action on the following grounds: any and all uses of the parking lot common area by storing materials in parking spaces, installing a camera system, installing a propane tank and gas line, piling scrap metal on top of trash enclosures and parking spaces, and parking and unloading UTVs from trucks and trailers in the parking area establishes as a matter of law that the specific subject incident where plaintiff Christine Norseth fell off an unguarded ledge in the parking area where a guard railing had existed for a long period of time prior to the incident, but was absent at the time of the incident, arose out of, involved, or was in connection with, the use and/or occupancy of the Suite G and K premises by cross-defendant lessees. The Meschis further argue that as a matter of law they have established that cross-defendants Coyle owed a duty of defense and indemnity under the indemnity causes of the two leases for the subject incident that occurred in the common area parking lot that cross-complainants had retained excusive management and control of.

- Applicability of the Indemnity Provision in the Subject Leases

"Under California law, an "[i]ndemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties or of some other person." (Civ.Code, § 2772.) "An indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, embraces the costs of defense against such claims, demands, or liability incurred in good faith, and in the exercise of a reasonable discretion...." (Civ.Code, § 2778, subd. 3.) An indemnitor in an indemnity contract generally undertakes to protect the indemnitee against loss or damage through liability to a third person. (*Somers v. U.S. Fidelity &*

Guaranty Co. (1923) 191 Cal. 542, 547, 217 P. 746.) ¶ An indemnity agreement is to be interpreted according to the language and contents of the contract as well as the intention of the parties as indicated by the contract. (*Widson v. International Harvester Co., Inc.* (1984) 153 Cal.App.3d 45, 59, 200 Cal.Rptr. 136.) The extent of the duty to indemnify is determined from the contract. (*Herman Christensen & Sons, Inc. v. Paris Plastering Co.* (1976) 61 Cal.App.3d 237, 245, 132 Cal.Rptr. 86.) The indemnity provisions of a contract are to be construed under the same rules governing other contracts with a view to determining the actual intent of the parties. (*Ibid.*) ¶ A clause which contains the words "indemnify" and "hold harmless" is an indemnity clause which generally obligates the indemnitor to reimburse the indemnitee for any damages the indemnitee becomes obligated to pay third persons. (*Varco–Pruden, Inc. v. Hampshire Constr. Co.* (1975) 50 Cal.App.3d 654, 660, 123 Cal.Rptr. 606.) Indemnification agreements ordinarily relate to third-party claims. (*Ibid.*)" (Myers Building Industries, Ltd. v. Interface Technology, Inc. (1993) 13 Cal.App.4th 949, 968–969.)

"The question here is not alone what could be used by defendants as appurtenant to the leased portion of the building but particularly as to what places the indemnity provision would apply. In determining this question and in interpreting the lease, it must be borne in mind that the terms of the lease must be construed strictly against plaintiff, first because the lease was prepared by plaintiff (see Basin Oil Co. v. Baasch-Ross Tool Co., 125 Cal.App.2d 578, 271 P.2d 122; Pacific Lumber Co. v. Industrial Accident Comm., 22 Cal.2d 410, 422, 139 P.2d 892; E. A. Strout Western Realty Agency v. Gregoire, 101 Cal.App.2d 512, 517, 225 P.2d 585); and secondly, because the indemnity provision purports to indemnify plaintiff against the results of its own negligence. [Footnote omitted] '* * * the law does not look with favor upon attempts to avoid liability or secure exemption for one's own negligence, and such provisions are strictly construed against the person relying upon them. * * * [W]here the language of an

instrument purporting to exculpate one of the parties for its future negligence was prepared entirely by the party relying on its terms, words clearly and explicitly expressing that this was the intent of the parties are required. [Citations.]', Basin Oil Co. v. Baasch-Ross Tool Co., supra, 125 Cal.App.2d at pages 594, 595, 271 P.2d at page 131. ¶ In Hollander v. Wilson Estate Co., 214 Cal. 582, 7 P.2d 177, the tenant leased the fourth floor of a 7 story building. The lease contained a provision indemnifying the landlord against all claims for damages to persons or property "in or about or connected with this tenancy or the occupancy of said demised premises." 214 Cal. at page 584, 7 P.2d at page 178. The court held that while no mention was made in the lease of the tenant's right to use the elevator, such right was an appurtenance of the lease. However, as to the indemnity clause, although the elevator was in a sense 'connected with' the tenancy, 'It is contrary to sound construction to say that said instrument had in contemplation the release from liability for damages for personal injuries arising from the negligent operation or maintenance of this public elevator.' 214 Cal. at page 585, 7 P.2d at page 179. ¶ In Pacific Indemnity Co. v. California Electric Works, Ltd., 29 Cal.App.2d 260, 84 P.2d 313, the court was construing the indemnity provision of a building contract. It held that to construe the provision as applying to the indemnity of one of the parties against its own wrong, '* * * the language of the contract must be of such a nature as to compel that interpretation, and to accomplish such a result the language used must be clear and explicit.' 29 Cal.App.2d at page 274, 84 P.2d at page 320. It then quoted from Murray v. Texas Co., 172 S.C. 399, 174 S.E. 231, to the effect that 'broad and comprehensive' language alone is not enough. The language indemnifying against the parties' own wrong must nevertheless be clear and explicit and as the defendant there wrote the indemnity provision into the contract for its own benefit, it should have 'plainly stated, if such was the understanding of the parties, that the plaintiff agreed to relieve it in the matter from all liability for its own negligence.' 29

Cal.App.2d at page 274, 84 P.2d at page 320. ¶ Applying such rules to the lease here, it would appear that while as appurtenant to the portion of the building leased there necessarily followed the right to use all portions of the building and even the walkway necessary for ingress to and egress from the Arena,-[Footnote omitted.] the indemnity provision only applied to the 'premises' as strictly defined in the lease. Paragraph 12 limits the indemnity to claims resulting from 'the use and occupation of the premises * * *' The parties have specifically defined 'the premises' as 'the Arena * * * (and no other space or accommodation except as may be hereinafter expressly provided for) * * *' While, of course, people going to the Arena would be entitled to use the walkways and driveways around the building and parking areas, if any, it would be unreasonable, in view of the very restrictive language of the lease, to hold that the indemnity applied to injuries incurred by conditions in those areas, particularly conditions over which defendants would have no control but plaintiff would. The mere fact that plaintiff made no charge to defendants for the use of the Arena would not broaden the terms of the indemnity. While the trial court did not characterize the walkway other than to say that it provides ingress to and egress from the building, the Herd complaint charged that the walkway 'was, and now is, dedicated to and set apart for the use of the general public and of individual persons in general, while in, upon and about said 'Municipal Auditorium." Under the lease defendants had the exclusive use of the Arena for the specified evening. Its use, however, of means of ingress and egress was not exclusive. Those means would have to be shared with the general public. That fact is another reason for construing strictly the indemnity provision and not applying it to all areas owned by plaintiff which the patrons of the Music Festival would use in coming to the affair. If it was to be understanding of the parties that the pathway outside the building was to be included in the indemnity clause, it would have been a very simple matter for plaintiff in drawing the lease to so provide. ¶ Plaintiff has cited cases like Werner v.

Knoll, 89 Cal.App.2d 474, 201 P.2d 45, and Barkett v. Brucato, 122 Cal.App.2d 264, 264 P.2d 978, as upholding clauses similar to paragraph 12. There is no question but that the indemnity provision is a valid one. The only question is as to what part of plaintiff's property it applied to. This question was not involved in the cited cases. The language of the lease is clear and unambiguous. It defines 'premises' and limits the indemnity to the premises defined. The fact that the parties 'understood,' if they did so, that defendants were to use more than the defined premises, did not extend the indemnity to more than the expressly defined limits." (Emphasis added.) (City of Oakland v. Oakland Unified School Dist. of Alameda County (1956) 141 Cal.App.2d 733, 735–738.)

"The tenant agreed to indemnify the landlords for claims "arising out of, involving or in connection with" his use or occupancy of the dental suite. The landlords contend the term "arising out of" should be liberally construed in favor of the promisee (here, the landlords). For this proposition, the landlords cite *Vitton Construction Co., Inc. v. Pacific Ins. Co.* (2003) 110 Cal.App.4th 762, 766, 2 Cal.Rptr.3d 1 (and many other insurance cases), where the court observed that " 'California courts have consistently given a broad interpretation to the terms "arising out of" or "arising from" in various kinds of insurance provisions.' " Here, the landlords say, "[w]ere it not for [the tenant's] use of the leased premises to operate his dental office, including his hiring of Arax to clean the carpet within the leased premises, [plaintiff] would not have been ascending the stairwell and would not have been injured." ¶ But this is not an insurance case. And as the Supreme Court instructs, "[t]hough indemnity agreements resemble liability insurance policies, rules for interpreting the two classes of contracts do differ significantly." (*Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541, 552, 79 Cal.Rptr.3d 721, 187 P.3d 424 (*Crawford*) [a "public policy concern influences to some degree the manner in which noninsurance indemnity agreements are construed"].) "For example, it

has been said that if one seeks, in a noninsurance agreement, to be indemnified ... regardless of the indemnitor's fault ... language on the point must be particularly clear and explicit, and will be construed strictly against the indemnitee." (*Ibid.*) In accordance with this principle, the indemnification clause cannot be read as the landlords suggest. ¶ Of course, "[i]n a remote sense," the accident would not have occurred if the tenant had not hired Arax to clean the carpets in his dental suite, and in that sense, the accident could be said to arise from the tenant's use of the suite. (See *Hollander v. Wilson Estate Co.* (1932) 214 Cal. 582, 584, 585, 7 P.2d 177 [construing the tenant's agreement to indemnify for claims " 'arising ... in or about or connected with' " the demised premises; "[i]n a remote sense, of course, the elevator [which dropped to the basement injuring the tenant] is a means of 'connection' between the street and the demised premises"; but elevator was "owned, controlled, operated and maintained exclusively by the defendant" and "can hardly be supposed to have been a subject within the scope of the lease"]; see also *City of Oakland v. Oakland etc. Sch. Dist.* (1956) 141 Cal.App.2d 733, 735, 737, 297 P.2d 752 (*City of Oakland*) [construing the lessee's agreement to indemnify the lessor for claims " 'arising out of the use and occupation of *the premises* by the lessee' "; the indemnity clause did not apply to an injury incurred when a third party stepped in a hole in a walkway used for ingress and egress to and from the leased premises].)" (Emphasis added.) (Morlin Asset Management LP v. Murachanian (2016) 2 Cal.App.5th 184, 190–191.) The appellate court concluded: "We hold that under the indemnity clause in this case, the injury to a third party that occurred outside the dental suite, in a common area over which the landlords have exclusive control, did not arise out of the tenant's use of the dental suite. It does not matter that the accident would not have happened but for the tenant hiring the third party to clean the carpets in the dental suite, and that the third party may have been at fault. The connection between the tenant's use of his suite and the accident in the stairwell over which

the tenant had no control is too remote to have been within the contemplation of the parties when they entered into the lease. This construction of the indemnity clause is fully consistent with the law governing the interpretation of indemnification provisions (*Crawford, supra,* 44 Cal.4th at p. 552, 79 Cal.Rptr.3d 721, 187 P.3d 424), and with the *Hollander* and *City of Oakland* cases construing similar language, albeit in distinguishable circumstances. The trial court properly granted summary judgment." (Morlin Asset Management LP v. Murachanian (2016) 2 Cal.App.5th 184, 193.)

The two subject leases define the premises as certain specifically identified portions of the project commonly known as 6192 Enterprise Drive, Suite G, generally described as 5,000 square feet of warehouse space, including one office and one bathroom, and 6192 Enterprise Drive, Suite K, and in addition to the lessees' right to use and occupy the two premises, lessees shall have non-exclusive rights to any utility raceways of the building containing the premises (Building) and to the common areas as defined in paragraph 2.7; and the premises, the building, common areas, and land upon which they are located, along with all other buildings and improvements are collectively referred to as the project. (Cross-Complainants Meschi's Exhibit B – William Coyle/TC Fabrication and Welding Lease Agreement, paragraph 1.2(a); and Exhibit C – Christopher Coyle/Alpine Designs Lease Agreement, paragraph 1.2(a).) The lease also defines the common areas as all areas and facilities outside the premises and within the exterior boundary line of the project and interior utility raceways and installations within the unit that are provided and designated by the lessor from time to time for the general non-exclusive use of the lessor, lessee, and other tenants of the project, suppliers, shippers, customers, contractors, and invitees; the William Coyle/TC Fabrication and Welding Lease Agreement further specifies that the common areas include parking areas, loading and unloading areas, trash areas, roadways, walkways, driveways, and landscaped areas; and the

leases further provide that the lessor or other persons as lessor may appoint have the exclusive control and management of the common areas. (Emphasis added.) (Cross-Complainants Meschi's Exhibit B– William Coyle/TC Fabrication and Welding Lease Agreement, paragraphs 2.7 and 2.9; and Exhibit C – Christopher Coyle/Alpine Designs Lease Agreement, paragraphs 2.7 and 2.9.) The indemnity provision of the lease provides: except for lessor's gross negligence or willful misconduct, lessees shall indemnify, protect, defend, and hold harmless the premises, lessor and its agents, partners and lenders, from and against any and all claims, loss of rents, and/or damages, liens, judgments, penalties, attorneys' and consultants' fees, expenses and/or liabilities arising out of, involving, or in connection with, the use and/or occupancy of the premises by lessees; if any action or proceeding is brought against lessor by reason of any of the foregoing matters, lessees shall upon notice defend the same at lessees' expense by counsel reasonably satisfactory to the lessor and lessor shall cooperate with lessees in such defense; lessor need not have first paid any such claim in order to be defended or indemnified; and the William Coyle/TC Fabrication and Welding Lease Agreement further specifies that lessor's master or ground lessor are also covered by the indemnity clause. (Emphasis added.) (Cross-Complainants Meschi's Exhibit B – William Coyle/TC Fabrication and Welding Lease Agreement, paragraph 8.7; and Exhibit C – Christopher Coyle/Alpine Designs Lease Agreement, paragraph 8.7.)

Plaintiff Christine Norseth testified in her deposition that at the time of the subject fall, she was in the parking lot while Chris Coyle demonstrated how to load an ATV on the rack just installed on plaintiff's truck. (Cross-Complainants Meschi's Exhibit K, Transcript of Deposition Testimony of Christine Norseth, page 14, lines 1-10; page 21, line 24 to page 22, line 1, page 22, lines 7-9; page 23, line 24 to page 24, line 1; page 24, lines 12-17.)

The following evidence was also submitted: as plaintiff Christine Norseth was watching she walked along the side of the truck and fell off the edge of a ledge. (TC Fabrication's and Coyle's Exhibit E – Transcript of Deposition Testimony of Christine Norseth,, page 7, lines 1-14; and page 31, lines 11-13.); originally there was a long guardrail that was on top of the sloped retaining wall; the railing went missing in January 2018 when it was backed over by a Sacramento Bee delivery truck in the middle of the night; there was a railing there through late December 2017; photo exhibit 1-003 depicts the subject ramp when it was missing the railing, which was in the common area; and Michael Meschi did not replace the railing until after plaintiff Christine Norseth fell in October 2018. (TC Fabrication's and Coyle's Exhibit B – Transcript of Deposition Testimony of Michael Meschi, page 50, lines 12-23; page 59, lines 3-7; and page 76, lines 11-15; and Exhibit 1-003)

The two subject leases have very specific provisions defining the meaning of the words premises and common areas as used in those documents. The indemnity provisions are expressly and strictly limited to all claims, loss of rents, and/or damages, liens, judgments, penalties, attorneys' and consultants' fees, expenses and/or liabilities arising out of, involving, or in connection with, the use and/or occupancy of the premises by lessees. (Emphasis the court's.) The parking lots are in the common areas, which is not the premises defined in the two leases, which are Suite G – a 5,000 square feet of warehouse space, including one office and one bathroom and Suite K. The Meschi lessors expressly retained exclusive management and control of the parking lots and areas outside the very limited definition of "premises". It was anticipated that the lessees on the project, including cross-defendants Coyle, their employees, customers, and invitees, had non-exclusive use of the common areas, including the parking lots (Cross-Complainants Meschi's Exhibit B– William Coyle/TC Fabrication and Welding Lease Agreement, paragraph 2.7; and Exhibit C – Christopher Coyle/Alpine Designs Lease

Agreement, paragraph 2.7.), yet the indemnity clause was strictly limited to the "premises". If it was to be the understanding of the parties that common area parking lots were to be included in the indemnity clause, it would have been a very simple matter for cross-defendants lessors Meschi to draft the lease to so provide. The drafting party, cross-defendants Meschi, appear to have engaged in great effort to specifically limit the scope of the specifically defined "premises" and did not provide that lessees cross-defendants Coyle agreed to be liable to indemnify cross-defendant Meschi for injuries in the common areas arising from claims for injuries incurred from a condition/dangerous condition of the common area while exercising the right to non-exclusive use of the common areas, which cross-complainants Meschi expressly retained exclusive control and management of under the terms of the lease. Strictly construing the terms of the lease against the cross-complainants Meschi, any evidence that cross-defendants used portions of the common area parking lots to store materials in parking spaces, install a camera system, install a propane tank and gas line, pile scrap metal on top of trash enclosures and parking spaces, park and unload UTVs from trucks and trailers in the parking area, and to demonstrate how to load an ATV on the rack just installed on plaintiff's truck does not establish as a matter of law that the specific subject incident where plaintiff Christine Norseth fell off an unguarded ledge in the parking area where a guard railing had existed for a long period of time prior to the incident, but was absent at the time of the incident, arose out of, involved, or was in connection with, the use and/or occupancy of the Suite G and K premises by the cross-defendant lessees.

"…the terms of the lease must be construed strictly against plaintiff, first because the lease was prepared by plaintiff… (Citations omitted.) and secondly, because the indemnity provision purports to indemnify plaintiff against the results of its own negligence. (Citations omitted.)"

(City of Oakland v. Oakland Unified School Dist. of Alameda County (1956) 141 Cal.App.2d 733, 735-736.)

Construing the terms of the indemnity clause strictly against the drafting lessors cross-complainants Meschi, the face of the subject commercial lease does not include the common area where the subject incident occurred within the term "premises", the lease did not provide that lessee cross-defendants agreed to be liable to indemnify cross-complainant Meschi for injuries in the common areas arising from claims for injuries incurred from a condition/dangerous condition of the common area while exercising their right to non-exclusive use of the common area, which the Meschis expressly retained exclusive control and management under the terms of the lease, there is no evidence presented in support of the motion that the claimed incident and injuries resulted from the demonstration, and, therefore, the cross-complainants Meschi have not established as a matter of law with the evidence presented that the claim for injuries sustained in the common area by plaintiffs arises out of, involves, or is in connection with the use and/or occupancy of the premises by the cross-defendant lessees. (See Cross-Complainants Meschi's Exhibit B – William Coyle/TC Fabrication and Welding Lease Agreement, paragraphs 1.2(a), 2.7, 2.9, and 8.7; and Exhibit C – Christopher Coyle/Alpine Designs Lease Agreement, paragraphs 1.2(a), 2.7, 2.9, and 8.7.)

"…it would be unreasonable, in view of the very restrictive language of the lease, to hold that the indemnity applied to injuries incurred by conditions in those areas, particularly conditions over which defendants would have no control but plaintiff would." (City of Oakland v. Oakland Unified School Dist. of Alameda County (1956) 141 Cal.App.2d 733, 737.)

The evidence submitted in support of the Meschis' contention that the undisputed material facts establish as a matter of law that the indemnity clause of both contracts with the cross-defendants were triggered does not meet /cross-complainants Meschi's initial burden to

establish as a matter of law that the indemnification provision applies to the incident that is the subject of the underlying complaint. Therefore, the burden did not shift to cross-defendants to present any evidence in opposition to raise a triable issue of material fact as to the assertion the indemnification provision were triggered.

- Gross Negligence

"…to set forth a claim for "gross negligence" the plaintiff must allege extreme conduct on the part of the defendant. (*Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1185–1186, 7 Cal.Rptr.3d 552, 80 P.3d 656 (*Eastburn*).) The conduct alleged must rise to the level of "either a ' " 'want of even scant care' " ' or ' " 'an extreme departure from the ordinary standard of conduct.' " ' [Citations.]" (*Santa Barbara, supra,* 41 Cal.4th at p. 754, 62 Cal.Rptr.3d 527, 161 P.3d 1095, fn. omitted.)" (Rosencrans v. Dover Images, Ltd. (2011) 192 Cal.App.4th 1072, 1082.)

""Generally it is a triable issue of fact whether there has been such a lack of care as to constitute gross negligence [citation] but not always." (*Decker v. City of Imperial Beach* (1989) 209 Cal.App.3d 349, 358, 257 Cal.Rptr. 356; accord, *Santa Barbara, supra,* 41 Cal.4th at p. 767, 62 Cal.Rptr.3d 527, 161 P.3d 1095.) In *Santa Barbara,* our Supreme Court "emphasize[d] the importance of maintaining a distinction between ordinary and gross negligence, and of granting summary judgment on the basis of that distinction in appropriate circumstances." (*Santa Barbara, supra,* at p. 767, 62 Cal.Rptr.3d 527, 161 P.3d 1095.)" Chavez v. 24 Hour Fitness USA, Inc. (2015) 238 Cal.App.4th 632, 640.)

Cross-Complainants Meschi submitted evidence that plaintiff Christine Norseth testified in her deposition that at the time she fell, she was in the parking lot. (Cross-Complainants Meschi's Exhibit K, Transcript of Deposition Testimony of Christine Norseth, page 14, lines 1-10.)

Evidence of the following was also submitted: as plaintiff Christine Norseth was watching she walked along the side of the truck and fell off the edge of a ledge. (TC Fabrication's and Coyle's Exhibit E – Transcript of Deposition Testimony of Christine Norseth,, page 7, lines 1-14; page 31, lines 11-13.); the subject accident occurred in October 2018. (Cross-Complainants Meschi's Exhibit L, Transcript of Deposition Testimony of Michael Norseth, page 55, lines 10-14.); originally there was a long guardrail that was on top of the sloped retaining wall; the railing went missing in January 2018 when it was backed over by a Sacramento Bee delivery truck in the middle of the night; there was a railing there through late December 2017; Michael Meschi received an estimate to replace the railing and then made a claim with the Sacramento Bee in February 2018, which was paid in a relatively short time thereafter, such as March or April 2018; photo exhibit 1-003 depicts the subject ramp when it was missing the railing, which was in the common area; and Michael Meschi did not replace the railing until after plaintiff Christine Norseth fell in October 2018 (TC Fabrication's and Coyle's Exhibit B – Transcript of Deposition Testimony of Michael Meschi, page 50, lines 12-23; page 59, lines 3-7; page 76, lines 1-15; and page 112, lines 8-22; and Exhibit 1-003).

Cross-Defendants have submitted sufficient evidence to raise a triable issue of material fact as to whether cross-complainants Meschi's failure to timely replace the railing on the ledge that plaintiff fell off from causing plaintiff's injury was gross negligence that prevents application of the indemnity provision by its own terms, which is an independent reason to deny the motion for summary adjudication of the contractual indemnity causes of action.

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 the moving cross-complainants Meschi have not met their initial burden of proof and there remains a triable issue of material fact that prevents entry of summary judgment or summary adjudication of the contractual indemnity cause of action of cross-complainants Meschi's cross-complaint..

The cross-complainant's motion for summary adjudication of the contractual indemnity causes of action is denied.

Breach of Contract Cause of Action

Cross-Complainants Meschi contend they are entitled to summary adjudication of the two breach of contract causes of action on the following grounds: the cross-complainants established as a matter of law with the evidence submitted that they invoked the applicable indemnity provisions of the two leases by tendering their defense and indemnity to the cross-defendants and their insurance carrier; and cross-defendants breached the contractual indemnity provision of the leases by failing and refusing to accept the tenders.

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

Cross-Complainants Meschi have not met their initial burden to establish as a matter of law that the indemnity clauses were triggered and there remains a triable issue of material fact as to whether as a result of grossly negligent conduct by cross-cross-complainants Meschi the indemnity clause does not apply. Therefore, cross-complainants Meschi have also failed to meet their initial burden to establish as a matter of law that the cross-defendants were contractually obligated to defend and indemnify plaintiff and breached the contracts by failure

to defend and indemnify; and there remains a triable issue of material fact as to whether cross-complainants Meschi were grossly negligent, which would render the indemnity clause inoperative and eliminate any potential contractual obligation to indemnify and defend cross-complainants pursuant to the indemnity clause.

Cross-Complainant's motion for summary adjudication of the breach of contract causes of action is denied.

Declaratory Relief Cause of Action

The 7th cause of action for declaratory relief alleges that a dispute as to the respective rights and duties of the parties has arisen as alleged throughout the cross-complaint.

Cross-Complainants Meschi contend they are entitled to entry of summary adjudication of the declaratory relief cause of action because they have established that the cross-defendant lessees each owed them defense and indemnity and they breached the leases by failure to provide indemnity and a defense against the injuries claimed by plaintiffs.

"Any person interested under a written instrument, excluding a will or a trust, or under a contract, or who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a watercourse, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and the declaration shall have the force of a final judgment. The declaration may be had before there

has been any breach of the obligation in respect to which said declaration is sought." (Code of Civil Procedure, § 1060.)

"A complaint for declaratory relief should show the following: ¶ (1) A proper subject of declaratory relief within the scope of C.C.P. 1060. (See infra, §858 et seq.) ¶ (2) An actual controversy involving justiciable questions relating to the rights or obligations of a party. (See *Tiburon v. Northwestern Pac. R. Co.* (1970) 4 C.A.3d 160, 170, 84 C.R. 469; infra, §817.)" (5 Witkin, California Procedure (5th ed.2008) Pleading, § 853, page 268.)

As stated earlier in this ruling, the previously cited evidence does not meet cross-complainant's Meschi's initial burden to establish as a matter of law that the indemnification provision applies to the incident that is the subject of the underlying complaint and there remains a triable issue of material fact as to whether as a result of grossly negligent conduct by cross-cross-complainants Meschi the indemnity clause does not apply.

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 the moving cross-complainants Meschi have not met their initial burden of proof and there remains a triable issue of material fact that prevent entry of summary judgment or summary adjudication in cross-complainants Meschi's favor on the declaratory relief cause of action.

Cross-Complainants Meschi's motion for summary adjudication of the declaratory relief cause of action and motion for summary judgment on the entire cross-complaint is denied.

Cross-Defendants TC Fabrication and Welding, LLC's and William Coyle d.b.a. TC Welding and Fabrication's Motion for Summary Judgment or Summary Adjudication of Causes of Action on Cross-Complainant Meschi's Cross-Complaint.

On February 8, 2022 Cross-Complainants Meschi filed a cross complaint against cross-defendants TC Fabrication and Welding, LLC, William Coyle an individual d.b.a. TC Welding and Fabrication (Cross-Defendants TC Fabrication and William Coyle), and Christopher Coyle an individual d.b.a. Alpine Designs asserting causes of action for contractual indemnity, breach of contract, equitable indemnity, apportionment of fault, and declaratory relief.

Cross-Defendants TC Fabrication and William Coyle move for summary judgment on the Meschi cross-complaint or summary adjudication of the cross-complaint causes of action on the following grounds: cross-defendants TC Fabrication and William Coyle did not owe a duty to maintain or repair the common area of cross-complainants Meschi's property, therefore, they are entitled to summary adjudication of the 5th, 6th and 7th causes of action for equitable indemnity, apportionment of fault, and declaratory relief; cross-defendants TC Fabrication and William Coyle did not owe a duty to warn plaintiff of a dangerous condition of property they did not control, therefore, they are entitled to summary adjudication of the 5th, 6th and 7th causes of action for equitable indemnity, apportionment of fault, and declaratory relief; and cross-defendants TC Fabrication and William Coyle are entitled to summary adjudication of the 1st and 2nd causes of action for contractual indemnity and breach of contract, because the indemnity clause in the subject lease does not extend to plaintiff's accident, which occurred on a common area which cross-defendants TC Fabrication and William Coyle had no control.

Cross-Complainants Meschi oppose the motion on the following grounds: there is evidence that cross-defendants TC Fabrication and William Coyle exercised control over the common area where the incident occurred, therefore, there remains a triable issue of material fact as to

whether cross-defendants TC Fabrication and William Coyle owe a duty to maintain or repair the common area of cross-complainants Meschi's property and/or to warn plaintiff of a dangerous condition of property, which prevents entry of summary adjudication of the equitable indemnity and apportionment of fault causes of action; and there remains a triable issue of material facts as to whether use of the common area and use of the leased premised was sufficiently connected to trigger the indemnity clause of the lease as the plaintiffs' claims arose out of, involved, or was in connection with the use and occupancy of the premises by cross-defendants TC Fabrication and William Coyle, which prevents entry of summary adjudication on the contractual indemnity, breach of contract nd declaratory relief causes of action.

Cross-Complainants Meschi also objected to certain deposition testimony of cross-complainant Michael Meschi submitted in support of the motion.

Cross-Defendants TC Fabrication and William Coyle replied to the opposition: the court should overrule the objections to the evidence; the various ways cross-defendants TC Fabrication and William Coyle used the common area of the cross-complainants Meschi's property do not suggest any element of control of the common area by cross-defendants that would give rise to cross-defendants owing duties of due care to maintain and repair the common area or warn plaintiffs of the condition of the ledge without a guardrail; cross-defendants TC Fabrication and William Coyle did not knowingly agree to indemnify cross-complainants Meschi for a dangerous condition it was not allowed to remedy; and plaintiffs claim remains outside the scope of the lease agreement indemnity provision. .

Cross-Complainants Meschi's Objections to Evidence

Cross-Complainants Meschi objected to consideration of TC Fabrication's and William Coyle's Exhibit F, page 69, lines 21-23 and page 70, lines 18-20 concerning what was stated by an insurance agent concerning replacement of a railing on the ground of hearsay. These

statements and page and line numbers are not found in Exhibit F, which are various documents produced by cross-defendant Meschi in discovery. They are however, found in TC Fabrication's and William Coyle's Exhibit B – Transcript of Deposition Testimony of Cross-Complainant Michael Meschi.)

Citing Evidence Code, § 1221, cross-defendants TC Fabrication and William Coyle contends that the objection should be overruled, because the testimony concerning the out of court statement of cross-complainant Meschi's insurance agent was not offered for the truth of the matter asserted and was instead submitted to support an argument that the later replacement of the railing was in response to the insurance agent's statement and this conduct manifested Michael Meschi's .adoption of the statement or belief it was true.

Cross-Complainant Michael Meschi testified during his deposition that when he made a claim on his insurance related to the incident that is the subject of the complaint, he was advised by his insurance agent that the subject area would benefit from a railing, regardless of whether the Code required it or not; and he went ahead with the work to replace it.

"(a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. ¶ (b) Except as provided by law, hearsay evidence is inadmissible. ¶ (c) This section shall be known and may be cited as the hearsay rule." (Evidence Code, § 1200.)

"Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." (Evidence Code, § 1221.)

The objections are overruled.

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 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.)

"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 **[*1092]** 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.)

"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.)

"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 cross-defendants TC Fabrication's and Coyle's motion for summary judgment or summary adjudication of causes of action of the Meschi cross-complaint.

Contractual Indemnity Cause of Action

The contractual indemnity cause of action alleges: the lease with cross-defendants TC Fabrication and William Coyle requires cross-defendants to defend and indemnify cross-complainants Meschi for the claims asserted in plaintiffs' complaint; cross-complainants Meschi tendered their defense an indemnity to cross-defendants and cross-defendants failed or refused to accept the tender; and cross-defendants Meschi are subject to liability to plaintiffs

by reason of the allegations and charges of the complaint, which cross-complainants specifically deny, and in that event, cross-complainants Meschi are entitled to be defended, indemnified, and reimbursed by cross-defendants (Meschi Cross-Complaint filed on February 18, 2021, paragraphs 12 and 13-15.)

- Applicability of the Indemnity Provision in the Subject Lease

"Under California law, an "[i]ndemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties or of some other person." (Civ.Code, § 2772.) "An indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, embraces the costs of defense against such claims, demands, or liability incurred in good faith, and in the exercise of a reasonable discretion...." (Civ.Code, § 2778, subd. 3.) An indemnitor in an indemnity contract generally undertakes to protect the indemnitee against loss or damage through liability to a third person. (*Somers v. U.S. Fidelity & Guaranty Co.* (1923) 191 Cal. 542, 547, 217 P. 746.) ¶ an indemnity agreement is to be interpreted according to the language and contents of the contract as well as the intention of the parties as indicated by the contract. (*Widson v. International Harvester Co., Inc.* (1984) 153 Cal.App.3d 45, 59, 200 Cal.Rptr. 136.) The extent of the duty to indemnify is determined from the contract. (*Herman Christensen & Sons, Inc. v. Paris Plastering Co.* (1976) 61 Cal.App.3d 237, 245, 132 Cal.Rptr. 86.) The indemnity provisions of a contract are to be construed under the same rules governing other contracts with a view to determining the actual intent of the parties. (*Ibid.*) ¶ A clause which contains the words "indemnify" and "hold harmless" is an indemnity clause which generally obligates the indemnitor to reimburse the indemnitee for any damages the indemnitee becomes obligated to pay third persons. (*Varco–Pruden, Inc. v. Hampshire Constr. Co.* (1975) 50 Cal.App.3d 654, 660, 123 Cal.Rptr. 606.)

Indemnification agreements ordinarily relate to third-party claims. (*Ibid.*)" (Myers Building Industries, Ltd. v. Interface Technology, Inc. (1993) 13 Cal.App.4th 949, 968–969.)

"The question here is not alone what could be used by defendants as appurtenant to the leased portion of the building but particularly as to what places the indemnity provision would apply. In determining this question and in interpreting the lease, it must be borne in mind that the terms of the lease must be construed strictly against plaintiff, first because the lease was prepared by plaintiff (see Basin Oil Co. v. Baasch-Ross Tool Co., 125 Cal.App.2d 578, 271 P.2d 122; Pacific Lumber Co. v. Industrial Accident Comm., 22 Cal.2d 410, 422, 139 P.2d 892; E. A. Strout Western Realty Agency v. Gregoire, 101 Cal.App.2d 512, 517, 225 P.2d 585); and secondly, because the indemnity provision purports to indemnify plaintiff against the results of its own negligence. [Footnote omitted] '* * * the law does not look with favor upon attempts to avoid liability or secure exemption for one's own negligence, and such provisions are strictly construed against the person relying upon them. * * * [W]here the language of an instrument purporting to exculpate one of the parties for its future negligence was prepared entirely by the party relying on its terms, words clearly and explicitly expressing that this was the intent of the parties are required. [Citations.]', Basin Oil Co. v. Baasch-Ross Tool Co., supra, 125 Cal.App.2d at pages 594, 595, 271 P.2d at page 131. ¶ In Hollander v. Wilson Estate Co., 214 Cal. 582, 7 P.2d 177, the tenant leased the fourth floor of a 7 story building. The lease contained a provision indemnifying the landlord against all claims for damages to persons or property "in or about or connected with this tenancy or the occupancy of said demised premises." 214 Cal. at page 584, 7 P.2d at page 178. The court held that while no mention was made in the lease of the tenant's right to use the elevator, such right was an appurtenance of the lease. However, as to the indemnity clause, although the elevator was in a sense 'connected with' the tenancy, 'It is contrary to sound construction to say that said

instrument had in contemplation the release from liability for damages for personal injuries arising from the negligent operation or maintenance of this public elevator.' 214 Cal. at page 585, 7 P.2d at page 179. ¶ In Pacific Indemnity Co. v. California Electric Works, Ltd., 29 Cal.App.2d 260, 84 P.2d 313, the court was construing the indemnity provision of a building contract. It held that to construe the provision as applying to the indemnity of one of the parties against its own wrong, '* * * the language of the contract must be of such a nature as to compel that interpretation, and to accomplish such a result the language used must be clear and explicit.' 29 Cal.App.2d at page 274, 84 P.2d at page 320. It then quoted from Murray v. Texas Co., 172 S.C. 399, 174 S.E. 231, to the effect that 'broad and comprehensive' language alone is not enough. The language indemnifying against the parties' own wrong must nevertheless be clear and explicit and as the defendant there wrote the indemnity provision into the contract for its own benefit, it should have 'plainly stated, if such was the understanding of the parties, that the plaintiff agreed to relieve it in the matter from all liability for its own negligence.' 29 Cal.App.2d at page 274, 84 P.2d at page 320. ¶ Applying such rules to the lease here, it would appear that while as appurtenant to the portion of the building leased there necessarily followed the right to use all portions of the building and even the walkway necessary for ingress to and egress from the Arena,-[Footnote omitted.] the indemnity provision only applied to the 'premises' as strictly defined in the lease. Paragraph 12 limits the indemnity to claims resulting from 'the use and occupation of the premises * * *' The parties have specifically defined 'the premises' as 'the Arena * * * (and no other space or accommodation except as may be hereinafter expressly provided for) * * *' While, of course, people going to the Arena would be entitled to use the walkways and driveways around the building and parking areas, if any, it would be unreasonable, in view of the very restrictive language of the lease, to hold that the indemnity applied to injuries incurred by conditions in those areas, particularly conditions

over which defendants would have no control but plaintiff would. The mere fact that plaintiff made no charge to defendants for the use of the Arena would not broaden the terms of the indemnity. While the trial court did not characterize the walkway other than to say that it provides ingress to and egress from the building, the Herd complaint charged that the walkway 'was, and now is, dedicated to and set apart for the use of the general public and of individual persons in general, while in, upon and about said 'Municipal Auditorium." Under the lease defendants had the exclusive use of the Arena for the specified evening. Its use, however, of means of ingress and egress was not exclusive. Those means would have to be shared with the general public. That fact is another reason for construing strictly the indemnity provision and not applying it to all areas owned by plaintiff which the patrons of the Music Festival would use in coming to the affair. If it was to be understanding of the parties that the pathway outside the building was to be included in the indemnity clause, it would have been a very simple matter for plaintiff in drawing the lease to so provide. ¶ Plaintiff has cited cases like Werner v. Knoll, 89 Cal.App.2d 474, 201 P.2d 45, and Barkett v. Brucato, 122 Cal.App.2d 264, 264 P.2d 978, as upholding clauses similar to paragraph 12. There is no question but that the indemnity provision is a valid one. The only question is as to what part of plaintiff's property it applied to. This question was not involved in the cited cases. The language of the lease is clear and unambiguous. It defines 'premises' and limits the indemnity to the premises defined. The fact that the parties 'understood,' if they did so, that defendants were to use more than the defined premises, did not extend the indemnity to more than the expressly defined limits." (Emphasis added.) (City of Oakland v. Oakland Unified School Dist. of Alameda County (1956) 141 Cal.App.2d 733, 735–738.)

"The tenant agreed to indemnify the landlords for claims "arising out of, involving or in connection with" his use or occupancy of the dental suite. The landlords contend the term

"arising out of" should be liberally construed in favor of the promisee (here, the landlords). For this proposition, the landlords cite *Vitton Construction Co., Inc. v. Pacific Ins. Co.* (2003) 110 Cal.App.4th 762, 766, 2 Cal.Rptr.3d 1 (and many other insurance cases), where the court observed that " 'California courts have consistently given a broad interpretation to the terms "arising out of" or "arising from" in various kinds of insurance provisions.' " Here, the landlords say, "[w]ere it not for [the tenant's] use of the leased premises to operate his dental office, including his hiring of Arax to clean the carpet within the leased premises, [plaintiff] would not have been ascending the stairwell and would not have been injured." ¶ But this is not an insurance case. And as the Supreme Court instructs, "[t]hough indemnity agreements resemble liability insurance policies, rules for interpreting the two classes of contracts do differ significantly." (*Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541, 552, 79 Cal.Rptr.3d 721, 187 P.3d 424 (*Crawford*) [a "public policy concern influences to some degree the manner in which noninsurance indemnity agreements are construed"].) "For example, it has been said that if one seeks, in a noninsurance agreement, to be indemnified ... regardless of the indemnitor's fault ... language on the point must be particularly clear and explicit, and will be construed strictly against the indemnitee." (*Ibid.*) In accordance with this principle, the indemnification clause cannot be read as the landlords suggest. ¶ Of course, "[i]n a remote sense," the accident would not have occurred if the tenant had not hired Arax to clean the carpets in his dental suite, and in that sense, the accident could be said to arise from the tenant's use of the suite. (See *Hollander v. Wilson Estate Co.* (1932) 214 Cal. 582, 584, 585, 7 P.2d 177 [construing the tenant's agreement to indemnify for claims " 'arising ... in or about or connected with' " the demised premises; "[i]n a remote sense, of course, the elevator [which dropped to the basement injuring the tenant] is a means of 'connection' between the street and the demised premises"; but elevator was "owned, controlled, operated and maintained

exclusively by the defendant" and "can hardly be supposed to have been a subject within the scope of the lease"]; see also *City of Oakland v. Oakland etc. Sch. Dist.* (1956) 141 Cal.App.2d 733, 735, 737, 297 P.2d 752 (*City of Oakland*) [construing the lessee's agreement to indemnify the lessor for claims " 'arising out of the use and occupation of *the premises* by the lessee' "; the indemnity clause did not apply to an injury incurred when a third party stepped in a hole in a walkway used for ingress and egress to and from the leased premises].)" (Emphasis added.) (Morlin Asset Management LP v. Murachanian (2016) 2 Cal.App.5th 184, 190–191.) The appellate court concluded: "We hold that under the indemnity clause in this case, the injury to a third party that occurred outside the dental suite, in a common area over which the landlords have exclusive control, did not arise out of the tenant's use of the dental suite. It does not matter that the accident would not have happened but for the tenant hiring the third party to clean the carpets in the dental suite, and that the third party may have been at fault. The connection between the tenant's use of his suite and the accident in the stairwell over which the tenant had no control is too remote to have been within the contemplation of the parties when they entered into the lease. This construction of the indemnity clause is fully consistent with the law governing the interpretation of indemnification provisions (*Crawford, supra,* 44 Cal.4th at p. 552, 79 Cal.Rptr.3d 721, 187 P.3d 424), and with the *Hollander* and *City of Oakland* cases construing similar language, albeit in distinguishable circumstances. The trial court properly granted summary judgment." (Morlin Asset Management LP v. Murachanian (2016) 2 Cal.App.5th 184, 193.)

Cross-Complainants Meschi admitted in the subject cross-complaint that Exhibit A attached to the cross-complaint was the subject lease between cross-defendants TC Fabrication and William Coyle and cross-complainants Meschi and that causes of action for contractual

indemnity and breach of contract are solely premised upon the indemnity provision in that lease. (See Meschi Cross-Complainant filed on February 18, 2021, paragraphs and 11-20.)

The following facts are undisputed: the subject incident occurred in a common area as defined in the lease; cross-complainants Meschi, as landlords, had the exclusive right to and duty to control, manage, maintain, and repair the common area; as landlord, cross-complainants Meschi had the exclusive right and duty to control manage, maintain and repair that part of the common area for which tenants paid common area operating expenses; in the common area just outside the premises was a walkway that ended with a change in elevation (common area ledge); and while Coyle was using the common area parking lot to load the rack onto the back of plaintiffs' truck, plaintiff Christine Norseth followed along, walking sideways, all the while watching Coyle and the Truck. (Cross-Complainants Meschi's Responses to Cross-Defendants TC Fabrication's and William Coyle's Separate Statement of Undisputed Material Facts in Support of Motion, Fact Numbers 2-5 and 13.)

The subject lease defines the premises as certain specifically identified portions of the project commonly known as 6192 Enterprise Drive, Suite G, generally described as 5,000 square feet of warehouse space, including one office and one bathroom, and in addition to the lessees' right to use and occupy the defined premises, lessees shall have non-exclusive rights to any utility raceways of the building contained in the premises (Building) and to the common areas as defined in paragraph 2.7; and the premises, the building, common areas, and land upon which they are located, along with all other buildings and improvements are collectively referred to as the project. (Cross-Defendants TC Fabrication and William Coyle's Exhibit A – Cross-Complainants Meschi's Cross-Complaint, Exhibit A to Cross-Complaint – William Coyle/TC Fabrication and Welding Lease Agreement, paragraph 1.2(a).) The lease also defines the common area as all areas and facilities <u>outside the premises</u> and within the exterior

boundary line of the project and interior utility raceways and installations within the unit that are provided and designated by the lessor from time to time for the general non-exclusive use of the lessor, lessee, and other tenants of the project, suppliers, shippers, customers, contractors, and invitees; the William Coyle/TC Fabrication and Welding Lease Agreement further specifies that the common areas include parking areas, loading and unloading areas, trash areas, roadways, walkways, driveways, and landscaped areas; and the lease further provides that the lessor or other persons as lessor may appoint have the exclusive control and management of the common areas. (Emphasis added.) (Cross-Defendants TC Fabrication and William Coyle's Exhibit A – Cross-Complainants Meschi's Cross-Complaint, Exhibit A to Cross-Complaint – William Coyle/TC Fabrication and Welding Lease Agreement, paragraphs 2.7 and 2.9.) The indemnity provision of the lease provides: except for lessor's gross negligence or willful misconduct, lessees shall indemnify, protect, defend, and hold harmless the premises, lessor and its agents, partners and lenders, from and against any and all claims, loss of rents, and/or damages, liens, judgments, penalties, attorneys' and consultants' fees, expenses and/or liabilities arising out of, involving, or in connection with, the use and/or occupancy of the premises by lessees; if any action or proceeding is brought against lessor by reason of any of the foregoing matters, lessees shall upon notice defend the same at lessees' expense by counsel reasonably satisfactory to the lessor and lessor shall cooperate with lessees in such defense; lessor need not have first paid any such claim in order to be defended or indemnified; and the William Coyle/TC Fabrication and Welding Lease Agreement further specifies that lessor's master or ground lessor are also covered by the indemnity clause. (Emphasis added.) **(**Cross-Defendants TC Fabrication and William Coyle's Exhibit A – Cross-Complainants Meschi's Cross-Complaint, Exhibit A to Cross-Complaint – William Coyle/TC Fabrication and Welding Lease Agreement, paragraph 8.7.)

Evidence of the following facts were submitted: Mr. Coyle agreed to demonstrate how to load an ATV on the rack installed; and as plaintiff Christine Norseth was watching she walked along the side of the truck and fell off the edge of a ledge. (Cross-Defendants TC Fabrication's and William Coyle's Exhibit E – Transcript of Deposition Testimony of Christine Norseth, page 24, lines 12-17; page 25, lines 1-19; and page 31, lines 11-13.); originally there was a long guardrail that was on top of the sloped retaining wall; the railing went missing in January 2018 when it was backed over by a Sacramento Bee delivery truck in the middle of the night; there was a railing there through late December 2017; photo exhibit 1-003 depicts the subject ramp when it was missing the railing, which was in the common area; and Michael Meschi did not replace the railing until after plaintiff Christine Norseth fell in October 2018. (Cross-Defendants TC Fabrication's and Coyle's Exhibit B – Transcript of Deposition Testimony of Michael Meschi, page 50, lines 12-23; page 59, lines 3-7; and page 76, lines 11-15; and Exhibit 1-003)

Cross-Complainant Michael Meschi testified in his deposition to the following: cross-defendants committed multiple common area violations; they used portions of the common area parking lots to store materials in parking spaces; installed a camera system without permission; installed a propane tank and gas line without permission or permit; piled scrap metal on top of trash enclosures and parking spaces; stored stuff in alcoves, power washers and equipment; and the violations occurred prior to the subject accident in October 2018. (Cross-Complainants Meschi's Exhibit J – Transcript of Deposition Testimony of Cross-Complainant Michael Meschi, page 22, line 17 to page 23, line 24.)

The following evidence was also presented: cross-defendants TC Fabrication's employee Christopher Coyle demonstrated how to load an ATV on the rack just installed on plaintiff's truck; and it only took 20 minutes to a half hour to install the rack; (Cross-Complainant Meschi's Exhibit K – Transcript of Deposition Testimony of Christine Norseth,, page 21, line 24

to page 22, line 1; page 22, lines 7-9; page 23, line 24 to page 24, line 1; page 24, lines 12-17; and Cross-Complainants Meschi's Exhibit L – Transcript of Deposition Testimony of Michael Norseth, page 30, lines 8-17.)

The subject lease has very specific provisions defining the meaning of the words premises and common areas as used in those documents. The indemnity provisions are expressly and strictly limited to all claims, loss of rents, and/or damages, liens, judgments, penalties, attorneys' and consultants' fees, expenses and/or liabilities arising out of, involving, or in connection with, the use and/or occupancy of the premises by lessees. (Emphasis the court's.) The parking lots are in the common areas, which is not the premises defined in the lease, which is Suite G – a 5,000 square feet of warehouse space, including one office and one bathroom. The lessors Meschi expressly retained exclusive control of the parking lots and areas outside the very limited definition of "premises". It was anticipated that the lessees on the project, including cross-complainant Coyle, had non-exclusive use of the common areas, including the parking lots, yet the indemnity clause was strictly limited to the "premises". If it was to be the understanding of the parties that common area parking lots were to be included in the indemnity clause, it would have been a very simple matter for cross-complainants lessors Meschi to draft the lease to so provide. The drafting party, cross-complainants Meschi, appear to have engaged in great effort to specifically limit the scope of the specifically defined "premises" and did not provide that lessee cross-complainant Coyle agreed to be liable to indemnify cross-defendant Meschi for injuries in the common areas arising from claims for injuries incurred from a condition/dangerous condition of the common area while exercising the right to non-exclusive use of the common areas, including parking areas, which cross-complainants Meschi expressly retained exclusive control and management under the terms of the lease. Strictly construing the terms of the lease against the cross-complainants Meschi,

any evidence that cross-defendants used portions of the common area parking lots to store materials in parking spaces, install a camera system, install a propane tank and gas line, pile scrap metal on top of trash enclosures and parking spaces, park and unload UTVs from trucks and trailers in the parking area, and to demonstrate how to load an ATV on the rack just installed on plaintiff's truck does not raise a triable issue of material fact concerning the issue of whether the specific subject incident where plaintiff Christine Norseth fell off an unguarded ledge in the parking area where a guard railing had existed for a long period of time prior to the incident, but was absent at the time of the incident, arose out of, involved, or was in connection with, the use and/or occupancy of the Suite G premises by the cross-defendant lessee. **(**See Cross-Defendants TC Fabrication and William Coyle's Exhibit A – Cross-Complainants Meschi's Cross-Complaint, Exhibit A to Cross-Complaint – William Coyle/TC Fabrication and Welding Lease Agreement, paragraphs 1.2(a), 2.7, 2.9, and 8.7.)

"…the terms of the lease must be construed strictly against plaintiff, first because the lease was prepared by plaintiff… (Citations omitted.) and secondly, because the indemnity provision purports to indemnify plaintiff against the results of its own negligence. (Citations omitted.)" (City of Oakland v. Oakland Unified School Dist. of Alameda County (1956) 141 Cal.App.2d 733, 735-736.)

There is no language in the subject indemnity clause that states the parties agreed that violations of rules and regulations imposed upon use of the common areas triggered the indemnity clause imposing a duty to defend and indemnify cross-complainants Meschi for any claimed injuries in the common areas, even where the injury resulted from a condition/dangerous condition of the common area itself. The key language is whether there was a use of the specifically described premises, the leased suite, which resulted in injuries arising from or in connection with the use of the suites**.** The connection between the cross-

defendant tenants' use of their suite, the non-exclusive use of the parking area to demonstrate loading an ATV, and the accident involving a fall from a ledge in the common area parking lot that lacked a guard rail that had previously existed for a long period of time at the ledge location where Christine Norseth fell from, which the cross-complainants had exclusive control of and cross-defendant tenants had no control, is too remote to have been within the contemplation and agreement of the parties as falling within the indemnity clause when they entered into the lease.

"…it would be unreasonable, in view of the very restrictive language of the lease, to hold that the indemnity applied to injuries incurred by conditions in those areas, particularly conditions over which defendants would have no control but plaintiff would." (City of Oakland v. Oakland Unified School Dist. of Alameda County (1956) 141 Cal.App.2d 733, 737.)

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 cross-defendants TC Fabrication and William Coyle have established as a matter of law that they are entitled to summary adjudication of the contractual indemnity cause of action, because the provision does not apply under the circumstances presented, and cross-complainants Meschi have not submitted evidence sufficient to raise a triable issue of material fact as to the applicability of the subject indemnity clause to the subject accident.

Cross-Defendants TC Fabrication's and William Coyle's motion for summary adjudication of the 1st cause of action of the Meschi Cross-Complaint for contractual indemnity is granted.

The court need not and does not reach the issue of whether cross-defendants have established as a matter of law that cross-complainants Meschi were grossly negligent in relation to the subject accident.

Breach of Contract Causes of Action

The 2nd cause of action of the Meschi cross-complaint are solely premised upon allegations that the two leases mandated cross-defendants to defend and indemnify the cross-complaints for the claims asserted in the underlying complaint in this action; cross-complainants tendered the defense and requested indemnity to cross-defendants and cross-defendants breached the lease agreements by failing or refusing to accept the tender. (Cross-Defendants TC Fabrication's and Coyle's Request for Judicial Notice, Exhibit A – Meschi Cross-Complaint, paragraphs 17, 19, and 20..)

Cross-Defendants having established as a matter of law that they are entitled to summary adjudication of the contractual indemnity causes of action, because the provision does not apply under the circumstances presented, and cross-complainants Meschi not having submitted evidence sufficient to raise a triable issue of material fact as to the applicability of the subject indemnity clause to the subject accident, the failure and refusal to accept the tender of defense and indemnity under that provision can not as a matter of law be a breach of the agreements. The evidence presented in opposition not having raised a triable issue of material fact as to the applicability of the indemnity provision and the sole breach of the lease alleged in the cross-complaint being failing or refusing to accept the tender of defense and indemnity pursuant to the indemnity clause of the lease, cross-defendants are entitled to summary adjudication of the breach of contact cause of action.

Cross-Defendants TC Fabrication's and William Coyle's motion for summary adjudication of the breach of contract cause of action is granted.

Equitable Indemnity and Apportionment of Fault Causes of Action

The Meschi cross-complaint alleges: if the Meschis are found liable to plaintiffs by reason of the allegations and charges of the complaint, in that event any such obligation and liability on the part of cross-complainants Meschi can and will be solely the result of active and/or primary fault, consisting of active and/or primary negligence, breach, or other wrongdoing by cross-defendants TC Fabrication and William Coyle, as opposed to a lack of negligence, breach or secondary or passive negligence by cross-complainants Meschi, and as a result, cross-complainants are entitled to indemnity and reimbursement by cross-defendants in the amount of any such sum that might or could be found or said to be due by cross-complainants to plaintiffs; cross-defendants and each of them were responsible in whole or part for the injuries and damages, if any, suffered by plaintiffs; and if cross-complainants Meschi are judgment liable to plaintiffs, cross-defendants should be required to pay a share of the plaintiffs' judgment that is in proportion to the comparative negligence of that cross-defendant in causing plaintiff's damages and to reimburse cross-complainants for any payments they make to plaintiffs in excess of their proportional share of all of cross-defendants' negligence. (Cross-Defendants TC Fabrication's and Coyle's Request for Judicial Notice, Exhibit A – Meschi Cross-Complaint, paragraphs 31, 33 and 34.)

Cross-Complainants Meschi argue in opposition: there is evidence that cross-defendants TC Fabrication and William Coyle exercised control over the common area where the incident occurred, therefore, there remains a triable issue of material fact as to whether cross-defendants TC Fabrication and William Coyle owe a duty to maintain or repair the common area of cross-complainants Meschi's property and/or to warn plaintiffs of a dangerous condition of property, which prevents entry of summary adjudication of the equitable indemnity and apportionment of fault causes of action.

Cross-Defendants TC Fabrication and William Coyle argue in reply: the various ways cross-defendants TC Fabrication and William Coyle used the common area of the cross-complainants Meschi's property do not suggest any element of control of the common area by cross-defendants that would give rise to cross-defendants owing duties of due care to maintain and repair the common area or warn plaintiffs of the condition of the ledge without a guardrail.

"The right to indemnity flows from payment of a joint legal obligation on another's behalf. (*GEM Developers v. Hallcraft Homes of San Diego, Inc.* (1989) 213 Cal.App.3d 419, 426, 261 Cal.Rptr. 626 (*GEM Developers*).)" (Bailey v. Safeway, Inc. (2011) 199 Cal.App.4th 206, 212.) In affirming the trial court's ruling sustaining the demurrer to the equitable indemnity cause of action without leave to amend, the appellate court in Bailey v. Safeway, Inc. (2011) 199 Cal.App.4th 206 stated: ""The elements of a cause of action for indemnity are (1) a showing of fault on the part of the indemnitor and (2) resulting damages to the indemnitee for which the indemnitor is ... equitably responsible. [Citation.]" (*Expressions at Rancho Niguel Assn. v. Ahmanson Developments, Inc., supra,* 86 Cal.App.4th at p. 1139, 103 Cal.Rptr.2d 895, italics omitted.) Nowhere in Bailey's complaint does he allege actual "fault" on the part of Safeway or state why Safeway should, in equity, be responsible for part of the damages." (Bailey v. Safeway, Inc. (2011) 199 Cal.App.4th 206, 217.)

"California permits an action between concurrent tortfeasors for equitable indemnity on a comparative fault basis. (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 591, 146 Cal.Rptr. 182, 578 P.2d 899.) The purpose is to assure liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault. (Ibid.) It is also established a settling defendant may assert a claim for equitable indemnity against a concurrent tortfeasor not named by the plaintiff. (*Sears, Roebuck & Co. v. International*

Harvester Co. (1978) 82 Cal.App.3d 492, 494, 147 Cal.Rptr. 262.)" (Mullin Lumber Co. v. Chandler (1986) 185 Cal.App.3d 1127, 1131.)

"Except as provided in Section 877 of the Code of Civil Procedure, a party to a joint, or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him." (Civil Code, § 1432.)

"(a) Where a money judgment has been rendered jointly against two or more defendants in a tort action there shall be a right of contribution among them as hereinafter provided. ¶ (b) Such right of contribution shall be administered in accordance with the principles of equity. ¶ (c) Such right of contribution may be enforced only after one tortfeasor has, by payment, discharged the joint judgment or has paid more than his pro rata share thereof. It shall be limited to the excess so paid over the pro rata share of the person so paying and in no event shall any tortfeasor be compelled to make contribution beyond his own pro rata share of the entire judgment. ¶ (d) There shall be no right of contribution in favor of any tortfeasor who has intentionally injured the injured person. ¶ (e) A liability insurer who by payment has discharged the liability of a tortfeasor judgment debtor shall be subrogated to his right of contribution. ¶ (f) This title shall not impair any right of indemnity under existing law, and where one tortfeasor judgment debtor is entitled to indemnity from another there shall be no right of contribution between them. ¶ (g) This title shall not impair the right of a plaintiff to satisfy a judgment in full as against any tortfeasor judgment debtor." (Civil Code, § 875.)

"In determining a defendant's share of fault, the court may consider other joint tortfeasors' degree of fault for the plaintiff's injuries and reduce the defendant's share accordingly. A defendant may attempt to reduce his or her share of liability for noneconomic damages by seeking to add nonparty joint tortfeasors. But unless there is substantial evidence that an

individual is at fault, there can be no apportionment of damages to that individual." (Wilson v. Ritto (2003) 105 Cal.App.4th 361, 367.)

The Third District Court of Appeal has held: ""A claim for contribution ... stems from a legally recognized right forged from principles of equity and natural justice. [Citations.] The right of contribution, although necessarily related to some former transaction or obligation, exists as an entirely separate contract implied by law. [Citation.] In situations where two or more parties are jointly liable on an obligation and one of them makes payment of more than his share, the one paying possesses a new obligation against the others for their proportion of what he has paid for them. [Citation.]" (*Borba Farms, Inc. v. Acheson* (1988) 197 Cal.App.3d 597, 601-602, 242 Cal.Rptr. 880.) ¶ "Equitable contribution is ... the right to recover, not from the party *primarily* liable for the loss, but from a *co-obligor* who *shares* such liability with the party seeking contribution. [Fn. noting the right is codified in Civil Code section 1432.] ... Equitable contribution permits reimbursement to the [party] that paid on the loss for the excess it paid over its proportionate share of the obligation, on the theory that the debt it paid was *equally* and *concurrently* owed by [others] and should be shared by them pro rata in proportion to their respective coverage of the [insurance] risk. The purpose of this rule of equity is to accomplish substantial justice by equalizing the common burden shared by [co-obligors], and to prevent one [obligor] from profiting at the expense of others. [Citations.]" (*Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1293, 77 Cal.Rptr.2d 296.) ¶ "Equitable contribution allows for loss sharing among [co-obligors] 'that share the same level of liability on the same risk as to the same [principal].' [Citation.]" (*RLI Ins. Co. v. CNA Casualty of California* (2006) 141 Cal.App.4th 75, 84, 45 Cal.Rptr.3d 667 [insurance case].) "The principle of equity on which the right of contribution is founded applies only where the parties are under a common burden of liability." (*Weinberg Co. v. Heller* (1925) 73 Cal.App. 769, 779, 239 P. 358

[contribution was not an appropriate remedy for corporation which incurred court costs litigating a lawsuit for the benefit of itself and an individual, and which sought to enforce the individual's promise to share the court costs].) The California Supreme Court said in dictum in *Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 190 Cal.Rptr. 355, 660 P.2d 813: "The right to contribution embodied in Civil Code section 1432 'rests upon principles of equity and natural justice.' (*Blankenhorn-Hunter-Dulin Co. v. Thayer* (1926) 199 Cal. 90, 96, 247 P. 1088; see also *Jackson v. Lacy* (1940) 37 Cal.App.2d 551, 559, 100 P.2d 313.) Footnote omitted.] Under fundamental principles of equity, a person who has paid no more than his or her just proportion of the debt cannot secure contribution from a codebtor, even if the codebtor has paid nothing. [Citations.] As a corollary to this rule, [the California Supreme Court] has held that *equality of liability among persons whose respective situations are not equal is inequitable.* (*Blankenhorn, supra,* at p. 96, 247 P. 1088 [cash customers who paid in full for stock purchased from broker were not in same class as marginal traders who had not paid in full, and therefore cash customers' stock could not be pledged as security for broker's debt].)" (*Jessup Farms, supra,* 33 Cal.3d at p. 650, fn. 7, 190 Cal.Rptr. 355, 660 P.2d 813, italics added [payments made by the principal obligor of four promissory notes should have been applied to extinguish the first note, hence extinguishing the liability of the defendant who cosigned only the first note, rather than ratably apportioned among the four notes].)" (Morgan Creek Residential v. Kemp (2007) 153 Cal.App.4th 675, 684-685.)

Cross-Complainant Michael Meschi testified in his deposition to the following: cross-defendants committed multiple common area violations; they used portions of the common area parking lots to store materials in parking spaces; installed a camera system without permission; installed a propane tank and gas line without permission or permit; piled scrap metal on top of trash enclosures and parking spaces; stored stuff in alcoves, power washers

and equipment; and the violations occurred prior to the subject accident in October 2018.. (Cross-Complainants Meschi's Exhibit J – Transcript of deposition Testimony of Cross-Complainant Michael Meschi, page 22, line 17 to page 23, line 24.)

The following evidence was also presented: cross-defendants TC Fabrication's employee Christopher Coyle demonstrated how to load an ATV on the rack just installed on plaintiff's truck; and it only took 20 minutes to a half hour to install the rack; (Cross-Complainant Meschi's Exhibit K – Transcript of Deposition Testimony of Christine Norseth,, page 21, line 24 to page 22, line 1; page 22, lines 7-9; page 23, line 24 to page 24, line 1; page 24, lines 12-17; and Cross-Complainants Meschi's Exhibit L – Transcript of Deposition Testimony of Michael Norseth, page 30, lines 8-17.)

"" '[T]he duties owed in connection with the condition of land are not invariably placed on the person [holding title] but, rather, are owed by the person in possession of the land [citations omitted] because [of the possessor's] supervisory control over the activities conducted upon, and the condition of, the land.' " (*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 368, 178 Cal.Rptr. 783, 636 P.2d 1121; *Preston v. Goldman* (1986) 42 Cal.3d 108, 119, 227 Cal.Rptr. 817, 720 P.2d 476 ["*Sprecher* demonstrates that we have placed major importance on the existence of possession and control as a basis for tortious liability for conditions on the land."].) This court recognized in *Johnston v. De La Guerra Properties, Inc.* (1946) 28 Cal.2d 394, 170 P.2d 5 that a defendant who lacks title to property still may be liable for an injury caused by a dangerous condition on that property if the defendant exercises control over the property. One of the defendants in *Johnston* operated a restaurant in a portion of a building leased from the owner of the property. A prospective customer of the restaurant fell while walking from her automobile onto an unlit portion of a walkway leading to the restaurant. The walkway was not situated within the premises leased by the defendant. This court observed: "A

tenant ordinarily is not liable for injuries to his invitees occurring outside the leased premises on common passageways over which he has no control. [Citations.] Responsibility in such cases rests on the owner, who has the right of control and the duty to maintain that part of the premises in a safe condition. It is clear, however, that if the tenant exercises control over a common passageway outside the leased premises, he may become liable to his business invitees if he fails to warn them of a dangerous condition existing thereon." [Footnote omitted.] (28 Cal.2d at p. 401, 170 P.2d 5.) ¶ We subsequently restated the principles announced in *Johnston:* "The courts have long held that one who invites another to do business with him owes to the invitee the duty to exercise reasonable care to prevent his being injured on 'the premises.' The physical area encompassed by the term 'the premises' does not, however, coincide with the area to which the invitor possesses a title or a lease. The 'premises' may be less or greater than the invitor's property. The premises may include such means of ingress and egress as a customer may reasonably be expected to use. *The crucial element is control.*" (*Schwartz v. Helms Bakery Limited* (1967) 67 Cal.2d 232, 239, 60 Cal.Rptr. 510, 430 P.2d 68, fns. omitted, italics added.) ¶ The Restatement Second of Torts uses the phrase "possessor of land," rather than the terms "owner" or "lessee," to describe who may be liable for injuries caused by a dangerous condition of land. (See, e.g., Rest.2d Torts, § 343, p. 215.) Section 328E (p. 170) of the Restatement Second of Torts defines the term "possessor of land" to include "a person who is in occupation of the land with intent to control it...." The comment to this section explains: "The important thing in the law of torts is the possession and not whether it is or is not rightful as between the possessor and some third person." (*Id.,* § 328E, com. a, p. 171.) ¶ In similar fashion, the Courts of Appeal have recognized that a defendant's potential liability for injuries caused by a dangerous condition of property may be based upon the defendant's exercise of control over the property. "In common law parlance, the possessor of

land is the party bearing responsibility for its safe condition. Possession, in turn, is equated with occupancy plus control. [Citations.] Thus, in identifying the party vulnerable to a verdict, control dominates over title. 'The crucial element is control.' [Citation.]" (*Low v. City of Sacramento* (1970) 7 Cal.App.3d 826, 831, 87 Cal.Rptr. 173; see also *Both v. Harband* (1958) 164 Cal.App.2d 743, 748, 331 P.2d 140 ["[A]ctual exercise of control by the tenant [over a portion of leased property], even though the lease itself confers no right of such control upon him, can subject him to liability."].) [Footnote omitted.]" (Alcaraz v. Vece (1997) 14 Cal.4th 1149, 1157-1159.)

"A defendant's control over property is sufficient to create a duty to protect owed to persons using the property. (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1162, 1166, 60 Cal.Rptr.2d 448, 929 P.2d 1239; accord, *Soto v. Union Pacific Railroad Co.* (2020) 45 Cal.App.5th 168, 177, 258 Cal.Rptr.3d 529 ["the rationale being that whoever has the means to control the property can take steps to prevent the harm"].) Conversely, absent any control of the property, a defendant cannot be held liable for a dangerous condition on that property. (*Cody F. v. Falletti* (2001) 92 Cal.App.4th 1232, 1241, 112 Cal.Rptr.2d 593 [" '[t]he law does not impose responsibility where there is no duty because of the absence of a right to control' "]; accord, *Soto v. Union Pacific Railroad Co.,* at p. 177, 258 Cal.Rptr.3d 529; *Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077, 1084, 224 Cal.Rptr.3d 846, 404 P.3d 1196 [generally, there is no right to control another's property].)" (Colonial Van & Storage, Inc. v. Superior Court (2022) 76 Cal.App.5th 487, 497.)

"When it comes to property, " 'control' " is defined as the " 'power to prevent, remedy or guard against the dangerous condition.' " (*Public Utilities Com. v. Superior Court* (2010) 181 Cal.App.4th 364, 378, 105 Cal.Rptr.3d 234; *Low v. City of Sacramento* (1970) 7 Cal.App.3d 826, 833–834, 87 Cal.Rptr. 173.) This involves a " 'dramatic assertion of a right normally

associated with ownership or at least ... possession' " of the subject property (*Contreras v. Anderson* (1997) 59 Cal.App.4th 188, 200, 69 Cal.Rptr.2d 69) or "undertaking affirmative acts that are consistent with being the owner or occupier of the property" (*Lopez v. City of Los Angeles* (2020) 55 Cal.App.5th 244, 258, 269 Cal.Rptr.3d 377). Accordingly, defendants have been found to control property in which they have no legal interest by taking some overt action directed at the property to modify or improve it beyond simple upkeep. For example, constructing a fence around the property (*Alcaraz v. Vece, supra*, 14 Cal.4th at pp. 1161–1162, 60 Cal.Rptr.2d 448, 929 P.2d 1239); erecting a Neon sign to illuminate the property (*Johnston v. De La Guerra Properties, Inc.* (1946) 28 Cal.2d 394, 401, 170 P.2d 5); installing sprinklers, planting trees, and maintaining the property (*Alpert v. Villa Romano Homeowners Assn.* (2000) 81 Cal.App.4th 1320, 1335, 96 Cal.Rptr.2d 364); or mowing and watering the property, removing debris, and repairing any holes in the grassy surface (*Low v. City of Sacramento, supra,* 7 Cal.App.3d at pp. 830, 834, 87 Cal.Rptr. 173). ¶ On the other hand, defendants were found not liable for slip and fall injuries sustained on public sidewalks abutting their property caused by third parties having deposited dog feces (*Selger v. Steven Bros., Inc.* (1990) 222 Cal.App.3d 1585, 1591–1592, 272 Cal.Rptr. 544), or rubbish and other detritus (*Bolles v. Hilton & Paley, Inc.* (1931) 119 Cal.App.126, 127–128, 6 P.2d 335; accord, *Lopez v. City of Los Angeles, supra,* 55 Cal.App.5th at p. 258, 269 Cal.Rptr.3d 377). The rationale being that in those instances the defendants did not exert sufficient control over the property by effectively treating it as their own to warrant imposition of a duty of care. (*Lopez*, at p. 256, 269 Cal.Rptr.3d 377.)" (Emphasis added.) (Colonial Van & Storage, Inc. v. Superior Court (2022) 76 Cal.App.5th 487, 497-498.)

The lessor cross-complainants expressly retained in the subject lease exclusive control and management of the common areas. (Emphasis added.) (Cross-Defendants TC Fabrication and

William Coyle's Exhibit A – Cross-Complainants Meschi's Cross-Complaint, Exhibit A to Cross-Complaint – William Coyle/TC Fabrication and Welding Lease Agreement, paragraphs 2.9.)

This evidence submitted in support of the motion meets cross-defendants' initial burden to establish as a matter of law that cross-defendant had no right or duty to control and manage the common area, including the parking area where the subject incident occurred. Absent a duty, cross-defendants TC Fabrication and William Coyle can not be held liable in negligence for the subject accident and, therefore, can not be held liable to cross-complainant landlords/lessors Meschi for equitable indemnity and apportionment of fault. The burden of proof has shifted to cross-complainants Meschi to submit sufficient evidence to raise a trial issue of material fact

The evidence of cross-defendant violations regarding use of the common area are not dramatic assertions of a right normally associated with ownership or at least .possession of the subject common area property where the incident occurred, affirmative acts that are consistent with being the owner or occupier of the subject parking area where the incident occurred when the subject incident occurred, or defendants exerting sufficient control over the property by effectively treating the subject common area parking lot where the incident occurred as their own to warrant imposition of a duty of care on cross-defendants TC Fabrication and William Coyle to maintain and replace the guardrail in the parking area or to warn plaintiffs of the dangerous condition of the lessor's common area parking lot.

Cross-Complainants have not raised with the evidence submitted in opposition a triable issue of material fact as to whether cross-defendants exercised control over the subject parking area such that a duty of due care arose to maintain and repair the parking lot guardrail or warn plaintiffs that absence of the guardrail was a dangerous condition of the property.

The motion for summary adjudication of the equitable indemnity and apportionment of fault causes of action is granted.

Declaratory Relief Cause of Action

The 7th cause of action for declaratory relief alleges that a dispute as to the respective rights and duties of the parties has arisen as alleged throughout the cross-complaint.

"Any person interested under a written instrument, excluding a will or a trust, or under a contract, or who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a watercourse, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and the declaration shall have the force of a final judgment. The declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought." (Code of Civil Procedure, § 1060.)

"A complaint for declaratory relief should show the following: ¶ (1) A proper subject of declaratory relief within the scope of C.C.P. 1060. (See infra, §858 et seq.) ¶ (2) An actual controversy involving justiciable questions relating to the rights or obligations of a party. (See *Tiburon v. Northwestern Pac. R. Co.* (1970) 4 C.A.3d 160, 170, 84 C.R. 469; infra, §817.)" (5 Witkin, California Procedure (5th ed.2008) Pleading, § 853, page 268.)

The court having granted summary adjudication of all causes of action pled against the moving parties that would serve as a basis for declaratory relief requested in the cross-complaint, the court grants summary adjudication of the declaratory relief cause of action premised upon the evidence previously cited and analysis previously stated in this ruling; and further grants summary judgment on all causes of action asserted against cross-defendants TC Fabrication and William Coyle in the subject cross-complaint.

TENTATIVE RULING # 2: CROSS-DEFENDANTS MESCHI'S MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION ON CROSS-COMPLAINANT COYLE'S CROSS-COMPLAINT IS DENIED. CROSS-COMPLAINANTS MESCHI'S MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION ON CROSS-COMPLAINANT MESCHI'S CROSS-COMPLAINT IS DENIED. CROSS-DEFENDANTS TC FABRICATION AND WELDING, LLC'S AND WILLIAM COYLE D.B.A. TC WELDING AND FABRICATION'S MOTION FOR SUMMARY JUDGMENT OF CAUSES OF ACTION OF CROSS-COMPLAINANT MESCHI'S CROSS-COMPLAINT IS GRANTED. NO HEARING ON THESE MATTERS WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL

ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, OCTOBER 7, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

3. COUNTY OF EL DORADO v. WALDOW 21CV0122

(1) Plaintiff's Motion to Impose Issue and Evidentiary Sanctions Against Defendant Waldow for Failure to Obey Discovery Order.

(2) Plaintiff's Motion to Impose Issue and Evidentiary Sanctions Against Defendant International Farmers Kitchen, LLC for Failure to Obey Discovery Order.

Plaintiff's Motion to Impose Issue and Evidentiary Sanctions Against Defendant Waldow for Failure to Obey Discovery Order.

On July 15, 2022 the court granted plaintiff's motion to compel discovery and ordered defendant Jennette Waldow to answer form and special interrogatories and produce documents without objections within ten days; deemed admitted requests for admission; and further directed defendant Jennette Waldow to pay $1,550 in monetary sanctions within ten days. The proof of service of the notice of ruling filed on August 1, 2022 declares that on July 29, 2022 notice of the ruling was served on defense counsel by mail and email.

Arguing that plaintiff Waldow has not complied with the court's discovery order, defendants move for an order imposing the following issue and evidentiary sanctions: an issue sanction be imposed finding that all 25 affirmative defenses set forth in defendant Waldow's answer have been established in plaintiff's favor without the need for additional proof; an issue sanction be imposed finding that defendant Waldow does not contend that any person had a valid permit issued by the County EMD under Chapter 8.05 of the El Dorado County Ordinance Code to operate Apple Bistro at any time from July 31, 2020 to March 16, 2022; an issue sanction be imposed finding that defendant Waldow does not contend that a permit issued by the County EMD under Chapter 8.05 of the El Dorado County Ordinance Code was not required to operate Apple Bistro at any time from July 31, 2020 to March 16, 2022; and an evidence sanction that precludes introduction of any evidence at trial, including all witnesses and

documents that should have been disclosed and produced in response to the discovery propounded.

The proofs of service in the court's file declare that notice of the hearing and the moving papers were served by mail and email to defense counsel on August 19, 2022. There is no opposition to the motion in the court's file.

Plaintiff's counsel declares: on July 25, 2022 the formal order deeming the requests for admission admitted and compelling defendant Waldow to provide answers to form and special interrogatories and produce the documents requested was signed by the court; on July 29, 2022 plaintiff served the notice of entry of the order on defense counsel by mail and email; the ten day period to answer interrogatories, produce documents and pay monetary sanctions expired prior to plaintiff's counsel's August 19, 2022 declaration in support of this motion; and as of the date of counsel's declaration, no answers, production of documents or monetary sanctions were received from defendant Waldow.

"A trial court has broad discretion to impose discovery sanctions, but two facts are generally prerequisite to the imposition of nonmonetary sanctions such as the evidence sanction imposed here: (1) absent unusual circumstances, there must be a failure to comply with a court order, [FN8] and (2) the failure must be willful. (See, e.g., *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 496, 89 Cal.Rptr.2d 353 [terminating sanctions properly imposed for repeated efforts to thwart discovery, including violation of two discovery orders].)" (Biles v. Exxon Mobil Corp. (2004) 124 Cal.App.4th 1315, 1327.)

Failure to obey a court order compelling answers to interrogatories and production of documents and things as ordered may result in additional sanctions as are just, including an issue sanction, evidence sanction, and/or a terminating sanction, and the court may also impose additional monetary sanctions. (Code of Civil Procedure, §§ 2030.290(c), and

2031.300(c).) "To the extent authorized by the chapter governing any particular discovery method or any other provision of this title, the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process: ¶ * * * (b) The court may impose an issue sanction ordering that designated facts shall be taken as established in the action in accordance with the claim of the party adversely affected by the misuse of the discovery process. The court may also impose an issue sanction by an order prohibiting any party engaging in the misuse of the discovery process from supporting or opposing designated claims or defenses. ¶ (c) The court may impose an evidence sanction by an order prohibiting any party engaging in the misuse of the discovery process from introducing designated matters in evidence. ¶ (d) The court may impose a terminating sanction by one of the following orders: ¶ (1) An order striking out the pleadings or parts of the pleadings of any party engaging in the misuse of the discovery process. ¶ (2) An order staying further proceedings by that party until an order for discovery is obeyed. ¶ (3) An order dismissing the action, or any part of the action, of that party. ¶ (4) An order rendering a judgment by default against that party." (Code of Civil Procedure, §§ 2023.030(b), 2023.030(c), and 2023.030(d).)

"'Discovery sanctions "should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery." [Citations.] "'The trial court has a wide discretion in granting discovery and ... is granted broad discretionary powers to enforce its orders but its powers are not unlimited.... [¶] The sanctions the court may impose are such as are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he seeks, but the court may not impose sanctions which are designed not to accomplish the objects of discovery but to impose punishment. [Citations.]'" [Citations.]' (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231

Cal.App.3d 481, 487-488, 282 Cal.Rptr. 530; accord *Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 35, 9 Cal.Rptr.2d 396.)" (Vallbona v. Springer (1996) 43 Cal.App.4th 1525, 1545.) "We recognize that terminating sanctions are to be used sparingly, only when the trial court concludes that lesser sanctions would not bring about the compliance of the offending party." (R.S. Creative, Inc. v. Creative Cotton, Ltd. (1999) 75 Cal.App.4th 486, 496.) "Discovery sanctions must be tailored in order to remedy the offending party's discovery abuse, should not give the aggrieved party more than what it is entitled to, and should not be used to punish the offending party. We review the trial court's order under the deferential abuse of discretion standard. (*Do It Urself, supra,* 7 Cal.App.4th at p. 35, 9 Cal.Rptr.2d 396.) [Footnote omitted.]" (Karlsson v. Ford Motor Co. (2006) 140 Cal.App.4th 1202, 1217.)

The Third District Court of Appeal has held: "The sanction of dismissal or the rendition of a default judgment against the disobedient party is ordinarily a drastic measure which should be employed with caution. (*Deyo v. Kilbourne*, supra, 84 Cal.App.3d at p. 793, 149 Cal.Rptr. 499.) The sanction of dismissal, where properly employed, is justified on the theory the party's refusal to reveal material evidence tacitly admits his claim or defense is without merit. (Ibid.; *Kahn v. Kahn*, supra, 68 Cal.App.3d at p. 382.)" (Puritan Ins. Co. v. Superior Court (1985) 171 Cal.App.3d 877, 885.)

Plaintiff argues that monetary fines assessed against defendant Waldow did not cause her to come into compliance with the permit requirement to operate a restaurant, possible monetary sanctions in a contempt proceeding did not prevent her alleged violation of the preliminary injunction in this case, and monetary sanctions issued in the instant discovery order did not cause her to comply with the discovery order, therefore, the court should grant the issue and evidence sanctions requested.

The court finds that it is not appropriate to impose the drastic issue and evidentiary sanctions requested in the first instance of failure to comply with a discovery order, which effectively results in a judgment in favor of plaintiff upon plaintiff submitting a prima facie case at trial. The court is not convinced that lesser sanctions will not bring about compliance. The request for issue and evidence sanctions is denied. The court, however, in the alternative, further orders defendant Jennette Waldow to comply with the prior order within ten days.

Plaintiff's Motion to Impose Issue and Evidentiary Sanctions Against Defendant International Farmers Kitchen, LLC for Failure to Obey Discovery Order.

On July 15, 2022 the court granted plaintiff's motion to compel discovery and ordered defendant International Farmers Kitchen, LLC to answer form and special interrogatories and produce documents without objections within ten days; deemed admitted requests for admission; and further directed defendant International Farmers Kitchen, LLC to pay $1,550 in monetary sanctions within ten days. The proof of service of the notice of ruling filed on August 1, 2022 declares that on July 29, 2022 notice of the ruling was served on defense counsel by mail and email.

Arguing that plaintiff Waldow has not complied with the court's discovery order, defendants move for an order imposing the following issue and evidentiary sanctions: an issue sanction be imposed finding that all 25 affirmative defenses set forth in defendant Waldow's answer has been established in plaintiff's favor without the need for additional proof; an issue sanction be imposed finding that defendant International Farmers Kitchen, LLC does not contend that any person had a valid permit issued by the County EMD under Chapter 8.05 of the El Dorado County Ordinance Code to operate Apple Bistro at any time from July 31, 2020 to March 16, 2022; an issue sanction be imposed finding defendant International Farmers Kitchen, LLC does not contend that a permit issued by the County EMD under Chapter 8.05 of the El Dorado

County Ordinance Code was not required to operate Apple Bistro at any time from July 31, 2020 to March 16, 2022; and an evidence sanction that precludes introduction of any evidence at trial, including all witnesses and documents that should have been disclosed and produced in response to the discovery propounded.

The proofs of service in the court's file declare that notice of the hearing and the moving papers were served by mail and email to defense counsel on August 19, 2022. There is no opposition to the motion in the court's file.

Plaintiff's counsel declares: on July 25, 2022 the formal order deeming the requests for admission admitted and compelling defendant Waldow to provide answers to form and special interrogatories and produce the documents requested was signed by the court; on July 29, 2022 plaintiff served the notice of entry of the order on defense counsel by mail and email; the ten day period to answer interrogatories, produce documents and pay monetary sanctions expired prior to plaintiff's counsel's August 19, 2022 declaration in support of this motion; and as of the date of counsel's declaration, no answers, production of documents or monetary sanctions were received from defendant International Farmers Kitchen, LLC.

"A trial court has broad discretion to impose discovery sanctions, but two facts are generally prerequisite to the imposition of nonmonetary sanctions such as the evidence sanction imposed here: (1) absent unusual circumstances, there must be a failure to comply with a court order, [FN8] and (2) the failure must be willful. (See, e.g., *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 496, 89 Cal.Rptr.2d 353 [terminating sanctions properly imposed for repeated efforts to thwart discovery, including violation of two discovery orders].)" (Biles v. Exxon Mobil Corp. (2004) 124 Cal.App.4th 1315, 1327.)

Failure to obey a court order compelling answers to interrogatories and production of documents and things as ordered may result in additional sanctions as are just, including an

issue sanction, evidence sanction, and/or a terminating sanction, and the court may also impose additional monetary sanctions. (Code of Civil Procedure, §§ 2030.290(c), and 2031.300(c).) "To the extent authorized by the chapter governing any particular discovery method or any other provision of this title, the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process: ¶ * * * (b) The court may impose an issue sanction ordering that designated facts shall be taken as established in the action in accordance with the claim of the party adversely affected by the misuse of the discovery process. The court may also impose an issue sanction by an order prohibiting any party engaging in the misuse of the discovery process from supporting or opposing designated claims or defenses. ¶ (c) The court may impose an evidence sanction by an order prohibiting any party engaging in the misuse of the discovery process from introducing designated matters in evidence. ¶ (d) The court may impose a terminating sanction by one of the following orders: ¶ (1) An order striking out the pleadings or parts of the pleadings of any party engaging in the misuse of the discovery process. ¶ (2) An order staying further proceedings by that party until an order for discovery is obeyed. ¶ (3) An order dismissing the action, or any part of the action, of that party. ¶ (4) An order rendering a judgment by default against that party." (Code of Civil Procedure, §§ 2023.030(b), 2023.030(c), and 2023.030(d).)

"'Discovery sanctions "should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery." [Citations.] "'The trial court has a wide discretion in granting discovery and ... is granted broad discretionary powers to enforce its orders but its powers are not unlimited.... [¶] The sanctions the court may impose are such as are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he seeks, but the court may not impose

sanctions which are designed not to accomplish the objects of discovery but to impose punishment. [Citations.]'" [Citations.]' (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, 487-488, 282 Cal.Rptr. 530; accord *Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 35, 9 Cal.Rptr.2d 396.)" (Vallbona v. Springer (1996) 43 Cal.App.4th 1525, 1545.) "We recognize that terminating sanctions are to be used sparingly, only when the trial court concludes that lesser sanctions would not bring about the compliance of the offending party." (R.S. Creative, Inc. v. Creative Cotton, Ltd. (1999) 75 Cal.App.4th 486, 496.) "Discovery sanctions must be tailored in order to remedy the offending party's discovery abuse, should not give the aggrieved party more than what it is entitled to, and should not be used to punish the offending party. We review the trial court's order under the deferential abuse of discretion standard. (*Do It Urself, supra,* 7 Cal.App.4th at p. 35, 9 Cal.Rptr.2d 396.) [Footnote omitted.]" (Karlsson v. Ford Motor Co. (2006) 140 Cal.App.4th 1202, 1217.)

The Third District Court of Appeal has held: "The sanction of dismissal or the rendition of a default judgment against the disobedient party is ordinarily a drastic measure which should be employed with caution. (*Deyo v. Kilbourne*, supra, 84 Cal.App.3d at p. 793, 149 Cal.Rptr. 499.) The sanction of dismissal, where properly employed, is justified on the theory the party's refusal to reveal material evidence tacitly admits his claim or defense is without merit. (Ibid.; *Kahn v. Kahn*, supra, 68 Cal.App.3d at p. 382.)" (Puritan Ins. Co. v. Superior Court (1985) 171 Cal.App.3d 877, 885.)

Plaintiff argues that monetary fines assessed against defendant International Farmers Kitchen, LLC did not cause it to come into compliance with the permit requirement to operate a restaurant, possible monetary sanctions in a contempt proceeding did not prevent defendant International Farmers Kitchen, LLC 's alleged violation of the preliminary injunction in this case,

and monetary sanctions issued in the instant discovery order did not cause defendant International Farmers Kitchen, LLC to comply with the discovery order, therefore, the court should grant the issue and evidence sanctions requested.

The court finds that it is not appropriate to impose the drastic issue and evidentiary sanctions requested in the first instance of failure to comply with a discovery order, which effectively results in a judgment in favor of plaintiff upon plaintiff submitting a prima facie case at trial. The court is not convinced that lesser sanctions will not bring about compliance. The request for issue and evidence sanctions is denied. The court, however, in the alternative, will further order defendant Jennette Waldow to comply with the prior order within ten days.

TENTATIVE RULING # 3: PLAINTIFF'S MOTION TO IMPOSE ISSUE AND EVIDENTIARY SANCTIONS AGAINST DEFENDANT WALDOW FOR FAILURE TO OBEY DISCOVERY ORDER IS DENIED. IN THE ALTERNATIVE, THE COURT WILL FURTHER ORDER DEFENDANT JENNETTE WALDOW TO COMPLY WITH THE PRIOR ORDER WITHIN TEN DAYS. DEFENDANT WALDO IS ORDERED TO PROVIDE ANSWERS TO FORM INTERROGATORIES, SET ONE AND SPECIAL INTERROGATORIES, SET ONE WITHOUT OBJECTION WITHIN TEN DAYS. DEFENDANT WALDOW IS FURTHER ORDERED TO PROVIDE RESPONSES AND PRODUCTION OF THE DOCUMENTS REQUESTED IN REQUESTS FOR PRODUCTION, SET ONE, WITHOUT OBJECTION WITHIN TEN DAYS. DEFENDANT WALDOW IS ALSO ORDERED TO PAY PLAINTIFF $1,550 IN MONETARY SANCTIONS WITHIN TEN DAYS. PLAINTIFF'S MOTION TO IMPOSE ISSUE AND EVIDENTIARY SANCTIONS AGAINST DEFENDANT INTERNATIONAL FARMERS KITCHEN, LLC FOR FAILURE TO OBEY DISCOVERY ORDER IS DENIED. IN THE ALTERNATIVE, THE COURT WILL FURTHER ORDER DEFENDANT INTERNATIONAL FARMERS KITCHEN, LLC TO COMPLY WITH THE PRIOR ORDER WITHIN TEN DAYS.

DEFENDANT INTERNATIONAL FARMERS KITCHEN, LLC IS ORDERED TO PROVIDE ANSWERS TO FORM INTERROGATORIES, SET ONE AND SPECIAL INTERROGATORIES, SET ONE WITHOUT OBJECTION WITHIN TEN DAYS. DEFENDANT INTERNATIONAL FARMERS KITCHEN, LLC IS FURTHER ORDERED TO PROVIDE RESPONSES AND PRODUCTION OF THE DOCUMENTS REQUESTED IN REQUESTS FOR PRODUCTION, SET ONE, WITHOUT OBJECTION WITHIN TEN DAYS. DEFENDANT INTERNATIONAL FARMERS KITCHEN, LLC IS ALSO ORDERED TO PAY PLAINTIFF $1,550 IN MONETARY SANCTIONS WITHIN TEN DAYS. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED

AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, OCTOBER 7, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

4. RANDHAWA v. GILL PC-20180565

(1) Defendant Gill's Motion to Sever/Bifurcate Trial.

(2) Trial Setting Conference.

Defendant Gill's Motion to Sever/Bifurcate Trial.

Defendants move for an order bifurcating the trial into two phases, with phase one to determine if plaintiffs timely brought their claims; and phase two to try all other issues. Defendants argue: the requested bifurcation will serve the interests of justice, economy, and efficiency of handling the litigation.

The proofs of service declare that the moving papers were served on plaintiffs by personal courier on August 17, 2022. There was no opposition to the motion in the courts file at the time this ruling was prepared.

"(b) The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross-complaint, or of any separate issue or of any number of causes of action or issues, preserving the right of trial by jury required by the Constitution or a statute of this state or of the United States." (Code of Civil Procedure, § 1048(b).)

"When the answer pleads that the action is barred by the statute of limitations, or by a prior judgment, or that another action is pending upon the same cause of action, or sets up any other defense not involving the merits of the plaintiff's cause of action but constituting a bar or ground of abatement to the prosecution thereof, the court may, either upon its own motion or upon the motion of any party, proceed to the trial of the special defense or defenses before the trial of any other issue in the case…" (Code of Civil Procedure, § 597.)

"Section 597 of the Code of Civil Procedure provides that when the answer pleads that the action is barred by the statute of limitations, the court may proceed to the trial of such special defense before the trial of any other issue in the case. As the cases explain, the objective of the bifurcation of the issues is avoidance of waste of time and money caused by the trial of issues which may be rendered moot--as was the case here (*Neff v. New York Life Ins. Co.* (1947) 30 Cal.2d 165, 175, 180 P.2d 900; *Booth v. Bond* (1942) 56 Cal.App.2d 153, 156--157, 132 P.2d 520). In the case at bench the affirmative defense of statute of limitations was pleaded in the answer, and in addition the cross-complaint showed on its face that the claims raised therein were barred by the statute of limitations. Under these circumstances the trial court was clearly justified in ordering a bifurcated trial of the issues." (Bedolla v. Logan & Frazer (1975) 52 Cal.App.3d 118, 135.)

"" 'It is only when the decision on the trial of the special defense is that the entire action is barred by a prior judgment that the court is empowered to render judgment for the defendant who has pleaded the special defense. [Citations.] When ... the court proceeds to try a special defense which does not constitute a bar to the entire action before the trial of any other issue, and the decision on such special defense is in favor of the defendant, the proper procedure is to make a minute order to that effect, proceed to the trial of the remaining issues, make findings of fact and conclusions of law on all issues, and render judgment accordingly. In such a case, the decision of the court on the special defense and all rulings on it may be reviewed on appeal from the judgment.' [Citations.]" (*People v. Rath Packing Co.* (1978) 85 Cal.App.3d 308, 336, 149 Cal.Rptr. 431.) The appeal from the final judgment in this case properly encompassed the ruling on the trial of the special defense of the YMCA release. (See also California Rules of Court, rule 1(a); *D'Avola v. Anderson* (1996) 47 Cal.App.4th 358, 361, 54

Cal.Rptr.2d 689 [sufficiency of notice of appeal should be construed liberally].)" (Gavin W. v. YMCA of Metropolitan Los Angeles (2003) 106 Cal.App.4th 662, 669.)

Absent opposition, it appears appropriate to grant the motion, bifurcate the trial into two phases with the statute of limitations affirmative defenses to be tried first and any remaining issues to be then be tried in phase two. The motion is granted.

Trial Setting Conference.

Appearances are required for the trial setting conference.

TENTATIVE RULING # 4: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, OCTOBER 7, 2022 IN DEPARTMENT NINE CONCERNING THE TRIAL SETTING CONFERENCE. 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. DEFENDANTS' MOTION TO SEVER/BIFURCATE TRIAL IS GRANTED. NO HEARING ON DEFENDANTS' MOTION TO SEVER/BIFURCATE TRIAL WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET

FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, OCTOBER 7, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

5. INTERWEST CONSULTING GROUP, INC. v. BRP CONSULTING GROUP, LLC 22CV0450

Defendants' Motion for Sanctions Against Plaintiffs and their Counsels of Record Pursuant to Code of Civil Procedure, § 128.7.

TENTATIVE RULING # 5: THIS MATTER IS CONTINUED TO 8:30 A.M. ON FRIDAY, NOVEMBER 9, 2022 IN DEPARTMENT NINE.

6. OGDEN v. JOHNSON 22CV0494

Defendant Johnson's Motion to Dissolve June 10, 2022 Preliminary Injunction.

TENTATIVE RULING # 6: THIS MATTER IS CONTINUED TO 8:30 A.M. ON THURSDAY, OCTOBER 14, 2022 IN DEPARTMENT NINE.

7. LVNV FUNDING, LLC v. BEATTY 22CV0359

Plaintiff's Motion to Deem Admitted Requests for Admission.

Plaintiff's counsel declares: on June 27, 2022 requests for admission were served on defendant by mail to an address on Darlington Avenue in Placerville; and despite a request for responses and production, defendant failed to provide any responses to the discovery propounded. The proof of service of the requests for admission filed on August 29, 2022 declares that the requests for admission were served to the Darlington Avenue address on June 27, 2022. Plaintiff moves to deem admitted requests for admission. Plaintiff does not request an award of monetary sanctions.

The proof of service in the court's file declares that on August 24, 2022 notice of the hearing and copies of the moving papers were served by mail on defendant to the address at which defendant was personally served the summons and complaint, which was located on Norman Way in Camino. There is no opposition to the motion in the court's file.

The discrepancies in addresses to which notices were mailed needs to be explained. Why were the requests for admission served by mail to a different address than the address that defendant was personally served the summons and complaint and the notice of this motion and moving papers?

"Within 30 days after service of requests for admission, the party to whom the requests are directed shall serve the original of the response to them on the requesting party, and a copy of the response on all other parties who have appeared, unless on motion of the requesting party the court has shortened the time for response, or unless on motion of the responding party the court has extended the time for response." (Code of Civil Procedure, § 2033.250(a).)

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

""If a party to whom requests for admission have been directed fails to serve a timely response, the following rules apply: ¶ * * *The court shall make this order, unless it finds that the party to whom the requests for admission have been directed has served, before the hearing on the motion, a proposed response to the requests for admission that is in substantial compliance with Section 2033.220. It is mandatory that the court impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) on the party or attorney, or both, whose failure to serve a timely response to requests for admission necessitated this motion." (Code of Civil Procedure, § 2033.280(c).)

The court can not reach the merits of the motion until plaintiff addresses the previously described service issue.

TENTATIVE RULING # 7: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, OCTOBER 7, 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. BURTON v. PHH MORTGAGE CORP. PC-20200465

(1) Motion for Leave to Withdraw as Counsel of Record for Melvin Burton.

(2) Motion for Leave to Withdraw as Counsel of Record for Catherine Burton.

While absent opposition, it would appear to be appropriate to grant the motion, the court is unsure that defense counsel was properly mailed notice of the hearing and the moving papers to the correct address. The proofs of service for both motions state that the motions were served by mail to the plaintiffs' last known address and to defense counsel by mail to an address on Market Street, Suite 2600 in San Francisco. It appears that the address of defense counsel is One Embarcadero Center, Suite 2600 in San Francisco. This needs to be explained.

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

9. DEPAOLI v. CLARK EQUIPMENT CO. 22CV0693

Defendant Clark Equipment Co.'s Motion to Strike Portions of the Complaint.

On August 12, 2022 defendant Clark Equipment Co. filed a demurrer to the 5th cause of action of the complaint for violation of Business and Professions Code, § 17200 and a motion to strike portions of the 5th cause of action of the complaint for violation of Business and Professions Code, § 17200. The notices stated the hearing would take place on October 7, 2022. On September 27, 2022 defendant Clark Equipment Co. filed an amended notice of the demurrer, which stated the hearing was continued to December 2, 2022 at 8:30 a.m. in Department Nine. The court is unable to find any amended notice of hearing on the related Motion to Strike in the court's file.

In the interests of judicial economy and efficiency, the court orders the related motion to strike continued to 8:30 a.m. on Friday, December 2, 2022 in Department Nine.

TENTATIVE RULING # 9: DEFENDANT CLARK EQUIPMENT CO.'S MOTION TO STRIKE IS CONTINUED TO 8:30 A.M. ON FRIDAY, DECEMBER 2, 2022 IN DEPARTMENT NINE.

10. MATTER OF THORNTON 22CV1086

OSC Re: Name Change.

TENTATIVE RULING # 10: THE PETITION IS GRANTED.

11. GENASCI v. MACRAE SC-20180229

Judgment Debtor Examination.

TENTATIVE RULING # 11: THE HEARING ON THIS MATTER WAS PREVIOUSLY CONTINUED UPON REQUEST OF THE JUDGMENT CREDITOR TO 8:30 A.M. ON FRIDAY, JANUARY 6, 2023 IN DEPARTMENT NINE.

12. PEOPLE v. ANDERSON PCL-20210122

Claim Opposing Forfeiture.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

At the August 26, 2022 hearing, the court was advised that the criminal matter was resolved. Respondent's counsel was not present in court when the hearing was continued to October 7, 2022. The People were directed to provide notice.

There was no proof of service of notice of the continued hearing on respondent's counsel in the court's file at the time this ruling was prepared. This needs to be explained.

TENTATIVE RULING # 12: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, OCTOBER 7, 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.

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

Plaintiffs' Motion for Summary Adjudication.

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 breach of contract and breach of fiduciary duty causes of action remain to be tried in this case. The trial date is to be set at the November 7, 2022 trial setting conference.

Plaintiffs move for summary adjudication of the following asserted breaches of contract by defendants: the HOA governing documents do not allow one person to be considered a quorum for an HOA Board meeting; defendants held an HOA Board meeting during which the two Board members present found plaintiffs violated the large animal rule without the required, proper quorum; defendants held an HOA Board meeting during which the two Board members present found plaintiffs violated the trailer rule without the required, proper quorum; defendants held an HOA Board meeting during which the two Board members present assessed fines on plaintiffs for violation of the large animal rule without the required, proper quorum; defendants held an HOA Board meeting during which the two Board members present assessed fines on plaintiffs for violation of the large animal rule without the required, proper quorum; defendants held an HOA Board meeting during which the two Board members present removed the plaintiffs' member in good standing status without the mandated quorum; and such conduct by the HOA are breaches of contract by the HOA. Plaintiffs argue in support of the motion: Corporations Code, § 7211(a)(7) mandates that HOA articles and bylaws may not provide that a quorum is less than two, unless the total number of directors authorized is one; Director Janet Gamboa had a conflict of interest that required her to recuse herself from two subject Board meetings/hearings and voting on the claims that plaintiffs violated the large animal and trailer rules, assessing fines for violations, and removing plaintiff's good standing status in the HOA; Director Janet Gamboa's mandated recusal due to conflict of interest reduced the

number of Directors without a disqualifying conflict of interest hearing who properly voted during the subject Board meetings/hearings to one, thereby invalidating the HOA Board action and breaching the HOA agreement in several separate and distinct ways; in order to find an HOA member materially breached the HOA agreement, the HOA must hold a duly noticed HOA Board meeting and a quorum of the HOA Board must find a material breach (Plaintiffs' Separate Statement of Undisputed Material Facts, Fact Number 50.); as there was no such valid findings by a quorum of the Board that plaintiffs materially breached the agreement by violating the HOA C,C,&Rs, bylaws, and/or rules, there was no material breach excusing defendants from adhering to their obligations under the HOA agreement; the defendants breaches of the contract caused damages to plaintiffs, including attorney fees to defend against the improper Board determinations (Plaintiffs' Separate Statement of Undisputed Material Facts, Fact Number 53.), with the amount to be determined later through a noticed motion after trial, and to the extent other damages are claimed, they will be pursued pursuant to the other breaches of contact claimed and breach of fiduciary duty not decided in this motion (See Plaintiffs' Memorandum of Point and Authorities in Support of Motion, page 11, lines 20-25).

Defendants oppose the motion on the following grounds: the issues asserted as properly subject to summary adjudication do not dispose of an entire cause of action and must be denied; plaintiffs can not adjudicate the breach of contract cause of action, because nowhere in plaintiff's separate statement of undisputed material facts do they assert they suffered any damages arising from the imposition of fines against them, which they admittedly never paid and were waived on March 9, 2020; there remains a triable issue of material fact as to whether plaintiff materially breached the HOA agreement by violating the trailer and large animal rules;

and there remains a triable issue of material fact as to whether the defendants are immunized from liability by the business judgment rule.

Plaintiffs reply: the motion for summary adjudication seeks to summarily adjudicate entire causes of action for breach of contract by separate and distinct breaches of the contract; defendants can not claim that plaintiffs breached the contact until such time as the Board with a properly composed quorum decided that plaintiffs violated the C,C,&Rs and since the court's statement of decision in the bifurcated trial expressly found that the Board could not find the plaintiffs committed violations and such fact is undisputed (Defendants' Response to Plaintiff's Separate Statement, Fact Number 46.), there is no triable issue of material fact as to whether plaintiffs materially breached the HOA C,C,&Rs and Rules/Agreement; defendants have admitted of that plaintiffs have established the first three elements of a breach contract cause of action, that there existed a contract, plaintiffs performance of the contract, and that defendants breached the agreement; and it is an undisputed fact that plaintiffs incurred attorney fees to maintain this action (Defendants' Response to Plaintiff's Separate Statement, Fact Number 53.), there is statutory support establishing that attorney fees are an element of damages in an action to enforce the HOA governing documents as provided in Civil Code, § 5975(c) and not a measure of costs, therefore, there is no triable issue of material fact that plaintiffs incurred damages in the form of costs.

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 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.)

"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.)

"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.)

"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 plaintiffs' motion for summary adjudication.

Requirement of Summary Adjudication of an Entire Cause of Action

Plaintiffs argue that there are separate and distinct breaches of contract that are each susceptible of summary adjudication, despite having only pled a single cause of action for breach of contract against defendants. Those alleged breaches are: defendants breached the HOA agreement by holding an HOA Board meeting with only one Board member, which is not a quorum; defendants breached the HOA agreement by holding a hearing and finding plaintiffs violated the HOA C,C,&Rs by maintaining trailers on their property when there was no proper quorum of Board Directors present; defendants breached the HOA agreement by holding a hearing and finding plaintiffs violated the HOA large animal rule when there was no proper quorum of Board Directors present; defendants breached the HOA agreement by holding a hearing and assessing fines against plaintiffs for maintaining trailers on their property when there was no proper quorum of Board Directors present; defendants breached the HOA agreement by holding a hearing and assessing fines against plaintiffs for their large animals when there was no proper quorum of Board Directors present; and defendants breached the

HOA agreement by holding a hearing and deciding to remove the plaintiffs' member in good standing status when there was no proper quorum of Board Directors present.

"A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if that party contends that the cause of action has no merit or that there is no affirmative defense thereto, or that there is no merit to an affirmative defense as to any cause of action, or both, or that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code of Civil Procedure, § 437c(f)(1).)

""Cause of action" means " 'a group of related paragraphs in the complaint reflecting a separate theory of liability.' " (*Lilienthal & Fowler v. Superior Court, supra*, 12 Cal.App.4th at p. 1853, 16 Cal.Rptr.2d 458, italics in original.) The appellate court found the clear intent of Code of Civil Procedure section 437c, subdivision (f) is " 'to stop the practice of adjudication of facts or adjudication of issues that do not completely dispose of a cause of action or defense.' " (12 Cal.App.4th at p. 1853, 16 Cal.Rptr.2d 458.) Code of Civil Procedure section 437c, subdivision (f) was meant to "eliminate summary adjudication motions that would not reduce the costs and length of litigation." (12 Cal.App.4th at p. 1853, 16 Cal.Rptr.2d 458.) The appellate court noted the following comment, which was written by the Senate Committee on the Judiciary when Code of Civil Procedure section 437c, subdivision (f) was amended in 1990: ¶ " 'According to the sponsor, it is a waste of court time to attempt to resolve issues if the resolution of those issues will not result in summary adjudication of a cause of action or affirmative defense. Since the cause of action must still be tried, much of the same evidence will be reconsidered by the

court at the time of trial. This bill would instead require summary adjudication of issues only where an entire cause of action, affirmative defense or claim for punitive damages can be resolved. [¶] ... [¶] The sponsor believes that the bill will save court time, reduce the cost of litigation for plaintiffs and defendants, and reduce the opportunity for abuse of the summary judgment procedure.' The August 1990, report of the Assembly Committee on Judiciary adopted the Senate's analysis." (*Lilienthal & Fowler v. Superior Court, supra*, 12 Cal.App.4th at pp. 1853–1854, 16 Cal.Rptr.2d 458.) ¶ The appellate court in *Lilienthal* found that the policy behind summary adjudication motions, **"**to 'promote and protect the administration of justice, and to expedite litigation by the elimination of needless trials,' " was not effectively served by the trial court's ruling. " '[The] statement and the wording of subdivision (f) show clearly that the Legislature wished to narrow summary adjudication from its broad focus on "issues" (sometimes interpreted to mean only asserted "facts") to a more limited focus on causes of action, affirmative defenses, claims for punitive damages and claims that defendants did not owe plaintiffs a duty.' " (*Lilienthal & Fowler v. Superior Court, supra,* 12 Cal.App.4th at p. 1854, 16 Cal.Rptr.2d 458.) Although each claim was joined with the other claim within each cause of action, the claims were in fact separate and distinct causes of action, having no relationship to each other. Thus Code of Civil Procedure section 437c, subdivision (f) could properly be utilized to challenge the separate and distinct matter even though the real parties in interest combined it with an unrelated matter in the same cause of action. (12 Cal.App.4th at pp. 1854–1855, 16 Cal.Rptr.2d 458.)" (Catalano v. Superior Court (2000) 82 Cal.App.4th 91, 96–97.)

"Fineman contends that the trial court's order of summary adjudication is impermissible because it does not "... completely dispose[ ] of a cause of action [or] an affirmative defense...." (Code Civ. Proc., § 437c, subd. (f).) The premise for Fineman's contention is that it pled all of the 23 of the 1991 to 1993 unauthorized checks in the aggregate amount of $63,500 in each of

its three causes of action. However, just because Fineman has elected to aggregate its claims does not forestall Bank of America from segregating them for the purpose of assessing each check to determine if it is barred by sections 4111 and 4406. ¶ It is established law that the owner of a checking account may file an action against the drawee bank for paying a forged check even if it is based only on the payment of one unauthorized check. (*Basch v. Bank of America* (1943) 22 Cal.2d 316, 321, 139 P.2d 1 ["a bank pays a forged *check* at its peril; and in such event, payment in legal contemplation will be considered to have been made from the bank's own funds so that it has no right to charge the depositor's account with the amount disbursed contrary to his genuine order, and it will be liable to him for so doing"].) ¶ Fineman's claims are based both upon a breach of contract and violation of section 4401. "The code provides that as between the drawee bank and the depositor, losses from a forged or unauthorized signature are borne by the bank since payment not made pursuant to directions of a 'properly payable' order cannot be charged to the depositor's account. (Com.Code, § 3401, subd. (1)....)" (*Fireman's Fund Ins. Co. v. Security Pacific Nat. Bank* (1978) 85 Cal.App.3d 797, 804, 149 Cal.Rptr. 883, fns. omitted.) "The relationship between a payor bank and its customers is that of debtor and creditor, being founded upon contract, and the bank is under a duty to pay checks only in strict accordance with its customer's order.... The bank is without authority to charge its customer's account with an unauthorized order, and payment of such is said to have been made out of the bank's own funds.... [¶] California Uniform Commercial Code section 3401, subdivision (1) provides that a person is not liable on an instrument unless his signature appears thereon. California Uniform Commercial Code section 3404, subdivision (1) states that an unauthorized signature which, under California Uniform Commercial Code section 1201, subdivision (43) includes one made without actual, implied or apparent authority, is wholly inoperative as the signature of a person whose name is signed. [¶]

By negative implication, a check with an unauthorized signature is not properly payable, and the bank breaches its agreement with its customer when paying such an item." (*Danning v. Bank of America* (1984) 151 Cal.App.3d 961, 969, 199 Cal.Rptr. 163.) ¶ In *Sun'n Sand, Inc. v. United California Bank* (1978) 21 Cal.3d 671, 148 Cal.Rptr. 329, 582 P.2d 920, an employee altered nine checks made payable to United California Bank (UCB) drawn on her employer's bank account. Upon presentation of the altered checks, UCB permitted the proceeds of the checks to be deposited into the employee's account. When the employer discovered the fraudulent activity, it sued UCB. UCB asserted as an affirmative defense section 4406, subdivision (f), barring claims for altered checks if the owner of the account fails to discover and report the alteration within one year. The *Sun'n Sand* court held that eight of the nine checks were issued sufficiently in advance of the filing of the action to compel the inference that they were negotiated and made available to Sun'n Sand with its monthly bank statements more than one year before it filed its action. The court concluded that a new one-year period begins to run with *each successive check,* specifically holding that the ninth check was not barred by the one-year limitation. Thus, *Sun'n Sand* instructs that each altered, forged, or unauthorized check stands on its own as a separate claim, independently subject to such affirmative defenses as may be applicable. In other words, notwithstanding the aggregation of the 23 1991–1993 checks, each constitutes a separate cause of action susceptible to a complete disposition if barred by affirmative defenses asserted by Bank of America. ¶ We conclude that "the clearly articulated legislative intent of [Code of Civil Procedure] section 437c, subdivision (f), is effectuated by applying the section in a manner which would provide for the determination on the merits of summary adjudication motions involving separate and distinct wrongful acts which are combined in the same cause of action. To rule otherwise would defeat the time and cost saving purposes of the amendment and allow a cause of action in its

entirety to proceed to trial even where, as here, a separate and distinct alleged obligation or claim may be summarily defeated by summary adjudication. Accordingly, we hold that under subdivision (f) of section 437c, a party may present a motion for summary adjudication challenging a separate and distinct wrongful act even though combined with other wrongful acts alleged in the same cause of action." (*Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1854–1855, 16 Cal.Rptr.2d 458, fn. omitted.)" (Edward Fineman Co. v. Superior Court (1998) 66 Cal.App.4th 1110, 1116–1118.)

The following material facts are undisputed: Corporations Code, § 7211(a)(7) mandates that HOA articles and bylaws may not provide that a quorum is less than two, unless the total number of directors authorized is one; two Board meetings were held on November 9, 2017 and April 10, 2018, only two Board Directors were present at those hearings, Julia Earle and Janet Gamboa, the hearings resulted in findings that plaintiffs violated HOA rules concerning trailers and large animals, fines were assessed against plaintiffs, and their good standing status in the HOA was removed; after the bifurcated court trial, the court found that Director Gamboa was required to disqualify herself from any disciplinary hearings regarding the plaintiffs; and Director Gamboa did not recuse herself from voting to find plaintiffs violated the rules, assess fines against the plaintiffs, and remove plaintiffs' good standing status at the subject hearings. (See Plaintiffs' Separate Statement of Undisputed Material Facts, Fact Numbers 15, 30-32, 34, 35, and 38-40.) This left the hearings with only one Board Director present at the hearings qualified to hear the complaints made against plaintiffs, vote on violations, remove good standing status, and assess fines, because the only other member of the Board present at the hearings was Director Gamboa.

This leaves the following five separate and distinct alleged breaches of contract potentially subject to summary adjudication: whether the contract was breached when the HOA Board

held a meeting without the mandated quorum of Board Members who were not disqualified from hearing the matter at which plaintiffs were determined to have violated the large animal rule; whether the contract was breached when the HOA Board held a meeting without the mandated quorum of Board Members who were not disqualified from hearing the matter at which plaintiffs were assessed fines for having violated the large animal rule; whether the contract was breached when the HOA Board held a meeting without the mandated quorum of Board Members who were not disqualified from hearing the matter at which plaintiffs were determined to have violated the trailer rule; whether the contract was breached when the HOA Board held a meeting without the mandated quorum of Board Members who were not disqualified from hearing the matter at which plaintiffs were assessed fines for having violated the trailer rule; and whether the contract was breached when the HOA Board held a meeting on November 9, 2017 without the mandated quorum of Board Members who were not disqualified from hearing the matter at which plaintiffs good standing status was removed by vote of the Board.

Defendants' Objections to Plaintiffs' Requests for Judicial Notice in Support of Motion

The court does not reach the objections to plaintiffs' request for judicial notice of Exhibit D – October 1, 2021 Ruling on Motion to Amend Complaint and Exhibit G – Robert's Rules of Order submitted in support of the motion, 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' Evidence in Support of the Motion

The defendants' objection numbers 12 and 28 that paragraphs 34 of Stephen Katzakian's declaration and Michelle Katzakian's declaration was improper lay opinion and improper legal argument objections are sustained.

The defendants' objection numbers 14 and 30 that paragraphs 36 of Stephen Katzakian's declaration and Michelle Katzakian's declaration was improper lay opinion and improper legal argument objections are sustained.

The court does not reach the remaining objections to the evidence submitted in support of the motion, 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).)

Breach of Contract Cause of Action

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

- Whether Plaintiffs Committed a Material Breach of the Terms of the HOA Governing Documents Thereby Excusing the HOA from any Further Performance of the HOA C,C,&Rs and Rules/Agreement

"But "in contract law a material breach excuses further performance by the innocent party. [Citations.]" (*De Burgh v. De Burgh* (1952) 39 Cal.2d 858, 863, 250 P.2d 598; see also *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277, 120 Cal.Rptr.3d 893.) "Normally the question of whether a breach of an obligation is a material breach, so as to excuse performance by the other party, is a question of fact. [Citations.]" (*Brown v. Grimes, supra,* 192 Cal.App.4th at p. 277, 120 Cal.Rptr.3d 893.)" (Plotnik v. Meihaus (2012) 208 Cal.App.4th 1590, 1602–1603.)

The issues presented are: (1) whether the can be no material breach of the HOA agreement unless and until the HOA Board holds a hearing with proper quorum of Board Directors present and the Directors find that the C,C,&Rs, bylaws, and/or rules were violated by the member; and (2) whether a breach of the HOA rules by violating the large animal rule and trailer rule is of such magnitude as to amount to a material breach of the HOA C,C,&Rs/Rules/Agreement. such that the HOA and its Board are excused from performing the agreement and are free to hold Board meetings to adjudicate the subject rule violation claims that do not comply with the mandated quorum requirements or basic fundamentals of due process, such as having fair and impartial Board members hearing the claims for violations and assessing fines and other penalties against the homeowners, such as removal of the status of good standing in the HOA.

The party to a contact can breach an agreement without any judicial or quasi-judicial determination of breach. The breach consists of the conduct of the alleged breaching party and whether the conduct amounts to a breach of the agreement. The breach exists in the absence of any findings of breach by any governing HOA Board. The violation/breach of the HOA agreement does not sprout out of the Board findings. Either the agreement was breached by the member's conduct prior to the Board hearing or not. Therefore, valid Board findings of

violations of the HOA C,C,&Rs, bylaws, and/or rules is not a critical prerequisite to establish in civil litigation that members of HOAs breached the HOA C,C,&Rs, bylaws, and/or rules.

The court now turns to the second issue presented regarding materiality of the violations of the HOA C,C,&Rs, bylaws, and/or rules.

"Normally the question of whether a breach of an obligation is a material breach, so as to excuse performance by the other party, is a question of fact. (See *Sanchez v. County of San Bernardino, supra,* 176 Cal.App.4th at pp. 529–530, 98 Cal.Rptr.3d 96; *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1051–1052, 241 Cal.Rptr. 487; *Whitney Inv. Co. v. Westview Dev. Co.* (1969) 273 Cal.App.2d 594, 601, 78 Cal.Rptr. 302 ["Whether a breach is so material as to constitute cause for the injured party to terminate a contract is ordinarily a question for the trier of fact"]; *Wyler v. Feuer, supra,* 85 Cal.App.3d at p. 404, 149 Cal.Rptr. 626; California Jury Instructions–Civil (Spring 2010 ed.), BAJI No. 10.82, p. 685; see also *Insurance Underwriters Clearing House, Inc. v. Natomas Co.* (1986) 184 Cal.App.3d 1520, 1526–1527, 228 Cal.Rptr. 449 ["Ordinarily the issue of materiality is a mixed question of law and fact, involving the application of a legal standard to a particular set of facts. However, if reasonable minds cannot differ on the issue of materiality, the issue may be resolved as a matter of law"]; 23 Williston on Contracts (4th ed. 2002) § 63:3, p. 440 (fn. omitted) ["The determination whether a material breach has occurred is generally a question of fact"].) Whether a partial breach of a contract is material depends on "the importance or seriousness thereof and the probability of the injured party getting substantial performance." (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 852, pp. 938–940; see also *Superior Motels, Inc. v. Rinn Motor Hotels, Inc., supra,* 195 Cal.App.3d at p. 1051, 241 Cal.Rptr. 487; *Sackett v. Spindler* (1967) 248 Cal.App.2d 220, 229, 56 Cal.Rptr. 435 [setting forth various factors as to materiality].) "A material breach of one aspect of

a contract generally constitutes a material breach of the whole contract." (23 Williston, *supra,* at § 63:3, p. 440, fns. omitted.)" (Emphasis added.) (Brown v. Grimes (2011) 192 Cal.App.4th 265, 277–278.)

"Whether a breach of contract is total or partial depends upon its materiality. (Rest., Contracts, s 317, p. 471.) In determining the materiality of a failure to fully perform a promise the following factors are to be considered: (1) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated; (2) the extent to which the injured party may be adequately compensated in damages for lack of complete performance; (3) the extent to which the party failing to perform has already partly performed or made preparations for performance; (4) the greater or less hardship on the party failing to perform in terminating the contract; (5) the wilful, negligent, or innocent behavior of the party failing to perform; and (6) the greater or less uncertainty that the party failing to perform will perform the remainder of the contract. (Rest., Contracts, s 275, pp. 402—403.)" (Sackett v. Spindler (1967) 248 Cal.App.2d 220, 229.)

It is undisputed that the HOA governing documents include the C,C,&Rs, bylaws,, and operating rules, including the C,C,&R Clarifications, Rules and Enforcement Policy, Revision 6 (C,C,&R Rules). (Defendants' Response to Plaintiff's Separate Statement, Fact Numbers 10 and 11.)

Plaintiff Stephen Katzakian declares: as of the date of his declaration executed on June 9, 2022 the subject trailer remains in the same location as when the Board voted to fine him. (Declaration of Stephen Katzakian in support of motion, paragraph 27.)

Defendant Julia Erle declares: the HOA Board passed the large animal rule, which restricted homeowners from owning more than one large animal per acre of land; the large animal rule was adopted effective January 1, 2017, however, members were given to January

1, 2018 to comply with the rule; a courtesy reminder was sent to the plaintiffs on February 8, 2017 stating about three trailers were observed on their property and stating the Board believed the trailers were in violation of Article VII, Section 10 of the C,C,& Rs; plaintiffs were asked to relocate the trailers to a location not viewable from the roads or placed in an approved enclosure to screen the trailers; plaintiffs did not relocate the trailers or submit an architectural application for an enclosure; a second courtesy notice was sent on July 17, 2017; plaintiffs did not relocate the trailers or submit an architectural application for an enclosure; on August 25, 2017 the Board sent plaintiffs a letter discussing options to resolve the alleged trailer violation; plaintiffs did not relocate the trailers or submit an architectural application for an enclosure; and the plaintiffs did not comply with the large animal rule by January 1, 2018. (Declaration of Defendant Julia Earle in Opposition to Motion, paragraphs 6-9 and 16.)

The C,C,&Rs, Article VII, Section 10 provides: No owners or occupants of any lot in this subdivision shall place, store, park or keep … house trailers … on the streets of this subdivision. Vehicles of these type stored on the lots shall be enclosed, undercover or stored to the back of the property out of public view from the street or neighboring property. (Plaintiffs' Exhibit D – First Restated and Consolidated C,C,&Rs for Sun Ridge Ranch, Units 1 and 2, Article VII, Section 10, page 7.)

The court in its statement of decision on the Phase 1 trial stated: the large animal rule limited members to one large animal per acre; and the court concluded that the HOA Board had the authority to adopt the large animal rule, the large animal rule is reasonable, and the notice was valid, because the notice text of the proposed rule change and a description of its purpose and effect. (Plaintiff's Request for Judicial Notice, Exhibit E, page 1, line 28 to page 2, line 1; and page 36, lines 7-11.)

Plaintiff Stephen Katzakian admitted the following during his deposition testimony: in 2019 he had nine cows on his property; and in 2018 he had approximately 10 to 12 cows on the property. (Defense Exhibit 9 – Transcript of Deposition Testimony of Stephen Katzakian, page 75, line 22 to page 76, line 8.)

There is evidence of violations of the HOA C,C,&Rs concerning the storage of trailers on plaintiffs' property and the newly enacted large animal rule. There remains a triable issue of material fact as whether these two violations are significant enough to amount to material breaches of the HOA agreement in light of the factors that need to be considered.

- Damages

Citing Pulliam v. HNL Automotive, Inc. (2022) 13 Cal.5th 127; and Code of Civil Procedure, § 1033.5(a)(10) defendants argue that attorney fees recoverable for bringing the civil action is not an element of damages.

A petition for Certiorari was filed with the U.S. Supreme Court on September 22, 2022 concerning the Pulliam decision.

Attorney fees incurred to bring the action itself are not an element of damages. (Brandt v. Superior Court (1985) 37 Cal.3d 813, 817, 818.)

Plaintiffs cite in the reply Code of Civil Procedure, § 5975(c) that mandates the prevailing party in the action be awarded reasonable attorney fees and costs as a statement of the Legislative intent to consider attorney's fees as an element of damages awardable to the prevailing party and not costs.

"(c) In an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs." (Civil Code, § 5975(c).)

"The following items are allowable as costs under Section 1032: ¶ * * * (10) Attorney fees, when authorized by any of the following: (A) Contract. ¶ (B) Statute. ¶ (C) Law." (Emphasis added.) (Code of Civil Procedure, § 1033.5(a)(10).)

"Any award of costs shall be subject to the following: ¶ * * * (5) When any statute of this state refers to the award of "costs and attorney's fees," attorney's fees are an item and component of the costs to be awarded and are allowable as costs pursuant to subparagraph (B) of paragraph (10) of subdivision (a). Any claim not based upon the court's established schedule of attorney's fees for actions on a contract shall bear the burden of proof. Attorney's fees allowable as costs pursuant to subparagraph (B) of paragraph (10) of subdivision (a) may be fixed as follows: (A) upon a noticed motion, (B) at the time a statement of decision is rendered, (C) upon application supported by affidavit made concurrently with a claim for other costs, or (D) upon entry of default judgment. Attorney's fees allowable as costs pursuant to subparagraph (A) or (C) of paragraph (10) of subdivision (a) shall be fixed either upon a noticed motion or upon entry of a default judgment, unless otherwise provided by stipulation of the parties." (Emphasis added.) (Code of Civil Procedure, § 1033.5(c)(5).)

"'The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. [Citations.]' (*Select Base Materials v. Board of Equal.* (1959) 51 Cal.2d 640, 645, 335 P.2d 672.) In determining that intent, we first examine the words of the statute itself. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698, 170 Cal.Rptr. 817, 621 P.2d 856.) Under the so-called 'plain meaning' rule, courts seek to give the words employed by the Legislature their usual and ordinary meaning. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735, 248 Cal.Rptr. 115, 755 P.2d 299.) If the language of the statute is clear and unambiguous, there is no need for construction. (Ibid.) However, the 'plain meaning' rule does not prohibit a court from

determining whether the literal meaning of a statute comports with its purpose. (Ibid.) If the terms of the statute provide no definitive answer, then courts may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history. (*People v. Coronado* (1995) 12 Cal.4th 145, 151, 48 Cal.Rptr.2d 77, 906 P.2d 1232.) '"We must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." [Citation.]' (Ibid.) The legislative purpose will not be sacrificed to a literal construction of any part of the statute. (*Select Base Materials v. Board of Equal.*, supra, 51 Cal.2d at p. 645, 335 P.2d 672.)" (Bodell Const. Co. v. Trustees of California State University (1998) 62 Cal.App.4th 1508, 1515-1516.)

"Because the language of a statute is generally the most reliable indicator of the Legislature's intent, we look first to the words of the statute, giving them their ordinary meaning and construing them in context. If the language is unambiguous, we presume the Legislature meant what it said, and the plain meaning of the statute controls. (*Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818, 31 Cal.Rptr.3d 591, 115 P.3d 1233; *People v. Braxton* (2004) 34 Cal.4th 798, 810, 22 Cal.Rptr.3d 46, 101 P.3d 994.)" (People v. Hudson (2006) 38 Cal.4th 1002, 1009.)

Civil Code, § 5975(c) is a statutory mandate of an award of reasonable attorney fees and costs to the prevailing party in an action to enforce the governing documents. The statute clearly refers to an award of attorney fees incurred in bringing and prosecuting the action. It does not state any intent that the award of attorney fees is separate from the costs award and is instead an award of damages.

Code of Civil Procedure, § 1033.5(a)(10)(B) expressly provides that attorney fee awardable by statute are allowable as costs. (Emphasis the court's.) Code of Civil Procedure, §

1033.5(c)(5) expressly provides that where a statute refers to the award of "costs and attorney's fees," attorney's fees are an item and component of the costs to be awarded. (Emphasis the court's.)

The statutory language of Civil Code, § 5975(c), when construed in light of Code of Civil Procedure, §§ 1033.5(a)(10)(B) and 1033.5(c)(5), clearly and unambiguously mandates by statute an award of fees and costs to the prevailing party as an element of costs. Plaintiffs incurring attorney fees to bring this action for breach of the governing documents does not establish as a matter of law the damages element of the breach of contract causes of action.

The next issue to resolve is whether plaintiffs met their initial burden of proof to establish as a matter of law that plaintiffs were damaged in a specific amount by the invalid findings of violations of the large animal and trailer rules, assessment of fines, and removal of their good standing status.

Plaintiffs allege in the breach of contract cause of action: the HOA never informed plaintiffs at any point prior to the 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; and plaintiffs are entitled to consequential damages according to proof, attorney fees pursuant to the Davis-Sterling Act and the C,C,&Rs, loss of quiet enjoyment damages, and common law mental distress. (1st Amended Complaint, paragraphs 46-50.)

"In an action for breach of contract, the measure of damages is 'the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom' (Civ.Code, § 3300), provided the damages are 'clearly ascertainable in both their nature and origin' (Civ.Code, § 3301). In an action not arising from contract, the measure of damages is 'the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not' (Civ.Code, § 3333). ¶ 'Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectation of the parties are not recoverable. [Citations.] This limitation on available damages serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise.' (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 515, 28 Cal.Rptr.2d 475, 869 P.2d 454 (*Applied Equipment*).)" (Erlich v. Menezes (1999) 21 Cal.4th 543, 550.) "…[D]amages for mental suffering and emotional distress are generally not recoverable in an action for breach of an ordinary commercial contract in California. (*Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 188, 28 Cal.Rptr.2d 371 (*Kwan*); *Sawyer v. Bank of America* (1978) 83 Cal.App.3d 135, 139, 145 Cal.Rptr. 623.) 'Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that

serious emotional disturbance was a particularly likely result.' (Rest.2d Contracts, § 353.)" (Erlich, supra at pages 558-559.)

Therefore, plaintiffs are not entitled to common law mental distress damages, the court can not find any statements of material fact in the plaintiffs' separate statement of material fact that the plaintiffs sustained emotional distress damages as a result of the breaches of contract that are the subject of the motion, and the court's attention has not been directed to any evidence supporting such a claim.

Plaintiffs have not met their initial burden of proof that mental distress damages were recoverable and sustained as a result of the alleged breaches of contract sought to be summarily adjudicated.

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

"The Separate Statement of Undisputed Material Facts in support of a motion must separately identify each cause of action, claim, issue of duty, or affirmative defense, and each supporting material fact claimed to be without dispute with respect to the cause of action, claim, issue of duty, or affirmative defense…" (Rules of Court, Rule 3.1350(d).)

""The separate statement is not merely a technical requirement, it is an indispensible part of the summary judgment or adjudication process. 'Separate statements are required not to satisfy a sadistic urge to torment lawyers, but rather to afford due process to opposing parties and to permit trial courts to expeditiously review complex motions for ... summary judgment to determine quickly and efficiently whether material facts are disputed.' (*United Community*

Church v. Garcin (1991) 231 Cal.App.3d 327, 335 [282 Cal.Rptr. 368].)" (*Whitehead v. Habig* (2008) 163 Cal.App.4th 896, 902, 77 Cal.Rptr.3d 679 (*Whitehead*).)" (Kojababian v. Genuine Home Loans, Inc. (2009) 174 Cal.App.4th 408, 415-416.)

""On appeal our review is limited to the facts shown in the documents presented to the trial judge in making our independent determination of their construction and effect as a matter of law." (*Bonus-Built, Inc. v. United Grocers, Ltd.* (1982) 136 Cal.App.3d 429, 442, 186 Cal.Rptr. 357.) Facts not contained in the separate statement do not exist. (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337, 282 Cal.Rptr. 368.)" (Kim v. Sumitomo Bank (1993) 17 Cal.App.4th 974, 978-979.)

"State Farm and its amici curiae [Footnote omitted.] contend the trial court, faced with an opposing party's defective separate statement, also has the discretion to enter a judgment against the offending party solely as a result of that curable procedural defect, urging us to reaffirm the oft-cited "golden rule" of summary judgment and summary adjudication: "[*A*]*ll* material facts must be set forth in the separate statement.... '[I]f it is not set forth in the separate statement, *it does not exist.*' " (*United Community Church, supra,* 231 Cal.App.3d at p. 337, 282 Cal.Rptr. 368, quoting Zebrowski, *The Summary Adjudication Pyramid* (Nov.1989) 12 L.A. Law. 28, 29; see, e.g., *Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 640–641, 134 Cal.Rptr.2d 273; *Massingill v. Department of Food & Agriculture* (2002) 102 Cal.App.4th 498, 511, 125 Cal.Rptr.2d 561; *North Coast Business Park v. Nielsen Construction Co., supra,* 17 Cal.App.4th at pp. 30–31, 21 Cal.Rptr.2d 104.) ¶ Some courts of appeal do appear to have endorsed this approach to affirm trial court orders granting summary judgment. (See, e.g., *San Diego Watercrafts, supra,* 102 Cal.App.4th at p. 316, 125 Cal.Rptr.2d 499 ["where evidence is not referenced, is hidden in voluminous papers, and is not called to the attention of the court at all, a summary judgment should not be reversed on grounds the court should have considered

such evidence"].) [Footnote omitted.] But most cases citing the so-called golden rule are readily distinguishable from the case at bar, either because they involve the failure of the *moving* party to file a proper separate statement or because the defect is the failure to identify the *disputed material fact*, rather than the evidence supporting it. As to the first point, although both moving and opposing parties are required by statute and rule to file separate statements, the trial court's exercise of the discretion authorized by section 437c to deny a motion for summary judgment, which simply means the case will proceed to trial, is more readily affirmed than a decision to grant the motion based on a curable procedural default, which deprives the opposing party of a decision on the merits. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478–479, 243 Cal.Rptr. 902, 749 P.2d 339 [appellate courts "are much more disposed to affirm an order when the result is to compel a trial on the merits than when the default judgment is allowed to stand"]; *Rappleyea v. Campbell, supra,* 8 Cal.4th at p. 980, 35 Cal.Rptr.2d 669, 884 P.2d 126 [public policy favors disposition of cases on their merits; any doubts must be resolved in favor of the party seeking relief from its procedural default].) ¶ As to the second point, although sometimes apparently overlooked (see, e.g., *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 115–116, 113 Cal.Rptr.2d 90), the "it" in Justice Zebrowski's "golden rule," as quoted by our Division One colleagues in *United Community Church, supra,* 231 Cal.App.3d at page 337, 282 Cal.Rptr. 368, is the undisputed material fact, which must appear in the separate statement or be disregarded, not the underlying evidence supporting the fact.[Footnote omitted] (See, e.g., *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 929, 134 Cal.Rptr.2d 101 [moving party failed to identify employee status of treating physicians as undisputed fact in separate statement and therefore cannot argue that status in support of summary judgment]; *North Coast Business Park v. Nielsen Construction Co., supra,* 17 Cal.App.4th at pp. 30–31, 21 Cal.Rptr.2d 104 [separate statement in opposition to summary

judgment focused entirely on delayed discovery of defective drainage; failure to identify problem of defective "footing" precludes consideration of that theory even though supporting evidence referred to footing problem].) The corollary for an opposing party, unless it wishes to advance additional disputed or undisputed material facts, is that it clearly indicate which of the facts contained in the moving party's separate statement it disputes. (§ 437c, subd. (b)(3).) Each party also must supply a "reference to the supporting evidence" in its separate statement (§ 437c, subd. (b)(1), (3)), but the evidence itself is not part of either the statutory requirements for a separate statement or the "golden rule."" (Parkview Villas Ass'n, Inc. v. State Farm Fire and Cas. Co. (2005) 133 Cal.App.4th 1197, 1213–1214.)

Plaintiffs' Undisputed Material Fact Number 43 asserts that due to their removal of good standing, plaintiff could not submit architectural committee applications to improve their property or run for the board. Defendants dispute this statement of fact.

"(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." (Emphasis added.) (Civil Code, § 5105(b)-(e).)

Both plaintiffs declare that due their removal of good standing, they could not submit architectural committee applications to improve their property or run for the Board. (Declaration

of Stephen Katzakian in Support of Motion, paragraph 34; and Declaration of Michelle Katzakian in Support of Motion, paragraph 34.) The court's decision after the phase 1 court trial found that such testimony showed that the plaintiffs faced other penalties, irrespective of the fines imposed. (Plaintiff's Request for Judicial Notice, Exhibit E, page 3, lines 9-12.)

The defendants' improper lay opinion and improper legal argument objections to paragraphs 34 of Stephen Katzakian's declaration and Michelle Katzakian's declaration were previously sustained. Therefore, that evidence is not before the court.

In addition, the court's decision that inability to submit architectural committee applications to improve their property or run for the Board due their removal of good standing showed that the plaintiffs faced other penalties, irrespective of the fines imposed, did not amount to any finding that plaintiffs actually suffered damages in any amount from this inability/penalty.

The plaintiffs' separate statement of undisputed material facts does not state any material facts as to the amount of damages suffered due to the alleged inability to submit architectural committee applications to improve their property or run for the Board due their removal of good standing; and the court is unable to find any citations by plaintiffs to admissible evidence establishing the amount of damages suffered due to the alleged inability to submit architectural committee applications to improve their property or run for the Board due their removal of good standing.

The undisputed material fact must appear in the separate statement or be disregarded. No other undisputed material facts concerning damages arising from the alleged contractual breaches having been asserted by the moving party plaintiff, for the purposes of this motion, any assertion that any other damages were incurred by the subject alleged breaches do not exist.

There is no admissible evidence that they were damaged in any amount from the lack of good standing status. Therefore, plaintiffs have not met their initial burden of proof to establish as a matter of law that they were damaged in a specific amount arising from the removal of their good standing status. The burden of proof did not shift to defendants to raise a triable issue of material fact concerning this category of damages. Damages is a critical element of the breach of contract causes of action.

Furthermore, plaintiffs also admit in their moving papers that they only rely on the claim for attorney fees to establish the damages element for the multiple breaches of contract causes of action they seek to summarily adjudication by means of the instant motion, thereby excluding from consideration during this motion proceeding an argument that any disability arising from their lack of good standing status they encountered regarding submission of architectural committee application to improve their property or to run for the Board damaged them. They state that to the extent there are any damages other than attorney fees, such damages will be pursued by plaintiffs in relation to the breaches of contract and breach of fiduciary duty that are not the subject of and not decided by this motion. (See Plaintiffs Points and Authorities in Support of Motion for Summary Adjudication, page 11, lines 20-25.)

The motion for summary adjudication of the six purported breaches of the HOA C,C,&Rs/agreement is denied.

The court need not and does not reach the issue of whether the business judgment rule immunizes defendants from the decisions made by the HOA Board with regards to the breach of contract causes of action.

TENTATIVE RULING # 13: PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION IS DENIED. NO HEARING ON THIS MATTER WILL BE HELD (<u>LEWIS V. SUPERIOR COURT</u> (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND

REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, OCTOBER 7, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

14. MATTER OF KUDA 22CV0659

OSC Re: Name Change.

There is no proof of publication in the court's file, which is mandated by Code of Civil Procedure, § 1277(a).

TENTATIVE RULING # 14: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, OCTOBER 7, 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.

15. PEOPLE v. KELLY PCL-20210332

Claim Opposing Forfeiture.

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

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

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

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

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

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

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

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

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

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

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

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

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

At the hearing on August 26, 2022 Mr. Kelly stated he believed the case is resolved. Upon request of petitioner, the hearing was continued to October 7, 2022.

TENTATIVE RULING # 15: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, OCTOBER 7, 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.

16. TWO JIN, INC. v. WALDOW 22CV0460

Defendant Imler's Motion to Set Aside Default and Default Judgment.

On March 14, 2022 plaintiff filed a complaint against defendants for breach of contract, account stated, open book account and quantum meruit arising from an alleged failure to pay the cost for a bail bond. A registered process server declares in the proof of service filed on May 18, 2022 that on April 21, 2022 defendant Imler was personally served the summons and complaint. Default was entered against defendant Imler on June 10, 2022. A default judgment was entered against defendant Imler by the court in the amount of $1,383.70 on July 8, 2022.

Defendant essentially moves to vacate the default and default judgment pursuant to the provisions of Code of Civil Procedure, § 473 on the grounds of mistake, inadvertence, surprise, or excusable neglect.

The proof of service declares that notice of the hearing and the moving papers were served by mail on plaintiff's counsel on August 10, 2022.

There was no opposition to the motion in the court's file at the time the ruling was prepared for the September 9, 2022 hearing date.

Plaintiff filed an opposition on September 2, 2022, which was late for the September 9, 2022 hearing date. However, the court's tentative ruling was to continue the hearing to October 7, 2022 to allow defendant Imler to file with the court and serve on plaintiff a proposed answer.

The motion hearing having been continued, the opposition has become timely as it was filed nine court days prior to the continued hearing date.

"…All papers opposing a motion so noticed shall be filed with the court and a copy served on each party at least nine court days … before the hearing…" (Emphasis added.) (Code of Civil Procedure, § 1005(b).) As reflected by the provisions of Code of Civil Procedure, §

1005(b), the date of determination of the timeliness of an opposition is the actual hearing date, not the initial hearing date.

Plaintiff opposes the motion on the following grounds: the defendant failed to submit a proposed answer; and that the declaration does not support granting relief, because no notice of trial was provided as no trial was set, the answer was not rejected due to failure to provide a stamp, because the answer was rejected as not in the proper format, and the defendant could have confirmed the response was filed or rejected by contacting the court instead of blaming the court.

Code of Civil Procedure, § 473(b) allows for a party to obtain relief from a default and default judgment which was taken against the party through his or her mistake, inadvertence, surprise, or excusable neglect. The application for relief shall be accompanied by a copy of the proposed response to be filed, otherwise the application shall not be granted. (Emphasis added.) (Code of Civil Procedure, § 473(b).)

Defendant met the proposed response requirement of Section 473(b) by submitting a proposed general denial on September 16, 2022.

"It is settled that the law favors a trial on the merits (*Elms v. Elms* (1946) 72 Cal.App.2d 508, 513, 164 P.2d 936; *Benjamin v. Dalmo Mfg. Co.* (1948) 31 Cal.2d 523, 525, 190 P.2d 593; *Davis v. Thayer* (1980) 113 Cal.App.3d 892, 904, 170 Cal.Rptr. 328; *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233, 211 Cal.Rptr. 416, 695 P.2d 713; *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 243 Cal.Rptr. 902, 749 P.2d 339) and therefore liberally construes section 473. (*Elms v. Elms*, supra, 72 Cal.App.2d at p. 513, 164 P.2d 936.) Doubts in applying section 473 are resolved in favor of the party seeking relief from default (*Elston v. City of Turlock*, supra, 38 Cal.3d at p. 233, 211 Cal.Rptr. 416, 695 P.2d 713) and if that party has

moved promptly for default relief only slight evidence will justify an order granting such relief." (Iott v. Franklin (1988) 206 Cal.App.3d 521, 526.)

Defendant declares in support of the motion: defendant submitted a timely answer to the complaint, however, it was rejected by the Court clerk due to plaintiff failing to provide a stamped envelope, which defendant did not know needed to be included; defendant was not notified by the clerk that the answer was rejected; defendant never received any notice of the rejection; and defendant was not notified of a trial.

Defendant is unrepresented. The court takes judicial notice that on May 13, 2022 the defendant's forms SC-105 (Request for Court Order and Answer) and SC-112A (Proof of Service by Mail), which she attempted to file were rejected as they are small claims forms and the instant case is a limited civil case. The notification of rejection also stated there was no SASE. Although the clerk's rejection letter states that the documents were returned/placed in will-call, there is no proof of service of the notice of rejection by mail to defendant.

Matters of which the court may take judicial notice establishes that defendant attempted to file an answer to the complaint on or about May 13, 2022 and default was not entered until nearly one month later on June 10, 2022. There is no evidence that the court clerk ever served the notice of rejection of the answer on defendant Imler, defendant Imler contends she never received the notice, and defendant Imler affirmatively declares it was not sent. Having submitted a form of answer to the complaint and not having received any indication the answer was rejected by the court, defendant Imler could reasonably believe that she had fulfilled her requirement to answer the complaint and was not on notice to inquire further.

The defendant having promptly moved for relief, only slight evidence justifies an order granting such relief. Resolving any doubts in applying section 473 in favor of the party seeking relief from default, the court finds that the evidence is sufficient to establish that the default was

a result of defendant Imler's mistake, inadvertence, surprise, or excusable neglect, which justifies granting the relief requested.

Defendant Imler's motion to set aside default and default judgment is granted.

TENTATIVE RULING # 16: DEFENDANT IMLER'S MOTION TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT IS GRANTED. DEFENDANT IMLER'S PROPOSED ANSWER BY GENERAL DENIAL IS DEEMED FILED AND SERVED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME

ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, OCTOBER 7, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.