1. GLINES v. KABIRINASSAB PC-20190655

(1) Defendant's Motion to Compel Plaintiff's Responses to Supplemental Interrogatory and Supplemental Request for Production, and for Sanctions.

(2) Defendant's Motion to Enforce Court's August 19, 2022 Order Compelling Plaintiff's Attendance at Independent Neuropsychological Evaluation.

(3) Defendant's Motion to Enforce Court's August 19, 2022 Order Compelling Plaintiff's Attendance at Independent Medical Examination.

Defendant's Motion to Compel Plaintiff's Responses to Supplemental Interrogatory and Supplemental Request for Production, and for Sanctions.

Defense counsel declares: on June 23, 2022 supplemental interrogatory, set 2 and supplemental request for production, set two were served on plaintiff Alan Glines' counsel by electronic service; the responses were due on July 27, 2022; plaintiff failed to serve responses; on July 29, 2022 defense counsel attempted to resolve the dispute informally by emailing plaintiff's counsel and staff; defense counsel requested that verified responses be served by August 5, 2022; plaintiff's counsel denied receipt of the discovery and requested a 30 day extension; defense counsel could not grant the request, because the deadline to notice a hearing on a motion to compel was approaching; attached as Exhibit B is an email showing that the supplemental discovery was served electronically on plaintiffs' counsel; plaintiff's counsel told defense counsel that he thought responses could be served the week of August 8, 2022; and defense counsel had not received any responses to the supplemental interrogatory and supplemental request for production. Defense Counsel's declaration is dated August 18, 2022.

Exhibit B to defense counsel's declaration is an email to plaintiffs' counsel, dated August 2, 2022, stating that attached are the supplemental interrogatory and supplemental request for

production to plaintiff Alan Glines and requesting that defense be contacted if plaintiffs' counsel had any questions or was unable to open the attached documents.

Defendants move to compel answers to the supplemental interrogatory and supplemental request for production of documents without objections and to produce any documents identified in the supplemental request for production. Defendant also requests an award of monetary sanctions in the amount of $430.

The proofs of service in the court's file declares that on August 22, 2022 notice of the hearing and copies of the moving papers were served by email on plaintiffs' counsel. On August 23, 2022 the court issued an ex parte minute order continuing the hearing from September 23, 2022 to October 14, 2022, because the court was closed on September 23, 2022. The ex parte minute order was served by mail to the interested parties' counsels on August 23, 2022. There was no opposition to the motion in the court's file at the time this ruling was prepared.

"In addition to the number of interrogatories permitted by Sections 2030.030 and 2030.040, a party may propound a supplemental interrogatory to elicit any later acquired information bearing on all answers previously made by any party in response to interrogatories." (Code of Civil Procedure, § 2030.070(a).)

"In addition to the inspection demands permitted by this chapter, a party may propound a supplemental demand to inspect any later acquired or discovered documents, tangible things, or land or other property that are in the possession, custody, or control of the party on whom the demand is made." (Code of Civil Procedure, § 2031.050(a).)

The party to whom interrogatories and requests for production have been served must serve responses upon the propounding party within 30 days after service or any other later date the propounding party stipulates to. (Code of Civil Procedure, §§ 2030.260, 2030.270,

2031.260, and 2031.270.) The failure to timely respond waives all objections to the interrogatories and requests and the propounding party may move to compel answers to interrogatories and production of documents. (Code of Civil Procedure, §§ 2030.290 and 2031.300.)

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

Sanctions

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

It appears appropriate under the circumstances presented to order plaintiff Alan Glines to pay defendants the sum of $430 in monetary sanctions.

Defendant's Motion to Enforce Court's August 19, 2022 Order Compelling Plaintiff's Attendance at Independent Neuropsychological Evaluation.

At the hearing on August 19, 2022 the court granted defendant's motion to compel Plaintiff's Attendance at Independent Neuropsychological Evaluation on August 26, 2022. The order was entered on August 19, 2022. Plaintiff's counsel appeared at the hearing. On August 25, 2022 plaintiff filed a notice of stay due to the filing of a petition for writ review with the 3rd District Court of Appeals. On September 2, 2022 the court received the Third District's order denying the petition for writ of prohibition or mandate with request for stay.

On September 30, 2022 plaintiff filed a notice of intent to object to all matters being heard by a court appointed temporary judge.

Defendant moves to enforce the August 19, 2002 order on the following grounds: on August 25, 2022 plaintiff's counsel advised defense counsel that plaintiff would not appear at the evaluation; the parties were unable to resolve the issue of plaintiff's refusal to appear at the evaluation; issue sanctions should be imposed directing that the nature and extent of plaintiff's injuries are not as he claimed, they were not caused or aggravated by the subject motor vehicle accident, and prohibit plaintiff from opposing these claims; evidence sanctions should be imposed prohibiting plaintiff from introducing evidence related to the nature and extent of hi claimed injuries, reasonable and necessary treatment, future treatment for those claimed injuries, and evidence relating to causation or aggravation of those claimed injuries; and a terminating sanction should be imposed, because there was no reasonable basis for disobeying the court order as merely filing a petition for writ with the Court of Appeal does not automatically stay the order as a stay must be requested and ordered and in this case no stay was ordered. Defendant also requests an award of monetary sanctions in the amount of $1,345 representing attorney fees incurred in this motion proceeding, a filing fee, and the $300 cancellation fee for the evaluation.

Plaintiff opposes the motion to enforce the court's August 19, 2022 order directing plaintiff to attend an Independent Neuropsychological Evaluation on the following grounds: plaintiff did not disobey the court's order compelling attendance at the Independent Neuropsychological Evaluation in bad faith, because plaintiff filed a writ petition challenging the orders; on September 2, 2022, shortly after receiving the results of the writ, and prior to filing the motion, plaintiff's counsel reached out to defense counsel and offered to make plaintiff available and to stipulate to continue the trial; the Independent Neuropsychological Evaluation is currently

scheduled to take place on October 24, 2022; and monetary, issue, evidence and terminating sanctions are not appropriate under the circumstances.

There was no reply in the court's file at the time this ruling was prepared.

"(a) Every court shall have the power to do all of the following: ¶ * * * (4) To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein… (Code of Civil Procedure, § 128(a)(4).)

Despite having requested the Third District Court of Appeals to issue a temporary stay pending decision on the writ petition, the Third District Court of Appeals did not issue the requested stay pending consideration of the petition for writ of mandate regarding the orders to compel plaintiff to attend an IME and Independent Neuropsychological Evaluation.

Absent the stay, plaintiff was not free to ignore the order.

Plaintiff's counsel declares in support of the motion: on August 25, 2022 plaintiff's counsel informed defense counsel that plaintiff would not be appearing for the neuropsychological evaluation set for August 26 or the IME set for September 9, 2022; he mentioned he would be filing writs on the orders compelling the IME and evaluation; plaintiff did not appear for the neuropsychological evaluation; defense counsel attempted to resolve the dispute by reminding plaintiff's counsel that the court ordered the evaluation and examination, failure to appear would be disobeying a court order, and that filing a writ petition did not automatically stay the proceedings; defense counsel offered alternative dates for the evaluation and examination if plaintiff changed plaintiff's mind about not complying with the court order; and they were unable to resolve the dispute.

Defense counsel's declaration in opposition authenticates various documentation, including Exhibit 7, which is a September 2, 2022 email from plaintiff's counsel to defense counsel

acknowledging that in light of the Third District's ruling on the writ, the plaintiff will comply with the two exams and also stipulated to continue the trial date and to keep discovery open.

The opposition also admits plaintiff has agreed to appear for the neuropsychological evaluation currently scheduled for October 24, 2022. (See Plaintiff's Opposition, page 5, lines 16-17.)

The statement of a need to comply with both exams as of September 2, 2022 necessarily admits plaintiff failed to obey the court order to appear for the Independent Neuropsychological Evaluation on August 26, 2022.

Although the motion to enforce the order was filed on September 2, 2022, the same date as the Third District's decision on the writ petition, the documents were executed on August 31, 2022 and were, therefore, executed and filed after plaintiff refused to attend the Independent Neuropsychological Evaluation, which was supposed to take place on August 26, 2022.

It appears appropriate to order plaintiff to appear at the Independent Neuropsychological Evaluation on October 24, 2022 as noticed by plaintiff.

Sanctions

"If a party is required to produce another for a physical or mental examination under Articles 2 (commencing with Section 2032.210) or 3 (commencing with Section 2032.310), or under Section 2032.030, but fails to do so, the court, on motion of the party entitled to the examination, may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Chapter 7 (commencing with Section 2023.010), unless the party failing to comply demonstrates an inability to produce that person for examination. In lieu of or in addition to that sanction, the court may impose a monetary sanction under Chapter 7 (commencing with Section 2023.010)." (Code of Civil Procedure, § 2032.420.)

"Misuses of the discovery process include, but are not limited to, the following: ¶ * * * (g) Disobeying a court order to provide discovery…" (Code of Civil Procedure, § 2023.010(g).)

"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: ¶ * * * If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (Code of Civil Procedure, § 2023.030(a).) The court is not required to find that the evidence establishes that the failure to comply with the court's discovery order was in bad faith. The court is mandated by statute to impose the monetary sanctions unless it makes a finding that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

"'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.)

The court finds that it is not appropriate to impose the drastic measure of termination of the plaintiff's case with prejudice or impose drastic evidence and issue sanctions in the first instance of failure to comply with a discovery order. The court is not convinced that lesser sanctions will not bring about compliance. The request for evidence, issue, and terminating sanctions is denied.

As for monetary sanctions, the court finds that the plaintiff was not substantially justified in failing to appear at the scheduled Independent Neuropsychological Evaluation and there are no other circumstances making the imposition of a monetary sanction unjust. There was no stay in place at the time the evaluation was ordered to take place and plaintiff waited until after

receiving the Third District order denying the writ and stay on September 2, 2022 to agree to make plaintiff available for both the IME and independent neuropsychological evaluation The court orders plaintiff to pay defendant $1,345 in monetary sanctions within ten days.

Defendant's Motion to Enforce Court's August 19, 2022 Order Compelling Plaintiff's Attendance at Independent Medical Examination.

At the hearing on August 19, 2022 the court granted defendant's motion to compel Plaintiff's Attendance at Independent Medical Examination on September 9, 2022. The order was entered on August 19, 2022. Plaintiff's counsel appeared at the hearing. On August 25, 2022 plaintiff filed a notice of stay due to the filing of a petition for writ review with the 3rd District Court of Appeals. On September 2, 2022 the court received the Third District's order denying the petition for writ of prohibition or mandate with request for stay.

On September 30, 2022 plaintiff filed a notice of intent to object to all matters being heard by a court appointed temporary judge.

Defendant moves to enforce the August 19, 2002 order on the following grounds: on August 25, 2022 plaintiff's counsel advised defense counsel that plaintiff would not appear at the examination; the parties were unable to resolve to resolve the issue of plaintiff's refusal to appear at the examination; issue sanctions should be imposed directing that the nature and extent of plaintiff's injuries are not as he claimed, they were not caused or aggravated by the subject motor vehicle accident, and prohibit plaintiff from opposing these claims; evidence sanctions should be imposed prohibiting plaintiff from introducing evidence related to the nature and extent of his claimed injuries, reasonable and necessary treatment, future treatment for those claimed injuries, and evidence relating to causation or aggravation of those claimed injuries; and a terminating sanction should be imposed, because there was no reasonable basis for disobeying the court order as merely filing a writ petition with the Court of Appeal

does not automatically stay the order as a stay must be requested and ordered and in this case no stay was ordered. Defendant also requests an award of monetary sanctions in the amount of $860 for attorney fees incurred in this motion proceeding and a filing fee.

There was no opposition to the motion in the courts file at the time this ruling was prepared.

"(a) Every court shall have the power to do all of the following: ¶ * * * (4) To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein… (Code of Civil Procedure, § 128(a)(4).)

Despite having requesting the Third District Court of Appeals a temporary stay pending decision on the writ petition the Third District Court of Appeals did not issue the requested stay pending consideration of the petition for writ of mandate regarding the orders to compel plaintiff to attend an IME and Independent Neuropsychological Evaluation.

Absent the stay, plaintiff was not free to ignore the order.

Plaintiff's counsel declares in support of the motion: on August 25, 2022 plaintiff's counsel informed defense counsel that plaintiff would not be appearing for the neuropsychological evaluation set for August 26 or the IME set for September 9, 2022; he mentioned he would be filing writs on the orders compelling the IME and evaluation; plaintiff did not appear for the neuropsychological evaluation; defense counsel attempted to resolve the dispute by reminding plaintiff's counsel that the court ordered the evaluation and examination, failure to appear would be disobeying a court order, and that filing a writ petition writ did not automatically stay the proceedings; defense counsel offered alternative dates for the evaluation and examination if plaintiff changed plaintiff's mind about not complying with the court order; and they were unable to resolve the dispute.

The court notes the following: the denial of the writ petition was received by the court on September 2, 2022; the court ordered the IME was to take place seven days later on

September 9, 2022; the defense counsel's declaration in support of the motion was executed on August 31, 2022, prior to the date plaintiff was to appear for the IME; and there is no evidence before the court that plaintiff failed to appear for the IME on September 9, 2022.

Defendant simply has not met defendant's burden to prove that plaintiff filed to appear for the IME scheduled for September 9, 2022. Under the circumstances presented, the court denies the defendant's motion to enforce court's August 19, 2022 order compelling plaintiff's attendance at independent medical examination without prejudice.

TENTATIVE RULING # 1: DEFENDANT'S MOTION TO COMPEL PLAINTIFF'S RESPONSES TO SUPPLEMENTAL INTERROGATORY, SET TWO AND SUPPLEMENTAL REQUEST FOR PRODUCTION, SET TWO, AND FOR SANCTIONS IS GRANTED. PLAINTIFF ALAN GLINES IS TO ANSWER SUPPLEMENTAL INTERROGATORY, SET TWO, WITHOUT OBJECTION WITHIN TEN DAYS. PLAINTIFF ALAN GLINES IS TO ANSWER SUPPLEMENTAL REQUEST FOR PRODUCTION AND PRODUCE ANY DOCUMENTS IDENTIFIED WITHOUT OBJECTION WITHIN TEN DAYS. PLAINTIFF ALAN GLINES IS FURTHER ORDERED TO PAY $430 IN MONETARY SANCTIONS WITHIN TEN DAYS. DEFENDANT'S MOTION TO ENFORCE COURT'S AUGUST 19, 2022 ORDER COMPELLING PLAINTIFF'S ATTENDANCE AT INDEPENDENT NEUROPSYCHOLOGICAL EVALUATION IS GRANTED IN PART AND DENIED IN PART. DEFENDANT'S REQUEST FOR ISSUE, EVIDENCE AND TERMINATING SANCTIONS IS DENIED. IN THE ALTERNATIVE, THE COURT ORDERS PLAINTIFF TO ATTEND THE INDEPENDENT NEUROPSYCHOLOGICAL EVALUATION ON OCTOBER 24, 2022 AS NOTICED BY PLAINTIFF. DEFENDANT'S REQUEST FOR AN AWARD OF MONETARY SANCTIONS IS GRANTED. PLAINTIFF IS ORDERED TO PAY DEFENDANT $1,345 IN MONETARY SANCTIONS WITHIN TEN DAYS. DEFENDANT'S MOTION TO ENFORCE COURT'S

AUGUST 19, 2022 ORDER COMPELLING PLAINTIFF'S ATTENDANCE AT INDEPENDENT MEDICAL EXAMINATION IS DENIED WITHOUT PREJUDICE. 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 14, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

2. MASSEY v. PROTEC RESTORATION, INC. 22CV1256

Petition to Release Property from Mechanics Lien.

The verified petition states that on or about October 25, 2019 respondent recorded a mechanic's lien against petitioner's property. Attached to the petition is a copy of that recorded lien. The petition further states that no action to foreclose on the lien has been filed, no extension of credit has been recorded, and the time period in which to file an action to foreclose on the lien has expired. It is further stated that despite providing the lien claimant notice pursuant to Civil Code, § 8482 on December 1, 2020 demanding the lien claimant to execute and record a release of the lien, the lien claimant is unwilling to release the lien in that the lien claimant has failed to respond to the demand. It is also stated in the petition that petitioner has not filed for relief in bankruptcy and no other restraint exists to prevent the lien claimant from filing an action to foreclose the lien. Petitioner requests that the court order the lien released and award $2,000 in attorney's fees incurred in this proceeding.

"The claimant shall commence an action to enforce a lien within 90 days after recordation of the claim of lien. If the claimant does not commence an action to enforce the lien within that time, the claim of lien expires and is unenforceable."" (Civil Code, § 8460(a).) "Subdivision (a) does not apply if the claimant and owner agree to extend credit, and notice of the fact and terms of the extension of credit is recorded (1) within 90 days after recordation of the claim of lien or (2) more than 90 days after recordation of the claim of lien but before a purchaser or encumbrancer for value and in good faith acquires rights in the property. In that event the claimant shall commence an action to enforce the lien within 90 days after the expiration of the credit, but in no case later than one year after completion of the work of improvement. If the

claimant does not commence an action to enforce the lien within that time, the claim of lien expires and is unenforceable." (Civil Code, § 8460(b).)

If the lien claimant fails to enforce a mechanic's lien by timely prosecution, the owner of the affected property may petition the court for an order releasing the property from the lien. (Civil Code, § 8480(a).) A petition for a release order shall be verified and shall allege all of the following: the date of recordation of the claim of lien; a certified copy of the claim of lien shall be attached to the petition; the county in which the claim of lien is recorded; the book and page or series number of the place in the official records where the claim of lien is recorded; the legal description of the property subject to the claim of lien; whether an extension of credit has been granted under Section 8460, if so to what date, and that the time for commencement of an action to enforce the lien has expired; that the owner has given the claimant notice under Section 8482 demanding that the claimant execute and record a release of the lien and that the claimant is unable or unwilling to do so or cannot with reasonable diligence be found; whether an action to enforce the lien is pending; and whether the owner of the property or interest in the property has filed for relief in bankruptcy or there is another restraint that prevents the claimant from commencing an action to enforce the lien." (Emphasis added.) (Civil Code, § 8484.)

The copy of the lien attached to the verified petition is not certified as mandated by Section 8484. This needs to be remedied or the court will have no alternative other than to deny the petition without prejudice due to failure to meet the requirements of Section 8484.

"On the filing of a petition for a release order, the clerk shall set a hearing date. The date shall be not more than 30 days after the filing of the petition. The court may continue the hearing only on a showing of good cause, but in any event the court shall rule and make any

necessary orders on the petition not later than 60 days after the filing of the petition." (Civil Code, § 8486(a).)

The petitioner must serve notice of the hearing and a copy of the petition on the lien claimant at least 15 days prior to the hearing date in the same manner that a summons and complaint is served, or by certified or registered mail, return receipt requested, sent to the lien claimant contractor's address as shown on the building permit, on the contract on which the lien is based, or on the records of the Contractor's State License Board. Service by certified or registered mail is complete on the fifth day following its deposit in the mail. (Civil Code, §§ 8108(d) and 8486(b).) The proof of service in the court's file declares that the lien claimant was served notice of the motion and the petition by mail to the lien claimant's address listed n the recorded lien on September 7, 2022. The proof of service does not declare that the notice nd petition were served by certified or registered mail, return receipt requested. The court can not reach the merits of the petition until there is proof of service on the lien claimant in the same manner that a summons and complaint is served, or by certified or registered mail, return receipt requested in the same manner that a summons and complaint is served, or by certified or registered mail, return receipt requested.

TENTATIVE RULING # 2: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, OCTOBER 14, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

3. FENNESSY v. ALTOONIAN PC-20160016

Defendant Altoonian's Motion for Attorney Fees and Costs.

On May 16, 2022 at the conclusion of a seven day trial the jury returned special verdicts and judgment was entered in favor of defendant Altoonian and against plaintiffs on that same date. The special jury verdict found, among other things, the following: plaintiffs Fennessy did not do all or substantially all of the significant things that the contract required them to do; defendant Altoonian did not make a false representation of fact to the plaintiffs; defendant Altoonian did not intentionally fail to disclose facts that plaintiffs did not know and could not have reasonably discovered; defendant Altoonian did not make a false representation of facts to plaintiffs concerning the negligent misrepresentation cause of action; although defendants DeVincenzi and DeVincenzi and Associates, Inc. were agents of defendant Altoonian, they were not acting in the scope of their agency when they harmed plaintiffs; and with regards to the seller nondisclosure of material facts claim, although defendant Altoonian did not disclose his mother committed suicide in the property, the plaintiffs were aware of the suicide or could have reasonably discovered the information.

Defendant Altoonian moves for an award of attorney fees in the amount of $795,146.50 and costs of $59,190.62 as the prevailing party entitled to such an award under the attorney fees provision of the subject Residential Purchase Agreement. Defendant Altoonian asserts the following grounds in support of the motion: the requested attorney fees are reasonable as they are premised upon the lodestar computation and the hourly rate claimed is within the reasonable hourly rate prevailing in the San Francisco Bay Area legal community; defendant Altoonian is entitled to recover the costs incurred for expert witnesses, depositions, motion and filing fees, travel and lodging costs, and jury fees; and he is also entitled to post judgment

interest in the amount of 10% after issuance of the forthcoming award of attorney fees and costs.

Plaintiffs oppose the motion on the following grounds: defendant should not be considered the prevailing party, because the amount of monetary damages never exceeded $87,800, plus $38,561 in prejudgment interest, therefore the expenditure for attorney fees greatly exceeded the amount in controversy and the focus of the litigation was between defendants Altoonian and his real estate agent defendants DeVincenzi; the cross-complaints did not arise out of the Residential Purchase Agreement; the lodestar amount should be limited to calculating the reasonable fee by using the reasonable hourly rate in El Dorado County of between $200-$400 per hour, depending on attorney experience, because it was not impracticable for defendant Altoonian to obtain local counsel to defend against this action and, therefore, the San Francisco Bay Area local legal community rates do not apply; attorney fees incurred prior to the filing of the complaint are related to the mediation and, therefore, must be borne by each of the parties pursuant to paragraph 26A of the agreement; defendant Altoonian is strictly limited to recovery of attorney fees that are incurred to defend against the breach of contract cause of action and he can not recover attorney fees incurred to defend against any other causes of action in this case; equitable considerations require the court to deny the attorney fees claim, because defendant should have accepted settlement offers that would have saved him the attorney fees incurred; plaintiffs are the prevailing parties in this litigation as they have a net monetary recovery, because they received $300,000 from the DeVincenzi defendants in settlement of the case; the amount of fees sought to be recovered shocks the conscience; the number of attorneys defending the case was excessive; the amount of fees claimed is twice the amount that was incurred by plaintiffs; the motion for an award of costs must be denied as defendant did not timely file and serve a memorandum of costs; and defendant Altoonian never

presented a Code of Civil Procedure, § 998 offer to compromise to plaintiff's that was rejected, therefore expert fees are not recoverable.

Motion for Attorney Fees General Principles

"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." (Code of Civil Procedure, § 1033.5(a)(10).)

"In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs. ¶ Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract. ¶ Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit. ¶ Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract which is entered into after the effective date of this section. Any provision in any such contract which provides for a waiver of attorney's fees is void." (Civil Code, § 1717(a).)

In finding that a noticed motion was the only method to obtain an award of attorney fees when such claim was premised on a contractual provision, the Third District Court of Appeal held: "…[I]n 1990, the Legislature amended section 1033.5 to its present form (fn. 13, ante), requiring that section 1717 attorney fees be fixed by noticed motion. In so doing, the Legislature expressed its intent as follows: ¶ "The Legislature finds and declares that *there is great uncertainty as to the procedure to be followed in awarding attorney's fees* where

entitlement thereto is provided by contract to the prevailing party. *It is the intent of the Legislature in enacting this act to confirm that these attorney's fees are costs which are to be awarded only upon noticed motion*, except where the parties stipulate otherwise or judgment is entered by default. *It is further the intent of the Legislature to vest the Judicial Council with the discretion provided in Section 1034 of the Code of Civil Procedure to adopt procedural guidelines establishing the time for hearing of these motions, but the Legislature finds and declares that the criteria set forth in Section 870.2 of the California Rules of Court provide a fair and equitable procedure for the motions*." (Stats.1990, ch. 804, § 2, emphasis added; see Historical and Statutory Notes, 18A West's Ann.Code Civ.Proc., § 1033.5 (1993 pocket supp.) p. 43.) ¶ This declaration of legislative intent could not be more clear. Contractual attorney fees are to be claimed "only" by noticed motion, not by the mere filing of a memorandum of costs." (Italics in original.) (Russell v. Trans Pacific Group (1993) 19 Cal.App.4th 1717, 1724-1725.)

"As the Court of Appeal herein observed, the fee setting inquiry in California ordinarily begins with the "lodestar," i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. "California courts have consistently held that a computation of time spent on a case and the reasonable value of that time is fundamental to a determination of an appropriate attorneys' fee award." (*Margolin v. Regional Planning Com.* (1982) 134 Cal.App.3d 999, 1004-1005, 185 Cal.Rptr. 145.) The reasonable hourly rate is that prevailing in the community for similar work. (Id. at p. 1004, 185 Cal.Rptr. 145; *Shaffer v. Superior Court* (1995) 33 Cal.App.4th 993, 1002, 39 Cal.Rptr.2d 506.) The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. (*Serrano v. Priest*, supra, 20 Cal.3d at p. 49, 141 Cal.Rptr. 315, 569 P.2d 1303.) Such an approach anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount

awarded is not arbitrary. (Id. at p. 48, fn. 23, 141 Cal.Rptr. 315, 569 P.2d 1303.) ¶ Thus, applying the lodestar approach to the determination of an award under Civil Code section 1717, the Court of Appeal in *Sternwest Corp. v. Ash* (1986) 183 Cal.App.3d 74, 77, 227 Cal.Rptr. 804 explained: "Section 1717 provides for the payment of a 'reasonable' fee. After the trial court has performed the calculations [of the lodestar], it shall consider whether the total award so calculated under all of the circumstances of the case is more than a reasonable amount and, if so, shall reduce the section 1717 award so that it is a reasonable figure."" (PLCM Group v. Drexler (2000) 22 Cal.4th 1084, 1095-1096.)

With the above-cited legal principles in mind, the court will rule on defendant Altoonian's motion for award of attorney fees and costs.

Contractual Attorney Fees Provision in the Subject Real Estate Purchase Agreement

The subject Real Estate Purchase Agreement provides with regards to recovery of attorney fees and costs: "In any action, proceeding, or arbitration between Buyer and Seller arising out of this Agreement, the prevailing Buyer or Seller shall be entitled to reasonable attorney fees and costs from the non-prevailing Buyer or Seller, except as provided in paragraph 26A." (Declaration of Andrew Morrison in Support of Motion, Exhibit A – Real Estate Purchase Agreement, paragraph 21.)

Paragraph 26A provides that "Mediation fees, if any, shall be divided equally among the parties involved." and should the prevailing party commence an action without first mediating the claim or refuses to mediate then that prevailing party shall not be entitled to recover attorney fees even if such fees were otherwise available for award to that party in any such action.

- Mediation Fees

Plaintiffs argue in opposition that all attorney fees incurred prior to the action having been filed are mediation fees that are not recoverable pursuant to the terms of the subject Residential Purchase Agreement and, therefore, the court must deny defendant's claim for recovery of those fees.

Plaintiffs have not pointed out and the court is unable to find any definition of the term "mediation fees" or any language in the mediation paragraph that can be construed to include "attorney fees" within the term "mediation fees". The prevailing party recovery of attorney fees provision explicitly applies to a "proceeding" arising out of the agreement, which reasonably includes a mediation proceeding that is expressly provided for in the agreement itself. The mediation provision clearly refers to fees that must be paid to the mediator or the mediation service used for the mediation and not attorney fees incurred by each party. That is the only reasonable interpretation that can be applied.

""It is the outward expression of the agreement, rather than a party's unexpressed intention, which the court will enforce." (*Winet, supra,* at p. 1166, 6 Cal.Rptr.2d 554.)" (Kerkeles v. City of San Jose (2015) 243 Cal.App.4th 88, 98.)

If the parties to the agreement truly intended to bar recovery of attorney fees incurred by the prevailing party prior to filing the action and during mediation proceedings, the agreement would have expressly prohibited recovery of attorney fees incurred during the time leading up to and during mediation.

The court rejects plaintiffs' interpretation that mediation fees included such attorney fees.

- Attorney Fees Recoverable

Eden Township Healthcare Dist. v. Eden Medical Center (2013) 220 Cal.App.4th 418, 427, cited by plaintiffs in support of their argument that the subject attorney fees provision only applies to the attorney fees incurred to defend against the complaint's breach of contract cause of action is distinguishable on its facts as the subject provision in this case was not limited to recovery of attorney fees incurred in an action on a contract.

The operation of Civil Code, § 1717(a) merely provides for mutuality of remedy for attorney fee claims under contractual attorney fee provisions for an award of attorney fees incurred to enforce a contract and does not limit fee awards just to "actions on the contract" or "actions to enforce the contract", unless the attorney fee provision limits the attorney fee award to such causes of action. A broad scope mutual attorney fees provision for any actions arising from the contract includes any actions that arose from the contract, including torts arising under the contract, thereby making attorney fees recoverable by the prevailing party on those causes of action as they fall within the express terms of the contract's fee provision.

"Having determined that the parties entered into a real estate purchase agreement that contains a facially valid and enforceable attorney fee provision, we proceed to decide whether, without considering Civil Code section 1717 and *Olen, supra,* 21 Cal.3d 218, 145 Cal.Rptr. 691, 577 P.2d 1031, this provision entitles the seller defendants to recover their attorney fees following the voluntary dismissal of this particular action. ¶ In their complaint in this action, plaintiffs alleged both a contract claim and various tort claims. Does the contractual provision permit the prevailing party to recover attorney fees incurred for the defense of each of these claims? We conclude that it does. ¶ On its face, the provision embraces all claims, both tort and breach of contract, in plaintiffs' complaint, because all are claims "arising out of the execution of th[e] agreement or the sale." (See *Lerner v. Ward* (1993) 13 Cal.App.4th 155,

160–161, 16 Cal.Rptr.2d 486.) Plaintiffs do not argue otherwise. If a contractual attorney fee provision is phrased broadly enough, as this one is, it may support an award of attorney fees to the prevailing party in an action alleging both contract and tort claims: "[P]arties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract." (*Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1341, 5 Cal.Rptr.2d 154.)" (Santisas v. Goodin (1998) 17 Cal.4th 599, 608.)

The California Supreme Court in Santisas, supra, later held that while the provisions of Civil Code, § 1717 applied to contractual attorney fee claims incurred for causes of action on the contract, the limitations of Civil Code, § 1717 related to who was a prevailing party did not apply to tort causes of action arising from the contract and those limitations only applied to contractual attorney fee claims for the fees incurred in litigation on the contract. The California Supreme Court held that where a contract action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section (Civil Code, § 1717(b)(2).) and no fees incurred for the contract cause of action can be recovered as there was no prevailing party on the contract action. (Santisas v. Goodin (1998) 17 Cal.4th 599, 615.)

Since this case was resolved by jury trial and not voluntarily dismissed or dismissed by plaintiffs after settlement of the case against defendant Altoonian, the "prevailing party" limitation of Section 1717(b)(2) related to actions on the contract does not apply.

"Under the American rule, each party to a lawsuit ordinarily pays its own attorney fees. (*Tract 19051 Homeowners Assn. v. Kemp* (2015) 60 Cal.4th 1135, 1142, 184 Cal.Rptr.3d 701, 343 P.3d 883.) Code of Civil Procedure section 1021, which codifies this rule, provides: "Except as attorney's fees are specifically provided for by statute, the measure and mode of

compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties...." In other words, section 1021 permits parties to " 'contract out' of the American rule" by executing an agreement that allocates attorney fees. (*Trope v. Katz* (1995) 11 Cal.4th 274, 279, 45 Cal.Rptr.2d 241, 902 P.2d 259; see *Santisas v. Goodin* (1998) 17 Cal.4th 599, 607, fn. 4, 71 Cal.Rptr.2d 830, 951 P.2d 399 (*Santisas*) [Code Civ. Proc., § 1021"does not independently authorize recovery of attorney fees"].) Thus, " '[p]arties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract.' " (*Santisas*, *supra*, 17 Cal.4th at p. 608, 71 Cal.Rptr.2d 830, 951 P.2d 399, quoting *Xuereb v. Marcus & Millichap, Inc*. (1992) 3 Cal.App.4th 1338, 1341, 5 Cal.Rptr.2d 154.)" (Emphasis added.) (Mountain Air Enterprises, LLC v. Sundowner Towers, LLC (2017) 3 Cal.5th 744, 751.)

"As to tort claims, the question of whether to award attorneys' fees turns on the language of the contractual attorneys' fee provision, i.e., whether the party seeking fees has "prevailed" within the meaning of the provision and whether the type of claim is within the scope of the provision. (*Santisas v. Goodin, supra,* 17 Cal.4th at pp. 602, 608–609, 617, 619, 71 Cal.Rptr.2d 830, 951 P.2d 399.) This distinction between contract and tort claims flows from the fact that a tort claim is not "on a contract" and is therefore outside the ambit of section 1717. (*Stout v. Turney* (1978) 22 Cal.3d 718, 730, 150 Cal.Rptr. 637, 586 P.2d 1228; *Childers v. Edwards* (1996) 48 Cal.App.4th 1544, 1548, 56 Cal.Rptr.2d 328.)" (Emphasis added.) (Exxess Electronixx v. Heger Realty Corp. (1998) 64 Cal.App.4th 698, 708.)

The attorney fee provision of the subject agreement is not limited to fees incurred to enforce the contract or on the contract. The agreement provides that in any action between Buyer and Seller arising out of this Agreement, the prevailing Buyer or Seller shall be entitled to reasonable attorney fees and costs from the non-prevailing Buyer or Seller. (Emphasis the

court's.) The scope of the provision is reasonably construed to include any cause of action arising from the agreement, including tort claims.

All the causes of action asserted against defendant Altoonian clearly arose from the underlying Residential Purchase Agreement, including any tort causes of action.

The complaint brought by plaintiffs initiated this litigation and the cross-complaints. There would have been no cross-complaints seeking recovery against other parties seeking to lay the blame for the harm plaintiffs claimed and liability for the damages claimed against defendants in the underlying complaint had the underlying complaint not been brought due to the real estate transaction and the costs and attorney fees to pursue and defendant against cross-complaints were incurred as a direct result of plaintiffs filing the underlying complaint. Therefore, this entire case arose out of the sale of the real estate under the subject Residential Purchase Agreement and the attorney fee provision applies to plaintiffs and defendant Altoonian.

The court rejects plaintiffs' assertion that the court should deny the fees requested under equitable principles.

As for plaintiff's claim that they prevailed by receiving a net monetary recovery in the case due to the $300,000 settlement with the DeVincenzi defendants lacks merit. There was no offset involved in this case. The jury verdict and judgment expressly found that defendant Altoonian was never liable to plaintiffs for any damages, therefore, there is no set of circumstances that can convert the settlement with the DiVincenzi defendants into a net recovery against defendant Altoonian or that somehow Plaintiffs prevailed in their action against defendant Altoonian when the jury found the opposite.

Defendant prevailed on the action and, as the seller defendant, he is entitled pursuant to the attorney fees provision to recover from the signatory buyer plaintiffs his attorney fees incurred in this action.

Reasonable Hourly Rate Prevailing in the El Dorado County Legal Community

Defendant Altoonian argues that hourly attorney rates from $635 to $375 charged by the seven attorneys in the firm he retained to defend him against this lawsuit and the legal assistant fee of $200 charged for work by three legal assistants are reasonable hourly rates prevailing in the San Francisco Bay Area Legal community, based upon the attorney's and legal assistant's legal work experience.

"The lodestar figure is calculated using the reasonable rate for comparable legal services in *the local community* for noncontingent litigation of the same type, multiplied by the reasonable number of hours spent on the case. (*Id.* at pp. 1132–1133, 104 Cal.Rptr.2d 377, 17 P.3d 735; see *PLCM Group, Inc. v. Drexler, supra,* 22 Cal.4th at p. 1095, 95 Cal.Rptr.2d 198, 997 P.2d 511["[t]he reasonable hourly rate is that prevailing in the community for similar work"].) Thus, a court's use of reasonable rates in the local community, as an integral part of the initial lodestar equation, is one of the means of providing some objectivity to the process of determining reasonable attorney fees. Such objectivity is " 'vital to the prestige of the bar and the courts.' " (*Ketchum, supra,* at p. 1132, 104 Cal.Rptr.2d 377, 17 P.3d 735, citing *Serrano III, supra,* 20 Cal.3d at p. 48, fn. 23, 141 Cal.Rptr. 315, 569 P.2d 1303.)" (Emphasis added.) (Nichols v. City of Taft (2007) 155 Cal.App.4th 1233, 1242-1243.)

In unusual circumstances where it is shown that local counsel is unavailable or that hiring local counsel was impracticable, the trial court is not limited to the use of local hourly rates, however, the party requesting a higher rate charged by attorneys outside the local community

must establish that attorneys in the local community were unavailable to take the case requiring resort to counsel from an area that charges higher hourly rates.

An appellate court in the Nichols opinion further stated the following with regards to claims of higher fees by out-of-town counsel and availability of counsel in the local legal community: "However, as pointed out in *Horsford,* the Supreme Court "has never hinted that, in the unusual circumstance that local counsel is unavailable, the trial court is limited to the use of local hourly rates." (*Horsford, supra,* 132 Cal.App.4th at p. 399, 33 Cal.Rptr.3d 644.) In that case, the plaintiff submitted a declaration showing extensive efforts to find local counsel that were wholly unsuccessful. Other declarations revealed that many local firms did not want to go against the defendant, a local university, due to the popularity of the university and its athletic teams. (*Id.* at p. 398, 33 Cal.Rptr.3d 644.) We found this was sufficient to demonstrate the need to hire out-of-town counsel: "If a potential defendant is too intimidating to the local bar or so replete with resources as to potentially overwhelm local counsel, or if the local plaintiffs' bar has not the resources to engage in complex litigation on a contingency-fee basis, the public interest in the prosecution of meritorious civil rights cases requires that the financial incentives be adjusted to attract attorneys who are sufficient to the cause." (*Id.* at p. 399, 33 Cal.Rptr.3d 644.) ¶ *Horsford* concluded that because the plaintiff showed " 'a good-faith effort to find local counsel' " and "demonstrate[d] ... that hiring local counsel was impracticable," the trial court should have considered the out-of-town counsel's higher rates, either in (1) calculating the initial lodestar figure **or** (2) evaluating whether to award a multiplier to a lodestar initially calculated using local hourly rates. (*Horsford, supra,* 132 Cal.App.4th at p. 399, 33 Cal.Rptr.3d 644.) The particular "method of achieving adequate compensation for out-of-town counsel, *when reasonably necessary,* rests within the trial court's discretion." (*Id.* at p. 399, 33 Cal.Rptr.3d 644, italics added.) ¶ In the present case, the trial court concluded at oral argument

that, unlike the plaintiffs in *Horsford,* plaintiff had failed to make a "sufficient demonstration of impracticality of not being able to obtain a local attorney." The trial court further stated that "[s]ince [plaintiff] had not ... in [plaintiff's] moving declaration, said that she made an application and tried to have a lawyer hired here, [the court] was caught." In the written order, the trial court simply avoided the issue by asserting it was unnecessary to decide whether plaintiff's showing was sufficient because the court intended to apply a multiplier. We note it is clear from plaintiff's declaration that, although she had concerns that she would be unable to find adequate representation, no effort was made to retain local counsel. Despite the fact that plaintiff failed to make an adequate threshold showing, the trial court proceeded to impose a fee multiplier based on the out-of-town attorneys' higher rates. ¶ We hold the trial court abused its discretion. Use of a fee multiplier to compensate for the higher rates of out-of-town counsel requires a sufficient showing—which plaintiff failed to make in this case—that hiring local counsel was impracticable. (See *Horsford, supra,* 132 Cal.App.4th at pp. 398–399, 33 Cal.Rptr.3d 644.) Otherwise, the rule tethering the lodestar to local rates would be effectively bypassed, since a trial court could always account for out-of-town rates through the "backdoor" by means of a multiplier, even when there was no showing that local attorneys were unavailable. Additionally, as noted earlier, the trial court mistakenly believed that it was *required* to impose a multiplier whenever a FEHA plaintiff hires out-of-town counsel from a higher fee market. No such mandatory multiplier rule exists in the law, and we have already concluded that reversal is warranted on that ground alone. On remand, the trial court shall exercise its sound discretion to impose a multiplier (or not) based upon a consideration of the relevant lodestar adjustment factors in this case (see fn. 4, *ante*), but without consideration of the out-of-town attorneys' higher rates." (Nichols v. City of Taft (2007) 155 Cal.App.4th 1233, 1242–1244.)

The reasonable hourly rate prevailing in the El Dorado County legal community for similar work is $350 per hour. The declarations in support of the motion do not establish that that hiring local counsel was impracticable or local counsel was unavailable to take on the case. Therefore, the court will apply the reasonable hourly rate prevailing in the El Dorado County legal community of $350 per hour to calculate the lodestar amount.

The legal assistant hourly rate of $200 appears to be comparable to legal assistant/paralegal rates in the El Dorado County legal community.

Lodestar Amount

"We adhere to our earlier conclusion that there is no general rule requiring trial courts to explain their decisions on motions seeking attorney fees. In cases where the award corresponds to either the lodestar amount, some multiple of that amount, or some fraction requested by one of the parties, the court's rationale for its award may be apparent on the face of the record, without express acknowledgment by the court of the lodestar amount or method. When confronted with hundreds of pages of legal bills, trial courts are not required to identify each charge they find to be reasonable or unreasonable, necessary or unnecessary. The party opposing the fee award can be expected to identify the particular charges it considers objectionable. A reduced award might be fully justified by a general observation that an attorney overlitigated a case or submitted a padded bill or that the opposing party has stated valid objections. ¶ It is the constitutional obligation of the appellate court to "determine causes ... in writing with reasons stated." (Cal. Const., art. 6, § 14.) A trial court's award of attorney fees must be able to be rationalized to be affirmed on appeal. In the absence of any explanation or comments by the trial court, we have unsuccessfully scrutinized the documents submitted by the parties to find reasons justifying the awards in this case. When a trial court makes an award that is inscrutable to the parties involved in the case, and there is no apparent

reasonable basis for the award in the record, the award itself is evidence that it resulted from an arbitrary determination. It is not the absence of an explanation by the trial court that calls the award in this case into question, but its inability to be explained by anyone, either the parties or this appellate court. We are compelled to conclude that there is no reasonable connection between the lodestar amount and the trial court's award. [FN 36.] ¶ FN36. In reaching this conclusion, we do not intend to suggest that the trial court was required to award the lodestar amount. We and contractor have identified a number of reasons that might support a reduced award. Our problem with the award here is that the award provides no evidence that trial court either adopted or rejected any particular arguments by the parties." (Gorman v. Tassajara Development Corp. (2009) 178 Cal.App.4th 44, 101.)

"As we have already noted, the lodestar method vests the trial court with the discretion to decide which of the hours expended by the attorneys were "reasonably spent" on the litigation. (*Serrano v. Unruh*, supra, 32 Cal.3d at pp. 633, 635, 639, 186 Cal.Rptr. 754, 652 P.2d 985.) The lodestar amount is the product of the number of hours "reasonably spent" and the reasonable rate." (Meister v. Regents of University of California (1999) 67 Cal.App.4th 437, 449.)

Attorney Craig Miller declares: he billed 176.2 hours working on this case; his legal work consisted of numerous conversations with the client, numerous emails to internal staff regarding case progress, discovery, deposition preparation, trial preparation and met with Of-Counsel attorneys many times during 2015-2022 regarding defense strategy, motions, mediations, and trial strategy, and supervising case work; William Weisberg billed 48.5 hours on this matter; and William Weisberg worked in a supervisory role, helping with case strategy, discovery, mediation, and trial preparation, and helped draft and review briefs and case pleadings. (Craig Miller's Declaration in Support of Motion, paragraphs 13, 16, and 17.)

The defense law firm had two partners, five other experienced attorneys, and three legal assistants working on this case. It has essentially been admitted the two partners worked in a supervisory role keeping an eye on the litigation, which appears to have generated attorney fees not reasonably incurred in this litigation and amounts to overlitigation. The court will deny the claim of $143,827.50 for 226.5 hours billed by the two partners as reflected in paragraph 17 of the Declaration of Andrew Morrison in Support of the motion.

The five other experienced attorneys billed 1,348 hours for legal work on this case. Applying the rate of $350 per hour, the attorney fee amount is $471,800. In addition, $14,800 in legal assistant fees were incurred. Therefore the total lodestar amount is $486,600.

The court finds that $486,600 in attorney fees was reasonably incurred by defendant Altoonian and it is reasonable in amount. The court further finds that the amount does not shock the conscience and the fact that plaintiffs incurred less than that amount in fees does not change the court's decision on the finding of reasonableness.

Memorandum of Costs Requirement

"A prevailing party who claims costs shall serve and file a memorandum of costs within 15 days after the date of mailing of the notice of entry of judgment or dismissal by the clerk under Code of Civil Procedure section 664.5 or the date of service of written notice of entry of judgment or dismissal, or within 180 days after entry of judgment, whichever is first. The memorandum of costs must be verified by a statement of the party, attorney, or agent that to the best of his or her knowledge the items of cost are correct and were necessarily incurred in the case." (Rules of Court, Rule 3.1700(a)(1).) "'The time provisions relating to the filing of a memorandum of costs, while not jurisdictional, are mandatory.' (*Hydratec, Inc. v. Sun Valley 260 Orchard & Vineyard Co.* (1990) 223 Cal.App.3d 924, 929, 272 Cal.Rptr. 899.)" (Sanabria v. Embrey (2001) 92 Cal.App.4th 422, 426.)

"The party claiming costs and the party contesting costs may agree to extend the time for serving and filing the cost memorandum and a motion to strike or tax costs. This agreement must be confirmed in writing, specify the extended date for service, and be filed with the clerk. In the absence of an agreement, the court may extend the times for serving and filing the cost memorandum or the notice of motion to strike or tax costs for a period not to exceed 30 days." (Rules of Court, Rule 3.1700(b)(3).)

The court takes judicial notice that the clerk served notice of entry of the judgment on counsels for plaintiffs and defendant Altoonian by mail on May 17, 2022; and that there is no memorandum of costs in the court's file from defendant Altoonian. The court denies the motion for an award of costs, including expert witness fees, as untimely.

Expert Witness Fees

"(a) The following items are allowable as costs under Section 1032: ¶ * * * (8) Fees of expert witnesses ordered by the court." (Code of Civil Procedure, § 1033.5(a)(8).)

"(b) The following items are not allowable as costs, except when expressly authorized by law: ¶ (1) Fees of experts not ordered by the court." (Code of Civil Procedure, § 1033.5(b)(1).)

"If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant." (Code of Civil Procedure, § 998(c)(1).)

There is no evidence before the court that defendant Altoonian served plaintiffs with a Section 998 offer to compromise that was rejected, therefore an award of expert witness fees under Section 998(c)(1) is not available.

The court also denies the request for an award of $37,453.06 in expert witness fees incurred by defendant Altoonian as not authorized by statute.

In summary, defendant Altoonian's motion for attorney fees and costs is granted in part and denied in part. The court awards defendant Altoonian as the prevailing party $486,600 in attorney fees as reasonable in amount and reasonably incurred by defendant Altoonian in this litigation that arose from the subject Residential Purchase Agreement.

TENTATIVE RULING # 3: DEFENDANT ALTOONIAN'S MOTION FOR ATTORNEY FEES AND COSTS IS GRANTED IN PART AND DENIED IN PART. THE COURT AWARDS DEFENDANT ALTOONIAN AS THE PREVAILING PARTY $486,600 IN ATTORNEY FEES AS REASONABLE IN AMOUNT AND REASONABLY INCURRED BY DEFENDANT ALTOONIAN IN THIS LITIGATION THAT AROSE FROM THE SUBJECT RESIDENTIAL PURCHASE AGREEMENT. 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 14, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

4. SANDOVAL v. REED 22CV0411

Defendants' Motion to Set Aside/Vacate Default and Default Judgment.

On March 28, 2022 plaintiff filed an action for breach of contract, fraud, declaratory relief, to quiet title and civil conspiracy against defendants. The acknowledgement of receipt of the summons and complaint by defendants was executed by defense counsel and filed on April 19, 2022. Default was entered on June 3, 2022 against defendants.

Just short of three months after entry of default, defendant filed the instant motion on September 1, 2022. Defendant moves to vacate the default pursuant to the provisions of Code of Civil Procedure, § 473(b) on the grounds of mistake, inadvertence, surprise, or excusable neglect. Defendant contends that defense counsel's significant medical ailments caused him to miss the date to timely file an answer due to excusable neglect. Defendants' Counsel's declaration in support of the motion states: he experienced significant medical ailments; and the debilitating physical afflictions together with the barrage of medications he was taking caused him to lose track of the deadline to file the answer and he was unable to catch up until very recently.

The proof of service declares that notice of the hearing and the moving papers were served by mail on plaintiff's counsel on August 31, 2022. There was no opposition to the motion in the court's file at the time this ruling was prepared.

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. (Code of Civil Procedure, § 473(b).)

"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.)

Absent opposition, under the circumstances presented, it appears appropriate to grant the motion.

TENTATIVE RULING # 4: DEFENDANTS' MOTION TO SET ASIDE/VACATE DEFAULT AND DEFAULT JUDGMENT IS GRANTED. THE PROPOSED ANSWER ATTACHED TO THE MOTION IS DEEMED SERVED ON PLAINTIFF. DEFENDANTS ARE DIRECTED TO FILE AN ORIGINAL, EXECUTED ANSWER THAT CONFORMS TO THE PROPOSED ANSWER ATTACHED TO THE MOTION. 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 14, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

5. NAPOLEON v. UNITED SERVICES AUTOMOBILE ASSOCIATION PC-20210289

Defendants' Demurrer to Complaint.

TENTATIVE RULING # 5: THIS MATTER IS CONTINUED TO 8:30 A.M. ON FRIDAY, NOVEMBER 18, 2022 IN DEPARTMENT NINE.

6. HENSON v. BELWOOD INVESTMENTS PC-20210277

Defendants Filo Real Estate, Inc.'s and Price's Motion for Determination of Good Faith Settlement.

Defendants Filo Real Estate, Inc. and Price have agreed to pay $5,000 in settlement of plaintiffs' claims. Defendants Filo Real Estate, Inc. and Price now move for a court determination under Code of Civil Procedure, § 877.6 that the settlement is in good faith. The proofs of service filed with the court declare that the parties were mailed and emailed notice of the hearing and copies of the moving papers on August 30, 2022. There was no opposition in the court's file at the time this ruling was prepared.

Any party to an action in which it is alleged that two or more parties are joint tortfeasors is entitled to a court hearing on the issue of the good faith of a settlement between the plaintiff and one or more of the alleged tortfeasors. (Code of Civil Procedure, § 877.6(a)(1).)

The application shall indicate the settling parties, and the basis, terms, and amount of the settlement. (Code of Civil Procedure, § 877.6(a)(2).)

The issue of good faith of a settlement may be determined by the court on the basis of affidavits served with the notice of hearing and any counter affidavits filed in response, or the court may, in its discretion, receive other evidence at the hearing. (Code of Civil Procedure, § 877.6(b).)

A determination by the court that the settlement was made in good faith bars any other joint tortfeasor from bringing any further claims against the settling tortfeasor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault. (Code of Civil Procedure, § 877.6(c).)

In Tech-Built v. Woodward-Clyde & Associates (1985) 38 Cal.3rd 448, the California Supreme Court addressed the good faith requirement for settlements under Section 877.6. The policies underlying the requirement, the Court said, "require that a number of factors be taken into account including a rough approximation of plaintiffs' total recovery and the settlor's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, and a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial. Other relevant considerations include the financial conditions and insurance policy limits of settling defendants, as well as the existence of collusion, fraud, or tortious conduct aimed to injure the interests of non-settling defendants." (Tech-Built v. Woodward-Clyde & Associates (1985) 38 Cal.3rd 448, 499.)

However, as noted in City of Grand Terrace v. Superior Court (1987) 192 Cal.App.3rd 1251, the overwhelming majority of applications for a good faith determination are unopposed and a full factual response to all of the Tech-Built factors would be a waste of valuable time and resources. So, when no one objects, a "barebones motion which sets forth the ground of good faith, accompanied by a declaration which sets forth a brief background of the case is sufficient." (City of Grand Terrace v. Superior Court (1987) 192 Cal.App.3rd 1251, 1261.)

In the present case, the Court has reviewed the application of defendants Filo Real Estate, Inc. and Price and declarations in support of the application. The application, which is not opposed, sets forth the basic statutory elements. Accordingly, the court finds that settlement is in good faith.

TENTATIVE RULING # 6: DEFENDANTS FILO REAL ESTATE, INC.'S AND PRICE'S MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT IS GRANTED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR

ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE 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 14, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

7. MATTER OF GERKIN 22CV1021

OSC Re: Name Change.

The proof of publication in the Tahoe Daily Tribune is deficient in that it notifies the public that the Superior Court located on Johnson Blvd. in South Lake Tahoe is where the case is located and that the hearing will take place in Department Nine. The publication does not notify the public that the hearing will take place at the courthouse located in Cameron Park. This needs to be corrected.

TENTATIVE RULING # 7: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, OCTOBER 14, 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. MATTER OF MATTHEWS 22CV1189

OSC Re: Name Change.

TENTATIVE RULING # 8: THE PETITION IS GRANTED.

9. MATTER OF PLANT 22CV1190

OSC Re: Name Change.

TENTATIVE RULING # 9: THE PETITION IS GRANTED.

10. MATTER OF TAYLOR 22CV1061

OSC Re: Name Change.

TENTATIVE RULING # 10: THE PETITION IS GRANTED.

11. MATTER OF ROBERTS 22CV1212

OSC Re: Name Change.

TENTATIVE RULING # 11: THE PETITION IS GRANTED.

12. PEOPLE v. ESQUIVEL PC-20200526

Petition for Forfeiture.

The People filed a petition for forfeiture of cash. The unverified petition contends: $32,370 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 defendant's property became subject to forfeiture pursuant to Health and Safety Code, § 11470(f), because that money was a thing of value furnished or intended to be furnished by a person in exchange for a controlled substance, the proceeds was traceable to such an exchange, and the money was used or intended to be used to facilitate a violation of various provisions of the Penal Code and Health and Safety Code. The People pray for judgment declaring that the money is forfeited to the State of California.

On November 23, 2020 respondent Esquivel filed a verified claim opposing the People's request for forfeiture.

"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).)

"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." (Health and Safety Code, § 11488.4(i)(4).)

"(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).)

At the May 13, 2022 hearing the court continued the hearing to October 14, 2022 and directed the People to provide notice. On June 6, 2022 the People filed proof of service of notice of the continuance on claimant's counsel.

TENTATIVE RULING # 12: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, OCTOBER 14, 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. PEOPLE v. BETAMEN 21CV0088

Claim Opposing Forfeiture.

Claimant Betamen filed a claim opposing forfeiture in response to a notice of administrative proceedings to determine that certain funds are forfeited. The verified claim contends the claimant is the owner of all of the currency and requests that the claimed property not be ordered forfeited.

"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).)

"(j) The Attorney General or the district attorney of the county in which property is subject to forfeiture under Section 11470 may, pursuant to this subdivision, order forfeiture of personal property not exceeding twenty-five thousand dollars ($25,000) in value. The Attorney General

or district attorney shall provide notice of proceedings under this subdivision pursuant to subdivisions (c), (d), (e), and (f), including: ¶ (1) A description of the property. ¶ (2) The appraised value of the property. ¶ (3) The date and place of seizure or location of any property not seized but subject to forfeiture. ¶ (4) The violation of law alleged with respect to forfeiture of the property. ¶ (5) The instructions for filing and serving a claim with the Attorney General or the district attorney pursuant to Section 11488.5 and time limits for filing a claim and claim form. ¶ If no claims are timely filed, the Attorney General or the district attorney shall prepare a written declaration of forfeiture of the subject property to the state and dispose of the property in accordance with Section 11489. A written declaration of forfeiture signed by the Attorney General or district attorney under this subdivision shall be deemed to provide good and sufficient title to the forfeited property. The prosecuting agency ordering forfeiture pursuant to this subdivision shall provide a copy of the declaration of forfeiture to any person listed in the receipt given at the time of seizure and to any person personally served notice of the forfeiture proceedings. ¶ If a claim is timely filed, then the Attorney General or district attorney shall file a petition of forfeiture pursuant to this section within 30 days of the receipt of the claim. The petition of forfeiture shall then proceed pursuant to other provisions of this chapter, except that no additional notice need be given and no additional claim need be filed." (Emphasis added.) (Health and Safety Code, § 11488.4(j).)

"(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).)

The People appeared at the August 26, 2022 hearing. The court stayed this case pending the outcome of the criminal case and continued the hearing to October 14, 2022. The proof of service of notice of the continuance on claimant Betamen's counsel by email was filed on September 7, 2022.

TENTATIVE RULING # 13: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, OCTOBER 14, 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.

14. PETITION OF PROKOPYEV 22CV1144

Petition for Order for Amendment to Child's Birth Certificate.

Petitioners Igor Prokopyev and Olga Prokopyeva petition for the court to issue an order directing that the birth certificate of their minor son be amended to correct an error in the petitioners' names on the original birth certificate as the certificate only lists the initials for their middle names, rather than correctly spelling out their middle names. The unverified petition states that despite having submitted a Form VS 24 to the Department of Public Health – Vital Statistics, the request to amend the certificate was rejected as the Department stated a court order was required. Attached to the petition is a copy of the VS 24 and the rejection.

Inasmuch a review of an administrative denial of the request is requested, due process requires that notice of the hearing and a copy of the petition needs to be served on the Department of Public Health – Vital Statistics. There is no proof of service that notice of the hearing and a copy of the petition were served on the Department of Public Health – Vital Statistics (Department).

While it does not appear that a petition for administrative mandamus applies under the circumstances as no hearing is required to determine if the application to amend the birth certificate is denied, it appears that a petition for a writ of ordinary mandate is available where all administrative remedies are exhausted.

"(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior

tribunal, corporation, board, or officer may be filed with the petition, may be filed with respondent's points and authorities, or may be ordered to be filed by the court. Except when otherwise prescribed by statute, the cost of preparing the record shall be borne by the petitioner. Where the petitioner has proceeded pursuant to Article 6 (commencing with Section 68630) of Chapter 2 of Title 8 of the Government Code and the Rules of Court implementing that section and where the transcript is necessary to a proper review of the administrative proceedings, the cost of preparing the transcript shall be borne by the respondent. Where the party seeking the writ has proceeded pursuant to Section 1088.5, the administrative record shall be filed as expeditiously as possible, and may be filed with the petition, or by the respondent after payment of the costs by the petitioner, where required, or as otherwise directed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, the expense shall be taxable as costs." (Code of Civil Procedure, § 1094.5(a).)

"Whenever the facts are not correctly stated in any certificate of birth, death, fetal death, or marriage already registered, the person asserting that the error exists may make an affidavit under oath stating the changes necessary to make the record correct, that shall be supported by the affidavit of one other credible person having knowledge of the facts, and file it with the state or local registrar." (Health & Safety Code, § 103225.)

"Health and Safety Code section 103225 provides that "[w]henever the facts are not correctly stated in any certificate of birth, ... the person asserting that the error exists may make an affidavit under oath stating the changes necessary to make the record correct, ... and file it with the state or local registrar." ¶ The statute's reference to "any" certificate of birth appears broad enough to include both an original birth certificate as well as a "new birth certificate" established under Health and Safety Code section 102635 after an adoption has

been completed. Therefore, section 103225 might create an administrative process that appellant could use to correct her original birth certificate. ¶ The amendment process, however, is not available for all errors contained in birth certificates. Health and Safety Code section 103230 states the amendment through affidavit process applies to certificates of birth "only in the absence of conflicting information relative to parentage on the originally registered certificate of birth." Section 102155 defines the "absence of conflicting information relative to parentage" to include "entries such as 'unknown,' 'not given,' 'refused to state,' or 'obviously fictitious names.' " [Footnote omitted.] ¶ Reading these provisions together, it appears that the amendment procedure is available to (1) add information not included in the original birth certificate, (2) correct typographical or spelling errors, and (3) correct statistical information about the parents, such as their age or state of birth." (Wynn v. Superior Court (2009) 176 Cal.App.4th 346, 352-353.)

The administrative process set forth in Section 103225 appears to set forth an administrative remedy for ministerial review of an application to correct the birth certificate and does not require a final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given and evidence is required to be taken. Therefore, as stated earlier in this ruling, the petitioners' remedy appears to be a petition for ordinary mandamus.

"A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by that inferior tribunal, corporation, board, or person." (Emphasis added.) (Code of Civil Procedure, § 1085(a).)

"The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested." (Code of Civil Procedure, § 1086.)

"A writ of mandate may be issued against a public body or public officer "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station" in cases "where there is not a plain, speedy, and adequate remedy, in the ordinary course of law." (Code Civ. Proc. §§ 1085, 1086; *People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 491, 96 Cal.Rptr. 553, 487 P.2d 1193 (*El Dorado*).) "Two basic requirements are essential to the issuance of the writ: (1) A clear, present and usually ministerial duty upon the part of the respondent [citations]; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty [citations]." (*El Dorado, supra,* 5 Cal.3d at p. 491, 96 Cal.Rptr. 553, 487 P.2d 1193.) "A 'ministerial duty' is one generally imposed upon a person in public office who, by virtue of that position, is obligated 'to perform in a prescribed manner required by law when a given state of facts exists. [Citation.]' [Citations.]" (*City of King City v. Community Bank of Central California* (2005) 131 Cal.App.4th 913, 926, 32 Cal.Rptr.3d 384.) ¶ **A. Adequate Remedy at Law** ¶ "Section 1086 of the Code of Civil Procedure provides that the writ of mandate 'must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law.' Although the statute does not expressly forbid the issuance of the writ if another adequate remedy exists, it has long been established as a general rule that the writ will not be issued if another such remedy was available to the petitioner. [Citations.] The burden, of course, is on the petitioner to show that he did not have such a remedy." (*Phelan v. Superior Court of San Francisco* (1950) 35 Cal.2d 363, 366, 217 P.2d 951.) ¶ " ' "The question whether there is a 'plain, speedy and adequate remedy in the ordinary course of law,' within the meaning of the statute, is one of fact,

depending upon the circumstances of each particular case, and the determination of it is a matter largely within the sound discretion of the court....” ' [Citation.]” (*Barnard v. Municipal Court of San Francisco* (1956) 142 Cal.App.2d 324, 327–328, 298 P.2d 679.) If it is clear, however, that mandate is the only remedy that can furnish the relief to which the petitioner is entitled, the discretion disappears and the petitioner is entitled to the writ. (*May v. Board of Directors of El Camino Irrigation Dist*. (1949) 34 Cal.2d 125, 133, 208 P.2d 661.)” (Flores v. California Department of Corrections and Rehabilitation (2014) 224 Cal.App.4th 199, 205-206.)

Apparently, on August 26, 2021 the Department informed petitioners that the Department was unable to process their request for the following reasons: the request was not submitted on the appropriate form or no form was submitted; a certified copy of the court order was not included in the amendment request; and in order to fix the parents’ middle names, a VS 21 adjudication of facts of parentage form and a court order is required.

The petitioners indicate that they are not seeking a court order adjudicating the fact of parentage of the two parents already named as parents in the birth certificate. Where conflicting information is presented relative to parentage on the originally registered certificate of birth the court must become involved to make a determination adjudicating the fact of the petitioners being the parents of the child and issue an order adjudicating the fact of parentage in order to change the names of the parents on the birth certificate.

“Section 103225 shall be applicable to certificates of birth only in the absence of conflicting information relative to parentage on the originally registered certificate of birth.” (Emphasis added.) (Health & Safety Code, § 103230.)

An appellate court has determined that the court has jurisdiction to order a change in the name of the parents where the court has adjudicated the parents named in the birth certificate are in error and determined that other persons were the parent. The appellate court held: “The

next question is whether a court that has adjudicated the existence of a biological mother-child relationship has the authority to enter an order directing the issuance of a new birth certificate. We conclude it does. ¶ The last sentence of Family Code section 7650, subdivision (a) states that the provisions applicable to the determination of the father and child relationship also apply to determinations of a mother and child relationship. One of the provisions in part 3 (Uniform Parentage Act) of division 12 (Parent and Child Relationship) of the Family Code applicable to the father and child relationship is section 7639, which states: ¶ "If the judgment or order of the court is at variance with the child's birth certificate, the court shall order that a new birth certificate be issued as prescribed in Article 2 (commencing with Section 102725) of Chapter 5 of Part 1 of Division 102 of the Health and Safety Code." The mandatory language in this provision indicates that a superior court has both the authority and the obligation to order the issuance of a new birth certificate if its determination of the existence of a biological mother-child relationship differs from that shown on the child's original birth certificate. [FN 4] ¶ FN 4. To ease the administrative process of issuing the new birth certificate, practitioners who prevail on a petition for such an order and are directed by the court to submit a proposed order should be familiar with the October 2008 publication of the California Department of Public Health titled "Adjudication of Facts of Parentage" and the form titled "Application to Amend Birth Record—Adjudication of Facts of Parentage (VS 21)." The publication is available on the department's Web site, <www. cdph.ca.gov> (as of July 30, 2009)." (Wynn v. Superior Court (2009) 176 Cal.App.4th 346, 355.)

The Department's own information sheet related to amendment of the certificate states that in order to request correction of the typographical errors or spelling errors in the parents name "… please submit the following: • Properly Completed VS 24 Form (See Form Guidelines

beginning on page 4.) • Notarized Sworn Statement (Only if requesting authorized copy. See page 9.) • Appropriate Fee (See top of page 10.) • Supporting Documentation."

The information sheet states with respect to supporting documents: "If correcting a parent's date of birth, place of birth, or a spelling/typographical error to the parent's name, please submit a photocopy of the parent's birth certificate."

Therefore, rather than submitting a form VS 21, adjudication of facts form, the form VS 24, affidavit to amend record was required to be submitted along with supporting documentation in the form of a photocopy of their birth certificates showing their full middle names.

Inasmuch as the Department's response was not an outright denial of the request and only sought additional documentation, it would be premature for the court to review the acts of the Department as there still remains an administrative remedy to exhaust prior to petitioning for issuance of a writ of mandate, submission of admissible evidence, and serving notice of further court proceedings on the Department.

In summary, the petition is denied without prejudice. Petitioners need to exhaust their administrative remedy by submission of a Form VS 24 to amend the certificate to the Department, providing photocopies of their birth certificates, and payment of the application fee as detailed in the Department of Public Health – Vital Statistics Information Sheet related to amendment of the birth certificate.

TENTATIVE RULING # 14: THE PETITION IS DENIED WITHOUT PREJUDICE. PETITIONERS NEED TO EXHAUST THEIR ADMINISTRATIVE REMEDY BY SUBMISSION OF A FORM VS 24 TO AMEND THE CERTIFICATE TO THE DEPARTMENT, PROVIDING PHOTOCOPIES OF THEIR BIRTH CERTIFICATES, AND PAYMENT OF THE APPLICATION FEE AS DETAILED IN THE DEPARTMENT OF PUBLIC HEALTH – VITAL STATISTICS INFORMATION SHEET RELATED TO AMENDMENT OF THE BIRTH CERTIFICATE. 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 14, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

15. BURNLEY v. ERB PC-20200069

Plaintiffs' Motion for Leave to File 5th Amended Complaint.

Plaintiffs moves for leave to file a 5th amended complaint to add causes of action for declaratory relief to address a potential judgment in a related case against the HOA that could lead to additional special assessments against the homeowner plaintiffs in this case and seeking a declaration that defendants in the instant case are liable for any additional assessments that are suffered by the homeowner plaintiffs as a result of any award in the related case. A proposed 5th amended complaint has been submitted.

The proofs of service in the court's file declares that on August 18, 2022 notice of the hearing and copies of the moving papers were served by email on defense counsel. There was no opposition to the motion in the court's file at the time this ruling was prepared.

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

There is a general policy in this state of great liberality in allowing amendment of pleadings at any stage of the litigation to allow cases to be decided on their merits. (Kittredge Sports Co. v. Superior Court (1989) 213 Cal.App.3d 1045, 1047.) "…it is a rare case in which 'a court will be justified in refusing a party leave to amend his pleadings so that he may properly present his case.' (Citations omitted.) If the motion to amend is timely made and the granting of the

motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion. (Citations omitted.)" (Morgan v. Superior Court (1959) 172 Cal.App.2d 527, 530.) "…absent a showing of prejudice to the adverse party, the rule of great liberality in allowing amendment of pleadings will prevail. (*Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564, 176 Cal.Rptr. 704.)" (Board of Trustees of Leland Stanford Jr. University v. Superior Court (2007) 149 Cal.App.4th 1154, 1163.)

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

No papers opposing the motion having been filed with the court at least nine court days before the hearing (Code of Civil Procedure, § 1005(b).), the court exercises its discretion to treat the plaintiffs' failure to file an opposition as an admission that the motion for leave to file a 5th amended complaint meritorious and grants the motion**.** (See Local Rule 7.10.02C.) Furthermore, on August 12, 2022 defendants conceded the propriety of allowing leave to file the 5th amended complaint by filing defendants' answer to the 5th amended complaint.

TENTATIVE RULING # 15: PLAINTIFFS' MOTION FOR LEAVE TO FILE 5TH AMENDED COMPLAINT IS GRANTED. THE 5TH AMENDED COMPLAINT IS DEEMED SERVED ON DEFENDANTS. PLAINTIFF IS TO FILE AN ORIGINAL EXECUTED 5TH AMENDED COMPLAINT AS PROPOSED. 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 14, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

16. OGDEN v. JOHNSON 22CV0494

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

On April 11, 2022, plaintiffs Levi Ogden and Jacqueline Slight filed a complaint asserting causes of action for quiet title (1st and 6th C/A), declaratory relief – easement by necessity (2nd and 7th C/A), declaratory relief – implied easement (3rd and 8th C/A), declaratory relief – prescriptive easement (4th and 9th C/A), and declaratory relief – equitable easement (5th and 10th C/A) against defendant Phillip Johnson. Also on April 11, 2022, plaintiffs filed an ex parte application for temporary restraining order and preliminary injunction. On April 13, 2022, the court granted the application for temporary restraining order, enjoining defendant from preventing plaintiffs and their guests and invitees from using Eagle Mine Road in any way, and defendant is required to (1) remove all barriers along Eagle Mine Road, (2) provide access to the electronic gate, and (3) unlock the back gate.

After oral argument at the hearing on the preliminary injunction on June 10, 2022 the court granted the request for a preliminary injunction. The court directed that gate card or key was to be provided to plaintiffs; plaintiffs are to make sure the gates are closed and locked; and plaintiffs shall not drive more than 10 miles per hour on the road.

The court takes judicial notice that the bond was posted on August 9, 2022.

On July 25, 2022 defendant filed a motion to dissolve the preliminary injunction on the grounds that the plaintiffs have repeatedly failed to close and lock the gates and have failed to drive less than 10 miles per hour on the road; this conduct has caused actual damages in the form of dust and materials kicked up; and plaintiffs have not posted the $2,500 bond ordered by the court..

Plaintiffs oppose the motion on the following grounds: defendant has failed to show a material change of facts justifying dissolution of the injunction; defendant failed to comply with the injunction by relocation of the easement road since the injunction was issued; due to the lack of an electronic gate, plaintiff Slight has had to unlock, open, and close the manual gate to allow access to her property, which led to the confrontation between the parties; plaintiffs have done their best to comply with shutting the gates and locking them; if the injunction is dissolved, plaintiff Slight will lose all access to her residence and plaintiff Ogden will lose all access to his property; and after the motion was filed, the plaintiffs obtained and posted the bond.

Defendant replied to the opposition that plaintiff's failure to comply with the court's instructions in the preliminary injunction is a material change justifying dissolution of the injunction.

Plaintiffs' Objections to Evidence Submitted in Support of Motion

The objections to the portions of defendant's declaration in support of the motion where he states plaintiffs repeatedly failed to close and lock the gate and repeatedly failed to drive on the easement less than 10 miles per hour are sustained.

General Principles Re: Dissolution of Preliminary Injunction

"In any action, the court may on notice modify or dissolve an injunction or temporary restraining order upon a showing that there has been a material change in the facts upon which the injunction or temporary restraining order was granted, that the law upon which the injunction or temporary restraining order was granted has changed, or that the ends of justice would be served by the modification or dissolution of the injunction or temporary restraining order." (Code of Civil Procedure, § 533.)

"A superior court should modify or vacate an injunction upon motion by the enjoined party if it finds a change in the facts *or* law *or* the ends of justice would be served by modifying or revoking the injunction. (*Harbor Chevrolet Corp. v. Machinists Local Union 1484* (1959) 173 Cal.App.2d 380, 384, 343 P.2d 640; *Sontag Chain Stores Co. v. Superior Court, supra,* 18 Cal.2d 92, 94–95, 113 P.2d 689.) This rule applies to preliminary injunctions as well as permanent injunctions. (*Union Interchange, Inc. v. Savage* (1959) 52 Cal.2d 601, 606, 342 P.2d 249.)" (New Tech Developments v. Bank of Nova Scotia (1987) 191 Cal.App.3d 1065, 1072.)

"It is settled that where there has been a change in the controlling facts upon which a permanent injunction was granted, or the law has been changed, modified or extended, or where the ends of justice would be served by modification or dissolution, the court has the inherent power to vacate or modify an injunction where the circumstances and situation of the parties have so changed as to render such action just and equitable. (*Sontag Chain Stores Co. v. Superior Court*, 18 Cal.2d 92, 94–95, 113 P.2d 689; *Union Interchange, Inc. v. Savage*, 52 Cal.2d 601, 604, 342 P.2d 249; *Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist.*, 65 Cal.App.3d 121, 130, 135 Cal.Rptr. 192; *Brunzell Constr. Co. v. Harrah's Club*, 253 Cal.App.2d 764, 772, 62 Cal.Rptr. 505.) This principle governs even though the judgment providing the injunctive relief is predicated upon stipulation of the parties. (*Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist., supra*, 65 Cal.App.3d 121, 130, 135 Cal.Rptr. 192.) The trial court's decision to either continue, modify or dissolve a permanent injunction will not be set aside on appeal absent the establishment of an abuse of discretion. However, sound judicial discretion calls for modification of a stipulated injunctive decree when circumstances of law existing at the time of issuance have changed, making the original decree inequitable. (*System Federation v. Wright*, 364 U.S. 642, 647, 81 S.Ct. 368, 371, 5

L.Ed.2d 349.)" (Welsch v. Goswick (1982) 130 Cal.App.3d 398, 404–405, disapproved of on another ground in Barrett v. Lipscomb (1987) 194 Cal.App.3d 1524.)

Inasmuch as dissolution of a preliminary injunction is dependent upon defendant showing that there has been a material change in the facts upon which the injunction or temporary restraining order was granted, that the law upon which the injunction or temporary restraining order was granted has changed, or that the ends of justice would be served by the modification or dissolution of the injunction or temporary restraining order, the following evidence submitted in support of, opposition to, and reply to the application for the preliminary injunction is relevant and should be considered in determining if there has been a material change in circumstances, or the ends of justice would be served by modification or dissolution of the preliminary injunction.

Plaintiff Ogden declared in support of the TRO and OSC Re: Preliminary Injunction: plaintiff owns certain real property on Eagle Mine Road having purchased it in March 2019; due to some title issues, the grant deed transferring record title was not recorded until December 10, 2021; plaintiff has exclusively used Eagle Mine Road for access to plaintiff's property several times a month since it was purchased; prior to purchase, plaintiff used the road to visit his mother several times each month; on March 2, 2022, while delivering a load of rock to plaintiff's property, defendant blocked access to the property by locking a gate across the road and refusing to give plaintiff a key to the lock; defendant told plaintiff that plaintiff could no longer use the road; afterwards, defendant further blocked the road by placing logs across it; plaintiff has no way to drive to his property; and the property will lose all value to plaintiff should the TRO and preliminary injunction not be granted. (Declaration of Levi Ogden in Support of TRO and OSC, paragraphs 2-5.)

Plaintiffs' counsel's declaration was attached to the application for the TRO and OSC Re: Preliminary Injunction. Counsel authenticates Exhibits 1-3, which are a survey recorded on June 27, 1968 generally depicting the subject properties/parcels and a 40 foot easement that tracks the physical location of Eagle Mine Road (Plaintiffs' Exhibit 1); a parcel map recorded on October 5, 1972 that depicts plaintiffs' properties and a non-exclusive road and utility easement that tracks the physical location of Eagle Mine Road (Plaintiffs' Exhibit 2.); and a survey recorded on March 6, 1981 that depicts defendant's property/parcel, the plaintiffs' parcels/properties, and Eagle Mine Road, which is labeled as the approximate location of an existing dirt road and clearly connects the defendant's property to plaintiffs' properties (Plaintiffs' Exhibit 3.). (Declaration of Richard Sopp in Support of TRO and OSC, paragraphs 2-4; and Exhibits 1-3.)

Defendant declared in opposition to the motion for issuance of the preliminary injunction: he owns certain real property on Grizzly Flat Road, which he obtained record title to on September 16, 2019; before defendant purchased the property defendant observed two gates on one end of the property that were secured by locks and keys; the previous owner did not disclose any information that other parcel owners should be allowed to enter and exit that property without permission, except for Frank Stenger, who had an express easement; plaintiffs have access to the main road by crossing through Old Mine Road instead of defendant's property; defendant has witnessed government vehicles use Eagle Mine Road to Access Old Mine Road and use Old Mine Road to access the main road; defendant initially provided plaintiff Slight with an access code to use the electronic gate to enter and exit defendant's property; plaintiff Slight failed to shut the gate properly, which posed a risk to defendant's livestock and personal property; defendant decided to revoke plaintiff Slight's access to the electronic gate; defendant has witnessed several vehicles speed through the

road on defendant's property, which caused him fear for his family and livestock; and plaintiffs have not offered to pay for the maintenance and upkeep of the road and gates. (Declaration of Phillip Johnson in Opposition to Motion for Preliminary Injunction, paragraphs 2-11.)

Plaintiff Ogden declared in reply to the motion for issuance of the preliminary injunction: plaintiff has traveled over Eagle Mine Road for over 30 years to visit his mother's property and since 2019 to access plaintiff's own property; for some time there was a single gate across the entrance from Grizzly Fat Road to Eagle Mine Road, however, the gate has never been locked; from time to time a lock or pin was inserted in the gate to make it appear to be locked but it was never actually locked; property owners along the road could always get through the gate without the need for a key or combination of any kind; there was a second gate to defendant's property located 20 feet from where the main gate was located, but the property owners always used the main gate; driving a car over Eagle Mine Road to Old Mine Road is not possible, because both roads pass through numerous private properties over which plaintiff has no legal right to pass; the pathway is blocked by gates on both Eagle Mine Road and Old Mine Road as depicted on plaintiff's Exhibits 9 and 10 attached to the declaration; Old Mine Road is extremely steep, narrow and very rugged; a car without four wheel drive cannot make the trip over the road and it would be impassable with snow in the winter; in recent months defendant has done grading on defendant's property that appears to be an attempt relocate to Eagle Mine Road over defendant's property; the new path is narrow, very steep and would be very difficult to use during winter snows; the new path is depicted in plaintiff's exhibits 11 and 12 attached to the declaration; and over the time plaintiff has used Eagle Mine Road, plaintiff and the other property owners have maintained it from time to time as needed at a cost that never exceeded more than a few hundred dollars in any single year. (Declaration of Levi

Ogden in Reply to Motion for Preliminary Injunction, paragraphs 2-5; and Plaintiff's Exhibits 9-12.

Defendant declares in support of the motion to dissolve the preliminary injunction that plaintiffs' failures have caused him imminent and actual harm, such as dust and materials kicked up that have entered his home and made breathing and living in his home difficult.

Defendant also requests the court to take judicial notice that the plaintiffs have not posted the bond in the amount of $2,500 as directed by the court's order.

Plaintiff Levi Ogden declares in opposition to the motion to dissolve the Preliminary Injunction: following issuance of the preliminary injunction, he only accessed his property over the Eagle Mine Road one time; at that time he closed the gates and then locked them; he did not exceed 10 miles per hour while driving across defendant's property; on the date the preliminary injunction was issued, he and his counsel met with defendant and defense counsel in order to attempt to resolve the dispute; they discussed the possibility of relocating the road across defendant's property and they agreed to discuss it further; because of those discussions and his belief that the matter would be resolved, he did not immediately obtain the injunction bond; and when he learned about this motion, he immediately obtained the bond. (Declaration of Plaintiff Levi Ogden in Opposition to the Motion to Dissolve the Preliminary Injunction, paragraphs 2 and 3.)

Plaintiff Jacqueline Slight declares in opposition: after issuance of the preliminary injunction defendant removed the electronic gate and installed a new gate approximately 30 feet from the location of where the electronic gate had been, which also resulted in relocation of the road; since the new gate does not have an electronic opener, every time anyone wants to visit her she must be called by the visitor to have her go down and open the gate; as she was recently assisting her friends who were attempting to leave defendant's property, she was accosted by

defendant; during that encounter he swung at her, knocking a flashlight out of her hands; following the encounter she turned and drove back to her house; due to the confrontation, she did not get out of her car to close and lock the gate, but defendant was standing right by it; since the issuance of the preliminary injunction, she has done her best to shut and lock the gates; other than the previously described incident, she does not recall ever leaving the gates open or unlocked; she has also tried to keep her speed down; and given the condition of the road, it is difficult to go much more than ten miles per hour. (Declaration of Plaintiff Jacqueline Slight in Opposition to the Motion to Dissolve the Preliminary Injunction, paragraphs 2-4.)

Daniel Shelly declares in reply: he is defendant's friend and neighbor; he responded to defendant's property on August 1, 2022 to check on his safety as it takes police a considerable amount of time to arrive at defendant's property; he observed that defendant's gate appeared to have been hit by the driver of a silver BMW as the gate and car were damaged; the driver was large and belligerent; the driver appeared to be inebriated; the driver got out of the vehicle; there appeared to be a man and woman in their early twenties in the car; the driver yelled, cursed and screamed at defendant; he threatened to beat defendant and blast him; he witnessed plaintiff Slight yelling cursing and screaming; and plaintiff Slight refused to provide the driver's name to the police officer. (Declaration of Daniel Shelly in Reply to Opposition, paragraphs 2-9.)

Daniel Shelly did not observe the purported collision incident itself and merely asserts an opinion as to the cause of damage to the vehicle and the gate merely because he observed damage to the car and the damage to the fence. In addition, there is no statement that he had personal knowledge and the basis of personal knowledge that the gate was undamaged up until that date and time.

Karen Johnson also declared that on August 1, 2022 plaintiff Slight's guest threatened to harm defendant Phillip Johnson and he damaged the gate with his vehicle; and the preliminary injunction causes her fear, anxiety, stress, and overall incapability of enjoying her property in peace. (Declaration of Karen Johnson in Reply to Opposition, paragraphs 3 and 4.)

Defendant Phillip Johnson declares in reply: to the best of his knowledge, Lance, a friend of Jacqueline Slight, damaged defendant's electronic gate and the electronic gate has not operated properly since the last court hearing; all parties must use the manual non-electronic gate on the property when it was purchased; he has not received any funds for maintenance of the road or gates, including the electronic gate, from plaintiffs; an individual knocked on his door on a date and at a time that is not specified; the individual appeared inebriated, stated his name was Rob, and he was a friend of plaintiff Slight; he demanded access to the gate; the man was a stranger, so he told him to call plaintiff Slight to acquire access; the stranger threatened defendant's life and damaged the defendant's fence with his vehicle; he called the authorities, who took reports; and the preliminary injunction causes him fear, anxiety, stress, and overall incapability of enjoying his property in peace. (Declaration of Defendant Phillip Johnson in Reply to Opposition, paragraphs 2-9.)

The CHP and Sheriff's Department Reports are not attached to Phillip Johnson's declaration as Exhibits 1 and 2 as stated in his declaration. His declaration "to the best of his knowledge" is insufficient to establish personal knowledge of the facts stated thereafter.

The court is unable to find any direction in the preliminary injunction mandating plaintiffs pay for maintenance of the road or electronic gate.

Defendant has raised an entirely new single incident that he claims should require the preliminary injunction to be dissolved and submitted a purported log of incidents that was withheld from the initial moving declarations.

Reply evidence is improper under most circumstances as consideration of such evidence after the opposing party submitted an opposition and evidence supporting its opposition violates the fundamental principles of due process, because the opposing party never had a reasonable opportunity to respond and be heard on the new reply evidence.

"The general rule of motion practice, which applies here, is that new evidence is not permitted with reply papers. This principle is most prominent in the context of summary judgment motions, which is not surprising, given that it is a common evidentiary motion. "[T]he inclusion of additional evidentiary matter with the reply should only be allowed in the exceptional case ..." and if permitted, the other party should be given the opportunity to respond. (*Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362, fn. 8, 13 Cal.Rptr.2d 811; *see Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 252, 100 Cal.Rptr.3d 296; *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316, 125 Cal.Rptr.2d 499.) The same rule has been noted in other contexts as well. (*Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1308, 72 Cal.Rptr.3d 259 [in preliminary injunction proceeding, "the trial court had discretion whether to accept new evidence with the reply papers"].) ¶ This rule is based on the same solid logic applied in the appellate courts, specifically, that "[p]oints raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument." (*American Drug Stores v. Stroh* (1992) 10 Cal.App.4th 1446, 1453, 13 Cal.Rptr.2d 432; see *Browne v. County of Tehama* (2013) 213 Cal.App.4th 704, 720, fn.10, 153 Cal.Rptr.3d 62.) ¶ To the extent defendants argue they had the right to file any reply declarations at all, they are not wrong. Such declarations, however, should not have addressed the substantive issues in the first instance but only filled gaps in the evidence created by the limited partners' opposition. Defendants' decision to wait until the reply briefs to bring forth *any* evidence at all, when the

limited partners would have no opportunity to respond, was simply unfair. Thus, while the trial court had discretion to admit the reply declarations, it was not an abuse of discretion to decline to do so. "(Jay v. Mahaffey (2013) 218 Cal.App.4th 1522, 1537–1538.)

In order for the court to consider the reply evidence and not violate plaintiffs' right to due process, the court allowed plaintiffs an opportunity to submit evidence in response to the reply declarations and continued the hearing to 8:30 a.m. on Friday, October 7, 2022 in Department Nine. At the hearing on October 7, 2022 the court continued the hearing to 8:30 a.m. on Friday, October 14, 2022 in Department Nine.

On September 27, 2022 plaintiffs filed the following documents in opposition to the reply: evidentiary objections to a portion of Karen Johnson's reply declaration; the declaration of plaintiffs' counsel in opposition to the reply; plaintiff Ogden's declaration in support of opposition to the reply; and plaintiff Slight's declaration in opposition to the reply. The proof of service declares that these documents were served on defense counsel by mail and email on September 27, 2022.

Karen Johnson declares in reply: she recorded a log of numerous incidents (Exhibit 1.) wherein plaintiff Slight and her guests failed to properly lock the gate, drove at excessive speeds, released their animals, or damaged the property since March 2, 2022; she included videos, photos (Exhibit 2.), and other supporting documents of each incident in the log; and she has explained the photos attached as Exhibit 3 relate to the gate, lock and dogs being released by plaintiff Slight. (Declaration of Karen Johnson in Reply to Opposition, paragraph 2.)

Plaintiffs object to paragraph 2 of Karen Johnson's declaration on the grounds that her statements lack foundation and she fails to properly authenticate the statements and pictures attached.

The objections are sustained. While Karen Johnson declares she recorded in writing the purported incidents in the log, she does not declare that each and every purported incident logged was personally witnessed by declarant Karen Johnson and the photos were taken by her. The log also includes references to videos that are not in evidence before the court.

Plaintiff Slight declares: she has done nothing to damage defendant's gate and she is not aware that any of her visitors have done so; on one occasion when the electronic gate was not working, a friend unhooked the latch so he could exit the property; the latch was reinstalled the next day and the gate worked just fine; she has tried to comply with the court's order on the injunction to the best of her ability; only recently were the gates shut across the road and locked; the locks require her to get out of her vehicle, unlock and open the gate, drive through, then get out of the car a second time to close and lock the gate; the same procedure must be done with regards to the second gate; she tries to keep the gates locked; she instructed those who visit her to lock the gates after they go through them; she has not driven excessively fast on the road; the path of the road makes it nearly impossible to exceed 10 miles an hour; on September 23, 2022 she needed to leave her property to babysit her grandkids; she opened the first gate, drove though, and shut and locked that gate; she drove to the second gate, unlocked, and drove through; as she went to lock the gate, the chain slipped and she reached down to grab it; defendant's dog bit her hand, causing a large, deep gash and puncture wound requiring thee stitches when she went to the hospital; attached as Exhibit A is a photo of the injuries suffered; defendant Johnson witnessed the attack from his porch, but said nothing and did nothing; and if the preliminary injunction is dissolved, she will be prevented from returning home and will have nowhere to go. (Plaintiff Jaqueline Slight's Declaration in Opposition to Reply, paragraphs 2-6.)

Plaintiff Ogden declares: since the issuance of the preliminary injunction in this case in June 2022 he has travelled on Eagle Mine Road across defendant's property a couple of times; and on each of those occasions, he shut and locked the gates on defendant's property. (Plaintiff Levi Ogden's Declaration in Opposition to Reply, paragraph 2.)

There is evidence of one incident where an inebriated stranger, who was not one of the plaintiffs, made threats against defendant's life and defendant seeks to hold plaintiff Slight accountable for the incident as the stranger stated he was her friend. There is conflicting evidence regarding whether plaintiff Glines failed to close a gate on one occasion; several unidentified vehicles drove on the easement at excessive speeds; and the electronic gate was damaged. There is also the following inadmissible evidence submitted: defendant has no personal knowledge as to who damaged the electronic gate as he declares to the cause of the damage "to the best of his knowledge", making the statement inadmissible as lacking sufficient foundation; declarant Daniel Shelly did not observe the purported collision incident itself and merely asserts an opinion as to the cause of damage to the vehicle and the gate merely because he observed damage to the car and the damage to the fence; and there is no statement that he had personal knowledge and the basis of personal knowledge that the gate was undamaged up until that date and time;

In short, there is no law cited that holds a dominant tenement easement holder is strictly liable for any misconduct of friends or acquaintances who use the easement, particularly where there is only one occasion mentioned concerning threats of a stranger and other occasions of unidentified drivers who purportedly exceeded the ten mile per hour limit; and no material evidence of significant and/or multiple violations of the use restrictions the court placed on the plaintiffs in the preliminary injunctions, such as closing gates and not exceeding ten miles per hour on the easement road.

Having reviewed and considered he moving papers, opposition, reply and documents filed in opposition to the reply, as well as the admissible evidence before the court, the court finds that under the totality of the circumstances presented there has not been a material change in the facts justifying modifying or revoking the injunction or the ends of justice would be served by modifying or revoking the injunction.

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

TENTATIVE RULING # 16: DEFENDANT JOHNSON'S MOTION TO DISSOLVE JUNE 10, 2022 PRELIMINARY INJUNCTION IS DENIED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT

www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, OCTOBER 14, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.