1. ALL ABOUT EQUINE ANIMAL RESCUE v. BYRD PC-20200294

OSC Re: Contempt.

Plaintiff seeks to have defendants Alexander Byrd, Maynard Byrd, and Terry Wilson held in contempt for failure to comply with the injunction issued on June 16, 2022 that ordered them to restore all damaged fencing and gates belonging to plaintiff with respect to plaintiff's property so that the property or exterior boundary is secure and will safely contain livestock; and to remove any fencing they installed along the north-south line approximately 50 west of the westerly boundary of the plaintiff's property.

On September 16, 2022 the court issued an order to show cause why defendants should not be held in contempt, which notified the matter will be heard on November 4, 2022 at 8:30 a.m. in Department Nine.

"As a general rule, the elements of contempt include (1) a valid order, (2) knowledge of the order, (3) ability to comply with the order, and (4) willful failure to comply with the order. (*Anderson v. Superior Court* (1998) 68 Cal.App.4th 1240, 1245, 80 Cal.Rptr.2d 891; *In re Cassil* (1995) 37 Cal.App.4th 1081, 1087, 44 Cal.Rptr.2d 267.)" (Matter of Ivey (2000) 85 Cal.App.4th 793, 798.)

"(2) *Grounds for Contempt Order.* The court may exercise its contempt power when the person against whom the judgment or order is rendered has notice or knowledge of the judgment and the ability to comply, but wilfully refuses to do so. (*Board of Supervisors v. Superior Court* (1995) 33 C.A.4th 1724, 1736, 39 C.R.2d 906; on requirements of affidavit of contempt, see infra, §343.) Punishment for contempt must rest on a clear, intentional violation of a specific, narrowly drawn order. (*Wilson v. Superior Court* (1987) 194 C.A.3d 1259, 1273, 240 C.R. 131; *Board of Supervisors v. Superior Court*, supra, 33 C.A.4th 1737.)" (Emphasis

added.) (8 Witkin, California Procedure (5th ed. 2008) Enforcement of Judgments, § 340(2), pages 365-366.)

"(a) Upon the answer and evidence taken, the court or judge shall determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he or she is guilty of the contempt, a fine may be imposed on him or her not exceeding one thousand dollars ($1,000), payable to the court, or he or she may be imprisoned not exceeding five days, or both. In addition, a person who is subject to a court order as a party to the action, or any agent of this person, who is adjudged guilty of contempt for violating that court order may be ordered to pay to the party initiating the contempt proceeding the reasonable attorney's fees and costs incurred by this party in connection with the contempt proceeding." (Code of Civil Procedure, § 1218(a).)

"The purpose of the statute involved here, section 1218, is to encourage parties to enforce contempt violations and to encourage parties to comply with court orders. ¶ Contempt proceedings under section 1218 are quasi-criminal in nature. (*People v. Gonzalez* (1996) 12 Cal.4th 804, 816, 50 Cal.Rptr.2d 74, 910 P.2d 1366.) In order to encourage parties to prosecute contempt proceedings and to indirectly encourage all parties to abide by the terms of court orders, section 1218 authorizes trial courts to award complainants attorney fees and costs for initiating and prosecuting contempt proceedings. (*Goold v. Superior Court* (2006) 145 Cal.App.4th 1, 10, 51 Cal.Rptr.3d 455.)" (Rickley v. Goodfriend (2012) 207 Cal.App.4th 1528, 1537.)

"The order to show cause acts as a summons to appear in court on a certain day and, as its name suggests, to show cause why a certain thing should not be done. (*Morelli v. Superior Court* (1968) 262 Cal.App.2d 262, 269, 68 Cal.Rptr. 572.) Unless the citee has concealed himself from the court, he must be personally served with the affidavit and the order to show

cause; otherwise, the court lacks jurisdiction to proceed. (§ 1015 [in civil actions in which a party is represented by an attorney, 'the service of papers, when required, must be upon the attorney instead of the party, except service of subpoenas, of writs, and other process issued in the suit, and of papers to bring him into contempt']; see also § 1016; *Arthur v. Superior Court*, supra, 62 Cal.2d at p. 408, 42 Cal.Rptr. 441, 398 P.2d 777; and see Weil & Brown, supra, § 9:716, p. 9(11)-47.) [Footnote omitted.]" (Cedars-Sinai Imaging Medical Group v. Superior Court (2000) 83 Cal.App.4th 1281, 1286-1287.)

"(1) *Right to Hearing.* The party charged with contempt is entitled to a hearing at which, by affidavits or witnesses or both, that party may present defenses. (C.C.P. 1217; see *Hotaling v. Superior Court* (1923) 191 C. 501, 505, 217 P. 73 [competent evidence must be produced at hearing]; *Collins v. Superior Court* (1956) 145 C.A.2d 588, 594, 302 P.2d 805, 2 *Cal. Proc.* (5th), *Jurisdiction,* §308 [refusal to allow evidence of defenses is denial of due process]; C.J.E.R., Judges Benchbook: Civil Proceedings—After Trial §6.166; 73 Harv. L. Rev. 353 [procedures for trying contempts in federal courts]; on defenses, see infra, §349 et seq.; on disqualification and challenge of judge, see 2 *Cal. Proc.* (5th), *Courts,* §§97, 154.) ¶ (2) *Effect of Participation.* Even though the contempt proceeding is usually commenced by an affidavit filed in the main action, the contempt proceeding is separate and distinct. Hence, participation in a contempt proceeding is not a general appearance in the main action. (*Bank of America v. Carr* (1956) 138 C.A.2d 727, 733, 292 P.2d 587.) ¶ (3) *Affidavits as Complaint and Answer.* In a civil contempt proceeding, the affidavits on which the citation is issued constitute the complaint and the affidavits of the defendant constitute the answer or plea. The issues of fact are framed by the respective affidavits serving as pleadings, and the hearing must be had on these issues. (*Hotaling v. Superior Court*, supra; *Freeman v. Superior Court* (1955) 44 C.2d 533, 537, 282 P.2d 857; *In re Von Gerzabek* (1922) 58 C.A. 230, 232, 208 P. 318; *Groves v.*

Superior Court (1944) 62 C.A.2d 559, 145 P.2d 355; for forms of counteraffidavits, see Cal. Civil Practice, 4 Procedure, §30:87 et seq.) ¶ (4) *Quasi-Criminal Proceeding.* Because the proceeding is criminal in nature (see 3 *Cal. Proc.* (5th), *Actions,* §69), the party charged may not be compelled to give testimony against himself or herself. (See *Oliver v. Superior Court* (1961) 197 C.A.2d 237, 240, 17 C.R. 474, infra, §350; 2 *Cal. Evidence* (4th), *Witnesses,* §367.) And a verified answer to the affidavit is not a waiver of the right to refuse to testify; it is similar in effect to a plea of not guilty in a criminal case. (*In re Ferguson* (1954) 123 C.A.2d 799, 801, 268 P.2d 71.) The proceeding is governed by the criminal trial standard of proof beyond a reasonable doubt. But there is no requirement that the record show that the judge followed that standard; the presumption that an official duty has been performed applies. (*Ross v. Superior Court* (1977) 19 C.3d 899, 913, 141 C.R. 133, 569 P.2d 727.) ¶ (5) *No Right to Jury Trial.* There is no right to a jury trial in a civil contempt proceeding. (*United Farm Workers Organizing Committee, AFL-CIO v. Superior Court* (1968) 265 C.A.2d 212, 214, 71 C.R. 513; *Pacific Tel. & Tel. Co. v. Superior Court* (1968) 265 C.A.2d 370, 373, 72 C.R. 177.) ¶ (6) *Right to Counsel.* The party charged has the right to be represented by counsel, but the right may be waived either expressly or by implication. (*In re Shelley* (1961) 197 C.A.2d 199, 202, 16 C.R. 916 [right expressly waived]; see 52 A.L.R.3d 1002 [right to counsel in contempt proceedings].) An indigent accused whose potential punishment includes a jail sentence has the right to appointed counsel. (*Santa Clara v. Superior Court* (1992) 2 C.A.4th 1686, 1688, 5 C.R.2d 7, 11 *Summary* (10th), *Husband and Wife,* §258; see 32 A.L.R.5th 31 [right to appointment of counsel in contempt proceedings].) ¶ (7) *Continuance Does Not Create Double Jeopardy.* In *Mulvany v. Superior Court* (1986) 184 C.A.3d 906, 229 C.R. 334, plaintiff sought to enforce an award of attorneys' fees by contempt. At the hearing on the order to show cause, no evidence was taken, the matter was continued, and it was subsequently taken off calendar. At a later

hearing on a new order to show cause, the trial judge ruled that removal from the calendar amounted to a dismissal, because "to conclude otherwise in a quasi-criminal action could subject a citee to multiple actions" in violation of the doctrine of double jeopardy. (184 C.A.3d 908.) *Held,* reversed. Trials of civil contempt enforcement matters are subject to the provisions of the Code of Civil Procedure, and double jeopardy principles are not involved. (184 C.A.3d 908.) Here, no witnesses were sworn and no testimony was offered. C.C.P. 581 (see 6 *Cal. Proc.* (5th), *Proceedings Without Trial,* §293) permits dismissal of an action anytime before the actual commencement of trial. By analogy, the contempt citation could have been dismissed and refiled. It follows that the action could also have been taken off calendar and then replaced. (184 C.A.3d 909.)" (8 Witkin, California Procedure (5th ed. 2008) Enforcement of Judgment, § 348(6), pages 375-376.)

The proofs of service filed on October 6, 2022 declare that a registered process server personally served Maynard Byrd the OSC Re: Contempt on October 4, 2022 and personally served Alexander Byrd the OSC Re: Contempt on September 30, 2022.

A proof of service filed on October 11, 2022 declares that on October 5, 2022 counsel for defendants was served the OSC Re: Contempt by email.

Inasmuch as there is no proof of personal service on defendant Terry Wilson in the court's file, the hearing may not proceed against defendant Terry Wilson.

TENTATIVE RULING # 1: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, NOVEMBER 4, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

2. ASHLEY v. NOUHI 22CV0840

(1) Defendants Nouhi's and Ghobadian's Demurrer to Complaint

(2) Defendants Nouhi's and Ghobadian's Motion to Strike Claim for Punitive Damages from the Complaint.

TENTATIVE RULING # 2: THESE MATTERS ARE CONTINUED TO 8:30 A.M. ON FRIDAY, DECEMBER 16, 2022 IN DEPARTMENT NINE.

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

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

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

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

The administrative record has not been lodged.

On October 26, 2022 a stipulation and joint request of the parties for an extension of time to prepare the administrative record to December 19, 2022 was submitted for court consideration. The court executed the proposed order on October 28, 2022.

TENTATIVE RULING # 3: THE REVIEW HEARING RE: STATUS OF SERVICE, LODGING OF ADMINISTRATIVE RECORD, AND BRIEFING SCHEDULE IS CONTINUED TO 8:30 A.M. ON FRIDAY, JANUARY 13, 2023 IN DEPARTMENT NINE.

4. CITY OF ROCKLIN v. LEGACY FAMILY ADVENTURES – ROCKLIN PC-20190309

(1) Plaintiff's Motion to Vacate or Continue Trial Date or Stay Action.

(2) Plaintiff's Motion to Compel Third Party to Produce Business Records.

(3) Plaintiff's Motion to Compel Production of Documents by Defendants Legacy Family Adventures – Rocklin and Busch.

Plaintiff's Motion to Vacate or Continue Trial Date or Stay Action.

Trial is currently set to commence on December 13, 2022. Plaintiff City of Rocklin moves for the court to vacate the trial date and all associated deadlines, including an MSC; and to reset the trial date and all associated deadlines, including the discovery cut-off date.

Plaintiff asserts that the following amounts to good cause to vacate or continue the trial date: defendants Legacy Family Adventures – Rocklin and Busch have thwarted plaintiff's efforts to complete discovery, which has prejudiced plaintiff's ability to prepare for trial; plaintiffs have failed to diligently search for and collect documents for production; a third party investor has refused to comply with a document subpoena; in December 2019 defendants appealed the court's order awarding plaintiff $73,851.96 in fees and costs incurred to defend against defendants' anti-SLAPP motion on the basis that the motion was frivolous, the appeal is fully briefed, remains pending in the Third District, and since defendant have expressly requested the Third District to not only reverse the fee award, but also to make a decision on the merits of the anti-SLAPP motion, thereby taking the issue out of the hands of the Superior Court, the decision will affect the entire lawsuit, and must be decided before trial can proceed; defendants' conduct of seeking and obtaining 12 continuances of time to file their opening and reply appellate briefs have delayed trial in this action by over one, which is the primary reason the state of the pleadings in this case remains uncertain; oral argument on the appeal is set for

November 16, 2022; trial is only two months away; no trial continuance was previously granted; there is no alternative to trial continuance that will resolve the issues that gave rise to this motion as the trial is only two months away; and none of the parties will be prejudiced by the continuance.

Cross-Defendants Bonsai Design, LLC and Adventure Operations, LLC joins in the motion to vacate or continue the trial date. Cross-Defendants also assert that the parties need additional time to complete the deposition of the person most knowledgeable (PNK) of defendant Legacy Family Adventures – Rocklin, because the deposition of the PNK, defendant Busch, was delayed due this unavailability until October 31, 2022; cross-defendants had not yet commenced their examination prior to the continuance of the deposition, and it is anticipated that it may take an addition 2-4 days of deposition testimony to complete his deposition; and the deposition of Mr. Wagner, another designated PNK for defendant Legacy Family Adventures – Rocklin, has not started; and the parties are discussing the scheduling of at least seven other witness depositions.

Defendants Legacy Family Adventures – Rocklin and Busch oppose the motion on the following grounds: plaintiff has unclean hands regarding discovery proceedings by failure to produce documents for 23 months, then dumping 131,000 pages of documents on defendants to severely hinder and prevent defendants from conducting meaningful computer–aided analysis of the documents produced; defendants have not acted in bad faith in responding to discovery and produced everything in its possession and control; plaintiff has not established good cause to vacate or continue the trial date premised upon prejudice from alleged inability to obtain essential evidence despite diligent efforts; plaintiff has not been diligent in seeking discovery during the 3 ½ years the case has been on file; the grounds asserted for the continuance that a reply brief in the appeal from the anti-SLAPP fee award suggested the

appellate court could make a decision on the merits of the motion and the plaintiff City's failure to notice depositions in 3 ½ years prejudices the plaintiff is not good cause to vacate or continue the trial, because even though plaintiff asked for such a decision on appeal, it can not be decided by the appellate court; the court rejected the anti-SLAPP motion argument in its ruling on the first motion to vacate the trial date; plaintiff's unsettled pleadings due to the appeal from the anti-SLAPP motion is not good cause; and a delayed trial prejudices defendants.

Plaintiff replied to the opposition.

"A party seeking a continuance of the date set for trial, whether contested or uncontested or stipulated to by the parties, must make the request for a continuance by a noticed motion or an ex parte application under the rules in chapter 4 of this division, with supporting declarations. The party must make the motion or application as soon as reasonably practical once the necessity for the continuance is discovered." (Rules of Court, Rule 3.1332(b).)

"Although continuances of trials are disfavored, each request for a continuance must be considered on its own merits. The court may grant a continuance only on an affirmative showing of good cause requiring the continuance. Circumstances that may indicate good cause include: ¶ (1) The unavailability of an essential lay or expert witness because of death, illness, or other excusable circumstances; ¶ (2) The unavailability of a party because of death, illness, or other excusable circumstances; ¶ (3) The unavailability of trial counsel because of death, illness, or other excusable circumstances; ¶ (4) The substitution of trial counsel, but only where there is an affirmative showing that the substitution is required in the interests of justice; ¶ (5) The addition of a new party if: ¶ (A) The new party has not had a reasonable opportunity to conduct discovery and prepare for trial; or ¶ (B) The other parties have not had a reasonable opportunity to conduct discovery and prepare for trial in regard to the new party's involvement

in the case; ¶ (6) A party's excused inability to obtain essential testimony, documents, or other material evidence despite diligent efforts; or ¶ (7) A significant, unanticipated change in the status of the case as a result of which the case is not ready for trial." (Rules of Court, Rule 3.1332(c).)

"In ruling on a motion or application for continuance, the court must consider all the facts and circumstances that are relevant to the determination. These may include: ¶ (1) The proximity of the trial date; ¶ (2) Whether there was any previous continuance, extension of time, or delay of trial due to any party; ¶ (3) The length of the continuance requested; ¶ (4) The availability of alternative means to address the problem that gave rise to the motion or application for a continuance; ¶ (5) The prejudice that parties or witnesses will suffer as a result of the continuance; ¶ (6) If the case is entitled to a preferential trial setting, the reasons for that status and whether the need for a continuance outweighs the need to avoid delay; ¶ (7) The court's calendar and the impact of granting a continuance on other pending trials; ¶ (8) Whether trial counsel is engaged in another trial; ¶ (9) Whether all parties have stipulated to a continuance; ¶ (10) Whether the interests of justice are best served by a continuance, by the trial of the matter, or by imposing conditions on the continuance; and ¶ (11) Any other fact or circumstance relevant to the fair determination of the motion or application." (Rules of Court, Rule 3.1332(d).)

"The trial court has discretion in ruling on requests to extend discovery deadlines or continue trial dates. Equally clear are the trial court's statutory obligations to enforce discovery cutoff dates and to set firm trial dates. (Code Civ. Proc., §§ 2024, 2034; Gov.Code § 68607, subd. (e)-(g); Cal. Stds. Jud. Admin., § 9.) Strict adherence to these delay reduction standards has dramatically reduced trial court backlogs and increased the likelihood that matters will be disposed of efficiently, to the benefit of every litigant. (See, e.g., *Estate of Meeker* (1993) 13

Cal.App.4th 1099, 1105, 16 Cal.Rptr.2d 825.) Here, the trial court's orders promote judicial efficiency by maintaining strict time deadlines. ¶ But efficiency is not an end in itself. Delay reduction and calendar management are required for a purpose: to promote the just resolution of cases on their merits. (*Thatcher v. Lucky Stores, Inc.* (2000) 79 Cal.App.4th 1081, 1085, 94 Cal.Rptr.2d 575; Gov.Code, § 68507; Cal. Stds. Jud. Admin., § 2.) Accordingly, decisions about whether to grant a continuance or extend discovery "must be made in an atmosphere of substantial justice. When the two policies collide head-on, the strong public policy favoring disposition on the merits outweighs the competing policy favoring judicial efficiency." (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 398–399, 107 Cal.Rptr.2d 270.) What is required is balance. "While it is true that a trial judge must have control of the courtroom and its calendar and must have discretion to deny a request for a continuance when there is no good cause for granting one, it is equally true that, absent [a lack of diligence or other abusive] circumstances which are not present in this case, a request for a continuance supported by a showing of good cause usually ought to be granted." (*Estate of Meeker, supra,* 13 Cal.App.4th at p. 1105, 16 Cal.Rptr.2d 825.)" (Emphasis added.) (Hernandez v. Superior Court (2004) 115 Cal.App.4th 1242, 1246–1247.)

With the above-cited legal authorities in mind, the court will rule on the motion to vacate the trial date or continue the trial date.

Discovery Issues

On October 21, 2022, after due consideration of defendants objections and opposition, the court granted plaintiff's motion to compel a further response and production concerning special interrogatory, set two, and imposed sanctions against defendants in the amount of $3,821.50.

There are two pending discovery motions brought against defendants Legacy Family Adventures – Rocklin and Busch to compel further responses to requests for production and to

enforce a subpoena for documents served on a third party investor in Legacy Family Adventures – Rocklin, which will not be heard until December 9, 2022. Should either or both of these motions be granted, even in part, there will be insufficient time to respond and analyze the responses prior to commencement of trial on the current trial date of December 13, 2022, which under such circumstances would severely prejudice plaintiff's ability to prepare for and try this action.

Pending Appeal from Anti-SLAPP Motion

In its tentative ruling on the first motion to continue or vacate the trial date the court's tentative ruling was to grant the motion. After hearing oral argument at the hearing on August 26, 2022 the court denied the motion without prejudice, maintained the currently set trial date of December 13, 2022, expressly advised the parties that if a problem should arise concerning the current trial and related dates, counsel is to file a motion to vacate or continue the trial, and also set a trial setting conference date for February 27, 2022 as a place holder. (Emphasis the court's.) The court did not express in the ruling that the court rejected the anti-SLAPP motion argument.

Defendants' argument that the pending appeal can not have any effect whatsoever on the matter to be tried is disingenuous at best. Citing Code of Civil Procedure, § 906, defendants expressly requested in their reply brief on the appeal that the Third District reach the second prong of the anti-SLAPP analysis to decide the merits of the motion, or, remand it to the Superior Court with instructions to reach the second prong and (either way) grant the SLAPP motion. (Plaintiff's Exhibit B – Defendants' Appellate Reply Brief, pages 77-78.) Defendant also cited Collier v. Harris (2015) 240 Cal.App.4th 41, 58; and Simmons v. Allstate Ins. Co. (2001) 92 Cal.App.4th 1068, 1073 in support of that request

"Based on its ruling Collier's claims did not arise from protected activity, the trial court did not undertake the second-prong analysis to determine whether Collier met her burden to establish a probability of prevailing on her claims. We therefore remand for the trial court to conduct that analysis. (*Navellier, supra,* 29 Cal.4th at p. 95, 124 Cal.Rptr.2d 530, 52 P.3d 703; *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 271, 131 Cal.Rptr.3d 63 (*Tuszynska*); *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 568, 92 Cal.Rptr.2d 755 (*DuPont*).) ¶ Korpi contends we should decide the question because the trial court ruled on the parties' evidentiary objections and therefore whether Collier established a probability of prevailing is a legal question we may decide in the first instance. According to Korpi, deciding the question now would serve the anti-SLAPP statute's purpose by expeditiously disposing of Collier's allegedly unmeritorious claims. Although we have discretion to decide the second prong because we independently review the question whether Collier established a probability of prevailing (*Schwarzburd v. Kensington Police Protection & Community Services Dist. Bd.* (2014) 225 Cal.App.4th 1345, 1355, 170 Cal.Rptr.3d 899 (*Schwarzburd*); *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1195, 128 Cal.Rptr.3d 205 (*Wallace*)), we decline Korpi's invitation to do so in this case. ¶ A few appellate courts have decided the matter when a quick decision was necessary. (See, e.g., *Schwarzburd, supra,* 225 Cal.App.4th at p. 1355, 170 Cal.Rptr.3d 899 [appellate court decided second prong in first instance because contract at issue was set to expire]; *Wallace, supra,* 196 Cal.App.4th at p. 1195, 128 Cal.Rptr.3d 205 [appellate court decided second prong because parties disagreed on how prong should be applied]; *Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 656, 24 Cal.Rptr.3d 619; *Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 615, 129 Cal.Rptr.2d 546.) The majority of appellate courts, however, have declined to do so either because contested evidentiary issues existed or simply because it was appropriate

for the trial court to decide the issue first. (See, e.g., *Navellier, supra,* 29 Cal.4th at p. 95, 124 Cal.Rptr.2d 530, 52 P.3d 703; *Hunter, supra,* 221 Cal.App.4th at pp. 1527–1528, 165 Cal.Rptr.3d 123; *Tuszynska, supra,* 199 Cal.App.4th at p. 271, 131 Cal.Rptr.3d 63; *Cross v. Cooper* (2011) 197 Cal.App.4th 357, 391–392, 127 Cal.Rptr.3d 903; *Birkner v. Lam* (2007) 156 Cal.App.4th 275, 286, 67 Cal.Rptr.3d 190; *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1347–1348, 63 Cal.Rptr.3d 798; *DuPont, supra,* 78 Cal.App.4th at p. 568, 92 Cal.Rptr.2d 755.) ¶ Here, Korpi has not established any reason why we should not allow the trial court to decide the second prong in the ordinary course. The Board election underlying the conduct at issue occurred more than two years ago, Korpi stopped redirecting Internet traffic and abandoned the domain names after only a few weeks and well before Collier filed this lawsuit, and Korpi died while this appeal was pending. Moreover, when we decide a matter in the first instance, we deprive the parties of a layer of independent review available to them when the matter is decided initially by the trial court. We think it best that the able and experienced trial judge decide the issue." (Emphasis added.) (Collier v. Harris (2015) 240 Cal.App.4th 41, 57–58.)

In opposition to the motion to vacate or continue the trial defendants argue the exact opposite position that the appeal was just directed at the fees award, the request for a decision on the merits was improperly raised by them in the reply and could not be considered by the Third District (People v. Mickel (2016) 2 Cal.5th 181, 197, ["Ordinarily, we do not consider arguments raised for the first time in a reply brief."].), and, as a matter of law, Code of Civil Procedure, § 425.17(e), where the trial court finds the cause of action is exempt from the anti-SLAPP motion under Section 425.17(c), the decision is not appealable.

"(c) Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to,

insurance, securities, or financial instruments, arising from any statement or conduct by that person if both of the following conditions exist: ¶ (1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services. ¶ (2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation, except where the statement or conduct was made by a telephone corporation in the course of a proceeding before the California Public Utilities Commission and is the subject of a lawsuit brought by a competitor, notwithstanding that the conduct or statement concerns an important public issue." (Code of Civil Procedure, § 425.17(c).)

"(e) If any trial court denies a special motion to strike on the grounds that the action or cause of action is exempt pursuant to this section, the appeal provisions in subdivision (i) of Section 425.16 and paragraph (13) of subdivision (a) of Section 904.1 do not apply to that action or cause of action." (Code of Civil Procedure, § 425.17(e).)

Defendants' own contradictory positions in the appeal and in opposition to this motion injects uncertainty that could reasonably impair the City' ability to prepare for trial.

The motion to vacate or continue trial date is granted. The court confirms that a trial setting conference will take place at 11:00 a.m. on Monday, February 27, 2023 in Department Nine.

Plaintiff's Motion to Compel Third Party to Produce Business Records.

This matter is continued to 8:30 a.m. on Friday, December 9, 2022 in Department Nine.

Plaintiff's Motion to Compel Production of Documents by Defendants Legacy Family Adventures – Rocklin and Busch.

This matter is continued to 8:30 a.m. on Friday, December 9, 2022 in Department Nine.

TENTATIVE RULING # 4: PLAINTIFF'S MOTION TO COMPEL THIRD PARTY TO PRODUCE BUSINESS RECORDS AND PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS BY DEFENDANTS LEGACY FAMILY ADVENTURES – ROCKLIN AND BUSCH ARE CONTINUED TO 8:30 A.M. ON FRIDAY, DECEMBER 9, 2022 IN DEPARTMENT NINE. PLAINTIFF'S MOTION TO VACATE OR CONTINUE THE TRIAL DATE IS GRANTED. THE COURT CONFIRMS THAT A TRIAL SETTING CONFERENCE WILL TAKE PLACE AT 11:00 A.M. ON MONDAY, FEBRUARY 27, 2023 IN DEPARTMENT NINE. NO HEARING ON PLAINTIFF'S MOTION TO VACATE OR CONTINUE THE TRIAL DATE WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE

DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldoradocourt.org/onlineservices/vcourt.html. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, NOVEMBER 4, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

5. COUNTY OF EL DORADO v. WALDOW 21CV0122

Motion to be Relieved as Counsel of Record for Defendant Waldow.

On September 2, 2022 the court granted counsel's motion to be relieved as counsel of record for defendant. The papers did not specify which defendant. Apparently this renewed motion corrects that error in that this motion only applies to defendant Waldow.

The court notes that the proposed order fails to identify defendant Waldow as the client that counsel is relieved as counsel of record and must be corrected prior to entry.

TENTATIVE RULING # 5: THE MOTION IS GRANTED. WITHDRAWAL WILL BE EFFECTIVE AS OF THE DATE OF FILING PROOF OF SERVICE OF THE FORMAL, SIGNED ORDER UPON THE CLIENT. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING

IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldoradocourt.org/onlineservices/vcourt.html. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, NOVEMBER 4, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

6. DEWATER v. HOSOPO CORP. PC-20190143

Review Hearing Re: Stay of Discovery.

Plaintiff filed an action against defendant Wilson and others for battery and negligent hiring, supervision or retention. Defendant Wilson moved for a protective order to stay all discovery in this case and to stay the setting of the trial date pending the final disposition of felony criminal charges being prosecuted against him in People v. Wilson, case number P18CRF0458-1, which arises from the same incident that is the subject of this civil action.

At the hearing on September 20, 2019 the court granted the motion in part and denied the motion in part. The court ordered that discovery propounded upon defendant Wilson shall be stayed until the jury enters its verdict after trial in the related criminal case. The formal order was entered on October 15, 2019.

On March 22, 2021 the court denied the first motion for reconsideration and to lift the stay. On April 1, 2022 the court denied the second motion for reconsideration of the stay of discovery. On that same date the court set this review hearing regarding the stay and ordered the following: plaintiffs and the other defendants are to file and serve by October 7, 2022 any points and authorities and evidence they wish to be considered by the court in reviewing whether to vacate the discovery stay; defendant Wilson is to file and serve any opposition/response to the documents filed by plaintiff and the other defendants not later than October 21, 2022; and plaintiffs and the other defendants are to file and serve any reply to defendant Wilson's opposition/response not later than October 28, 2022.

Defendant Aerotek Affiliate Services, Inc. filed further briefing regarding the stay. Defendant Aerotek states: defendant Wilson's criminal trial commenced in August 2022, however, it was not concluded due to a mistrial; the trial is now set to commence on October 17, 2022, which

defendant Aerotek anticipates will take several weeks to conclude; and most fact discovery, except as to defendant Wilson, has been completed.

Defendant Aerotek asserts that it is only a staffing company that placed defendant Wilson with no control over his day-to-day activities; and it is unduly prejudiced as it is forced to continue to litigate this action and incur costs and fees due to its inability to file a dispositive motion before all parties have had a chance to conduct discovery as to defendant Wilson.

Defendant Aerotek requests that the court continue the review hearing a period of 60 days in order to allow for the criminal trial to conclude.

At the time this ruling was prepared, there were no briefs from the other parties in the court's file.

TENTATIVE RULING # 6: THIS MATTER IS CONTINUED TO 8:30 A.M. ON FRIDAY, JANUARY 6, 2023 IN DEPARTMENT NINE.

7. WHITESIDE v. TABER PC-20200212

Defendant Taber's Motion to Compel Plaintiff to Answer Form Interrogatories and Requests for Production.

Defendant Taber's counsel declares: on August 1, 2021 form interrogatories – construction litigation, set one and requests for production, set one were served on plaintiff by mail; and despite having granted plaintiff's request for a two week extension of time to respond and produce, no responses to the discovery propounded have been received from plaintiff. Defendant Taber moves to compel answers and production of documents without objections and further requests an award of monetary sanctions in the amount of $1,780.

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.)

The court is unable to find any proof of service of the notice of hearing and moving papers on plaintiff in the court's file. Absent proof of adequate service on plaintiff, the court has no alternative other than to deny the motion without prejudice.

TENTATIVE RULING # 7: DEFENDANT TABER'S MOTION TO COMPEL PLAINTIFF TO ANSWER FORM INTERROGATORIES AND REQUESTS FOR PRODUCTION IS DENIED WITHOUT PREJUDICE DUE TO LACK OF PROOF OF SERVICE ON PLAINTIFF. 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, NOVEMBER 4, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

8. GOLD BEACH MANUFACTURED HOUSING COMMUNITY, LLC v. OWENS 22UD0221

Defendant's Motion to Vacate Default and Default Judgment of Unlawful Detainer.

The proof of service filed on August 22, 2022 declares that on August 1, 2022 defendant Owens was personally served the summons and complaint, mandatory cover sheet, supplemental allegations, verification by landlord re: rental assistance, and prejudgment claim of right to possession. On August 22, 2022 default was entered against defendant Owens and all unnamed occupants and a default judgment for possession only was entered against defendant Owens and all occupants of the premises.

On October 7, 2022 the court denied defendant's ex parte application to set aside the default and default judgment and directed the matter be heard on the regular law and motion calendar at 8:30 a.m. on Friday, November 4, 2022 in Department Nine.

On that same date, the court granted the ex parte application to stay execution of the judgment until October 21, 2022, provided defendant delivered $200.62 to the on-site manager on October 7, 2022.

Both plaintiff and defendant were present at the October 7, 2022 hearing.

Defendant moves to vacate the default and default judgment pursuant to the provisions of Code of Civil Procedure, § 473(b) on the grounds of mistake and surprise. Defendant contends: defendant was mistaken as to some material fact or law relating to defendant's duty to respond; and defendant was prevented from responding due to an unexpected condition or situation that arose, without any default or negligence on defendant's part, and which ordinary care could not have prevented

Defendant's declaration in support of the motion states: defendant did not receive the summons and complaint in time to file a response; defendant did not understand he had to

respond to the plaintiff's papers in five days, defendant thought that weekends and holidays did not count in computing the time, and when defendant attempted to file a response at the court defendant was told it was too late; defendant was unable to come to court because he had hip surgery on September 28, 2022; and defendant is illiterate.

At the time this ruling was prepared, there was no opposition to the motion in the court's file.

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

Although the motion states in paragraph 2 that a proposed answer is attached, there is no proposed answer attached to the motion and the court is unable to find a proposed answer in the file. Therefore, this is an independent reason to deny the motion.

"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.)

It is well settled that the court in exercising its discretion under section 473, it should appear that something more than mere inadvertence or neglect without reasonable excuse or justification existed, and that the inadvertence or neglect in question is not the result of mere forgetfulness or neglect but is based on circumstances which would make the neglect excusable. (Daniels v. Pitman (1954) 123 Cal.App.2d 345, 348.) While it is the general policy that section 473 is to be liberally construed to the end that trials on the merits may be had, one may not be relieved from his or her default unless he or she shows he or she has acted in good faith and demonstrates that his excusable neglect was the actual cause of the default. Inexcusable neglect is not a ground for relief. To warrant relief, the neglect must have been such as might have been the act of a reasonably prudent person under the same circumstances. (Elms v. Elms (1946) 72 Cal.App.2d 508.) Section 473 is remedial and to be liberally construed, but the moving party must show mistake, inadvertence, surprise or excusable neglect. Every party who desires to resist an action or wants to participate in the action has a duty to take timely and adequate steps to retain counsel or to act in his own person to avoid an undesirable judgment. Unless the moving party shows that he or she has exercised such reasonable diligence as a person of ordinary prudence usually bestows upon important business, the moving party's motion for section 473 relief will be denied. The courts neither act as guardians for incompetent parties, nor those who are grossly careless of their own affairs. The burden of proof is upon the moving party by a preponderance of the evidence. (Luz v. Lopez (1960) 55 Cal.2d 54, 62.)

Defendant Owens was personally served the summons and complaint, mandatory cover sheet, supplemental allegations, verification by landlord re: rental assistance, and prejudgment claim of right to possession on August 1, 2022 at the subject address and the default and default judgment were entered on August 22, 2022. The proof of service of the request to enter

default declares defendant was mailed the request by mail to the subject address on August 12, 2022. Defendant's declared hip surgery on September 28, 2022, long after personal service and entry of the default and default judgment, was not an unexpected event that prevented a timely response to the complaint from being filed and served.

There is no evidence that illiteracy prevented or impaired him from recognizing that he was being served with important documents that he may need to seek assistance with and he attempted to obtain legal assistance or other assistance to deal with the documents of readily apparent legal significance.

Defendant was served with a Summons that clearly and expressly notified defendant of the following: "NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 5 days. You have 5 DAYS, not counting Saturdays and Sundays and other judicial holidays, after this summons and legal papers are served on you to file a written response at this court and have a copy served on plaintiff. ¶ * * * If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court. ¶ There are other legal requirements. You may want to call an attorney right away…""(Emphasis in original.)

Failure to seek assistance and/or heed the express warning of the Unlawful Detainer Summons that a written response to the complaint was mandated within 5 days of service of the summons, or the court may decide against the defendant without being heard is not neglect as might have been the act of a reasonably prudent person under the same circumstances; it is not the exercise of such reasonable diligence as a person of ordinary prudence usually bestows upon important business; and does not establish the existence of a condition or situation in which a party is unexpectedly placed to his injury, without any default or negligence of his or her own, which ordinary prudence could not have guarded against.

The motion is denied.

TENTATIVE RULING # 8: DEFENDANT'S MOTION TO VACATE DEFAULT AND DEFAULT JUDGMENT OF UNLAWFUL DETAINER 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, NOVEMBER 4, 2022 EITHER IN

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

9. JP MORGAN CHASE BANK v. SULLIVAN 22CV0574

Motion to Set Aside and Vacate Default and Default Judgment Entered Against Defendant Sullivan.

Defendant Sullivan moves to vacate and set aside the default entered against defendant on August 5, 2022 and the default judgment entered against defendant on August 12, 2022. Defendant argues that the default and default judgment were entered due to the fault of counsel. A declaration filed by counsel describes the error of the law firm representing defendant that led to the failure to file an answer on defendant's behalf in this case.

On October 24, 2022 plaintiff filed a notice of non-opposition to the motion and requests that an answer be filed within 30 days.

The proposed answer is attached as Exhibit B to the moving papers, which the proof of service declares was served by mail on plaintiff's counsel on September 21, 2022

TENTATIVE RULING # 9: THE MOTION IS GRANTED. THE ANSWER AS PROPOSED IS DEEMED SERVED ON PLAINTIFF. DEFENDANT IS TO FILE AN ORIGINAL EXECUTED ANSWER 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, NOVEMBER 4, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

10. LOEWEN v. MASTEN PC-20200307

Plaintiffs' Motion for Summary Adjudication.

Plaintiffs filed a 1st amended complaint against defendants asserting causes of action for quiet title to express easement; decretory relief; for preliminary and permanent injunction; and interference with easement. Plaintiffs move for summary adjudication of the quiet title and injunction causes of action on the following grounds: defendants predecessor in interest entered into an easement agreement in 1989 that provided each of the plaintiffs with a pedestrian easement access across the predecessor's property in order to access the Folsom Lake State Recreational Area (FLSRA), which was recorded on July 6, 1989 (Plaintiffs' Exhibit Q.); the easement has been used for decades; defendants recently erected fences and gates that obstruct plaintiffs' use of the easement; defendants have justified their conduct by claiming that use of the easement to access the FLSRA would constitute an illegal trespass, use of the easement is unsafe, and it exposes defendants to liability for any potential injury by using the pedestrian easement; the evidence establishes as a matter of law that plaintiffs have a right and title to an express pedestrian easement that they are entitled to use to access Folsom Lake; the evidence establishes as a matter of law that despite the valid easement, defendants have prevented the plaintiffs from using the easement; it is not plaintiffs' initial burden to disprove defendants' affirmative defenses and once it is established that plaintiffs have a valid pedestrian easement, the burden of proof shifts to defendants to raise a triable issue of material fact; plaintiffs are entitled to an injunction that enjoins defendants from interfering with their use of the easement; the evidence establishes as a matter of law that plaintiffs' use of the pedestrian easement access to the FLSRA across defendants' land does not amount to illegal trespass onto FLSRA property by entering the park during its business hours; defendants have

no standing to assert the trespass issue, because they do not own the FLSRA property; and the defendants' claim of exposure to liability for injuries resulting from use the easement lacks merit, because the access to their property is for recreational purposes, therefore, they are immune from liability pursuant to the provisions of Civil Code, 846.

Defendants oppose the motion on the following grounds: the safety of the easement is a triable issue of material fact; entry through a barbed wire fence is unsafe, which is a triable issue of material fact; the court should not empower plaintiffs to do something they should not be doing such as illegal entry into the FLSRA by use of the easement; plaintiff should get the FLSRA to make the foot of the easement an authorized access point and to allow a gate in order to provide a safe entry; plaintiffs' entitlement to enter the FLSRA property is a triable issue of material fact; plaintiffs have a defense that plaintiffs must make the easement safe before the court can determine the interests of the parties concerning the easement; defendants have an defense that the easement is not safe; and the recreational immunity does not apply, because the recreational use is not on the easement as it is only for the purposes of pedestrian access.

Plaintiffs replied to the opposition: defendants have not contested the validity of the easement; the plaintiffs' Dunbar's legal description is not identical to their predecessor in interest, Viola Coelho's property description, because the Dunbars only purchased a subdivided portion of the Coelho property and the grant deed of that parcel transferred the right to use the subject easement; the alleged maintenance obligation does not constitute a defense to the validity of the easement; the mutual obligations of parties regarding repair of easements do not obligate them to make major improvements; owners of the servient tenement, such as the defendants, can not obstruct or hinder plaintiffs' access for the purpose of maintaining the easement, therefore, defendants can not prevent plaintiffs' access and then claim then can not

use the easement due to failure to maintain the easement; defendants have not explained how plaintiffs have failed to maintain the easement as the easement is an unimproved path that exists in its natural state; there is no evidence that the pedestrian easement has been modified from its natural state, there is no obligation to maintain as it is in its natural state, and the opposition to the motion does not identify any maintenance that is required of an unimproved path to Folsom Lake; the condition of the FLSRA property that has a barbed wire fence which is property owned by defendants, can not be used as a defense against the court determining the existence of the easement and the interests of the parties related to that claimed easement; defendants have not cited any legal authority for the proposition they are responsible for any injuries that may occur due to the condition of the FSLRA property they do not own, such as the barbed wire fence boundary; the Civil Code, §846 recreational use immunity applies to the pedestrian easement to Folsom Lake; and use of the easement to access Folsom Lake is not illegal.

Motion for Summary Adjudication Principles

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

"(2) A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment. A party shall not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court unless that party establishes, to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion." (Code of Civil Procedure, § 437c(f)(2).)

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

"The moving party "bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar, supra,* 25 Cal.4th at p. 850, 107 Cal.Rptr.2d 841, 24 P.3d 493, fn. omitted.) "In moving for summary judgment, a 'plaintiff ... has met' his 'burden of showing that there is no defense to a cause of action if' he 'has proved each element of the cause of action entitling' him 'to judgment on that cause of action. Once the plaintiff ... has met that burden, the burden shifts to the defendant ... to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant ... may not rely upon the mere allegations or denials' of his 'pleadings to show that a triable issue of material fact exists but, instead,' must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.' [Citation.]"

(*Id.* at p. 849, 107 Cal.Rptr.2d 841, 24 P.3d 493, quoting Code Civ. Proc., § 437c, subd. (*o*)(1); see also Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2004) ¶ 10:224.1, p. 10–81.)" (Law Offices of Dixon R. Howell v. Valley (2005) 129 Cal.App.4th 1076, 1091-1092.)

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

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

"The pleadings determine the issues to be addressed by a summary judgment motion. (*Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848, 885, 164 Cal.Rptr. 510, 610 P.2d 407, revd. on other grounds *Metromedia, Inc. v. San Diego* (1981) 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800.)" (Oakland Raiders v. National Football League (2005) 131 Cal.App.4th 621, 629.)

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

With the above-cited principles in mind, the court will rule on the plaintiff's motion for summary adjudication of the Quiet Title to Express Easement and Injunction Causes of Action of the 1st amended complaint.

Quiet Title Cause of Action

The Third District Court of Appeal has stated: "A quiet title action seeks to declare the rights of the parties in realty. A trial court should ordinarily resolve such dispute. This accords with the rule that a trial court should not dismiss a regular declaratory relief action when the plaintiff loses, but instead should issue a judgment setting forth the declaration of rights and thus ending the controversy. (See *Maguire v. Hibernia S. & L. Soc.* (1944) 23 Cal.2d 719, 729, 146 P.2d 673; *Haley v. L.A. County Flood Control Dist.* (1959) 172 Cal.App.2d 285, 292-294, 342 P.2d 476.) As stated in a case involving Western's predecessors, " 'The object of the action is to finally settle and determine, as between the parties, all conflicting claims to the property in controversy, and to decree to each such interest or estate therein as he may be entitled to.' " (*Yuba Invest. Co. v. Yuba Consol. Gold Fields* (1926) 199 Cal. 203, 209, 248 P. 672; see

Gazos Creek Mill etc. Co. v. Coburn (1908) 8 Cal.App. 150, 153, 96 P. 359 ["all parties were before the court with their grievances"].)" (Western Aggregates, Inc. v. County of Yuba (2002) 101 Cal.App.4th 278, 305.)

- Easements

"Easements are a type of servitude; the "extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired." (Civ. Code, § 806.) For express easements like those contained in the deed reservations, " 'only those interests expressed in the grant and those necessarily incident thereto pass from the owner of the fee.' " (*Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990) 51 Cal.3d 845, 867, 274 Cal.Rptr. 678, 799 P.2d 758 (*Camp Meeker*), superseded by statute on another ground, as stated in *Pacific Bell v. Public Utilities Com.* (2000) 79 Cal.App.4th 269, 281, 93 Cal.Rptr.2d 910.)" (Pear v. City and County of San Francisco (2021) 67 Cal.App.5th 61, 71.)

"The scope of an easement is determined by the terms of its grant. (Civ.Code, s 806.) The grant of an unrestricted easement, not specifically defined as to the burden imposed upon the servient land, entitles the easement holder to a use limited by the requirement that it be reasonably necessary and consistent with the purpose for which the easement was granted. (*Pasadena v. California-Michigan etc. Co.*, Supra, 17 Cal.2d 576 at p. 582, 110 P.2d 983; *Wall v. Rudolph* (1961) 198 Cal.App.2d 684, 692, 18 Cal.Rptr. 123, 128, 129, 3 A.L.R.3d 1242.) This permits a use consistent with 'normal future development Within the scope of the basic purpose (citations), but not an abnormal development, one which actually increases the burden upon the servient tenement * * *. California courts have set their faces firmly against such increases in the burden upon the servient tenement.' (*Wall v. Rudolph*, Supra (italics added).) So long as an easement exists, both parties have the right to insist that it shall remain substantially the same as it was when granted, regardless of the relative benefit or damage

that would ensue to the parties by reason of a change in the mode and manner of its enjoyment. (*Whalen v. Ruiz* (1953) 40 Cal.2d 294, 302, 253 P.2d 457 (quoted, with additional citations, in *Wall v. Rudolph*, Supra, at pp. 694—695, 18 Cal.Rptr. 123.))" (Emphasis added.) (Atchison, T. & S. F. Ry. Co. v. Abar (1969) 275 Cal.App.2d 456, 464-465.)

"The grant of an easement must "be interpreted liberally in favor of the grantee." (*Norris v. State of California ex rel. Dept. Pub. Wks*. (1968) 261 Cal.App.2d 41, 46–47, 67 Cal.Rptr. 595, citing Civ.Code, § 1069.) When an easement is based on a grant, as it is here, the grant gives the easement holder both "those interests expressed in the grant and those necessarily incident thereto." (*Pasadena v. California–Michigan etc. Co*. (1941) 17 Cal.2d 576, 579, 110 P.2d 983.) "Every easement includes what are termed 'secondary easements;' that is, the right to do such things as are necessary for the full enjoyment of the easement itself." (*North Fork Water Co. v. Edwards* (1898) 121 Cal. 662, 665–666, 54 P. 69.) ¶ A secondary easement can be the right to make "repairs, renewals and replacements on the property that is servient to the easement" (*Donnell v. Bisso Brothers* (1970) 10 Cal.App.3d 38, 43, 88 Cal.Rptr. 645) "and to do such things as are necessary to the exercise of the right" (*Smith v. Rock Creek Water Corp*. (1949) 93 Cal.App.2d 49, 53, 208 P.2d 705). Thus, where the easement was for flood control purposes, one court held, it carried a secondary easement for repair of the channel including the right "to take earth, rock, sand and gravel for the purpose of excavating, widening and deepening or otherwise rectifying the channel and the maintenance and repair of embankments and other protection work." (*Haley v. L.A. County Flood Control Dist*. (1959) 172 Cal.App.2d 285, 290, 342 P.2d 476.) A right-of-way to pass over the land of another carries with it "the implied right ... to make such changes in the surface of the land as are necessary to make it available for travel in a convenient manner." (*Ballard v. Titus* (1910) 157 Cal. 673, 681, 110 P. 118.) ¶ Incidental or secondary easement rights are limited by a rule of reason. "The

rights and duties between the owner of an easement and the owner of the servient tenement ... are correlative. Each is required to respect the rights of the other. Neither party can conduct activities or place obstructions on the property that unreasonably interfere with the other party's use of the property. In this respect, there are no absolute rules of conduct. The responsibility of each party to the other and the 'reasonableness' of use of the property depends on the nature of the easement, its method of creation, and the facts and circumstances surrounding the transaction." (6 Miller & Starr, Cal. Real Estate (3d ed.2011) § 15:63, p. 15-215 (rel. 8/2006).) ¶ As applied to dominant owners, the rule of reason allows them to exercise secondary easement rights "so long as the owner thereof uses reasonable care and does not increase the burden on or go beyond the boundaries of the servient tenement, or make any material changes therein." (*Ward v. City of Monrovia* (1940) 16 Cal.2d 815, 821–822, 108 P.2d 425; see *North Fork Water Co. v. Edwards, supra,* 121 Cal. at p. 666, 54 P. 69; *Haley v. L.A. County Flood Control Dist.,supra,* 172 Cal.App.2d at p. 290, 342 P.2d 476.) A secondary easement may be exercised "only when necessary and in such reasonable manner as not to increase the burden needlessly on the servient estate or to enlarge it by alteration in the mode of operation." (*Smith v. Rock Creek Water Corp*., *supra,* 93 Cal.App.2d at p. 53, 208 P.2d 705.) The easement owner does not have the right to "so change the surface of the land as seriously to damage the usefulness of the servient estate ... [¶] 'It is well settled that the owner of an easement cannot change its character, or materially increase the burden upon the servient estate, or injuriously affect the rights of other persons, but within the limits named he may make repairs, improvements, or changes that do not affect its substance.' " (*White v. Walsh* (1951) 105 Cal.App.2d 828, 832, 234 P.2d 276, citing *Burris v. People's Ditch Co.* (1894) 104 Cal. 248, 252, 37 P. 922.) In *Herzog v. Grosso* (1953) 41 Cal.2d 219, 259 P.2d 429, the Supreme Court held that the trial court properly recognized a right in the easement holder to

construct and maintain a wooden guardrail along the northerly boundary of the roadway because, "[b]y the grant of the easement ... [the easement holder] acquired the right to do such things as are reasonably necessary to their use thereof. [Citations.]" (*Id*. at p. 225, 259 P.2d 429.) Where the road adjoined a steep embankment, guardrails were "reasonably necessary and would not unduly burden the servient tenement." (*Ibid.*) ¶ Likewise, the servient owner "who holds the land burdened by a servitude" (Rest.3d Property, Servitudes, § 4.9, p. 582) is held to the same reasonableness standard. The servient owner is "entitled to make all uses of the land that are not prohibited by the servitude and that do not interfere unreasonably with the uses authorized by the easement... ." (*Ibid.*) "[T]he servient owner may use his property in any manner not inconsistent with the easement so long as it does not *unreasonably impede* the dominant tenant in his rights." (*City of Los Angeles v. Howard* (1966) 244 Cal.App.2d 538, 543, 53 Cal.Rptr. 274, italics added.) "*Actions that make it more difficult to use an easement, that interfere with the ability to maintain and repair improvements built for its enjoyment, or that increase the risks attendant on exercise of rights created by the easement are prohibited ... unless justified by needs of the servient estate*. In determining whether the holder of the servient estate has unreasonably interfered with exercise of an easement, the interests of the parties must be balanced to strike a *reasonable accommodation* that maximizes overall utility to the extent consistent with effectuating the purpose of the easement ... and subject to any different conclusion based on the intent or expectations of the parties... ." (Rest.3d Property, Servitudes, § 4.9, com. c, p. 583, italics added.) ¶ Given that reasonableness depends on the facts and circumstances of each case, "[w]hether a particular use of the land by the servient owner ... is an unreasonable interference is a question of fact for the jury. [Citations.]" (*Pasadena v. California–Michigan etc. Co*., *supra,* 17 Cal.2d at pp. 579–580, 110 P.2d 983; see *Red Mountain, LLC v. Fallbrook Public Utility Dist*. (2006) 143 Cal.App.4th 333, 354, 48

Cal.Rptr.3d 875.)" (Emphasis added.) (Dolnikov v. Ekizian (2013) 222 Cal.App.4th 419, 428–430.)

"The owner of the dominant tenement must use his or her easements and rights in such a way as to impose as slight a burden as possible on the servient tenement. (*Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 356, fn. 17, 27 Cal.Rptr.2d 613, 867 P.2d 724.) Every incident of ownership not inconsistent with the easement and the enjoyment of the same is reserved to the owner of the servient estate. (*Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 35, 31 Cal.Rptr.2d 378; *City of Los Angeles v. Ingersoll–Rand Co.* (1976) 57 Cal.App.3d 889, 893–894, 129 Cal.Rptr. 485.)" (Scruby v. Vintage Grapevine, Inc. (1995) 37 Cal.App.4th 697, 702.) "The conveyance of an easement limited to roadway use grants a right of ingress and egress and a right of unobstructed passage to the holder of the easement. A roadway easement does not include the right to use the easement for any other purpose. (See *Marlin v. Robinson* (1932) 123 Cal.App. 373, 377, 11 P.2d 70.) When the easement is "nonexclusive" the common users "have to accommodate each other." (*Applegate v. Ota* (1983) 146 Cal.App.3d 702, 712, 194 Cal.Rptr. 331.) An obstruction which unreasonably interferes with the use of a roadway easement can be ordered removed "for the protection and preservation" of the easement. (*Id.* at pp. 712–713, 194 Cal.Rptr. 331.)" (Emphasis added.) (Scruby v. Vintage Grapevine, Inc. (1995) 37 Cal.App.4th 697, 703.)

"As the grading and retaining wall are necessary incidents of, and not inconsistent with, the easement for ingress and egress, they are secondary easements, and so plaintiff was entitled to make the cut and build the wall in furtherance of her rights and her full enjoyment of the easement. Plaintiff acted reasonably in grading and seeking to install the retaining wall to prevent defendants' land from eroding onto the roadway. She followed the city's requirements to merely excavate and make changes in the surface of the land necessary to make the

easement passable. The record showed plaintiff neither went beyond the bounds of the easement, nor increased the burden needlessly, nor injured defendants' rights. Indeed, rather than damage the usefulness of, or unduly burden, the servient estate, the evidence showed that by grading, plaintiff made the easement useable "for street purpose," and **667 the retaining wall would prevent injurious impact on defendants' property. Therefore, plaintiff benefitted defendants in the event they seek to develop their property. [Footnote omitted.]" (Emphasis added.) (Dolnikov v. Ekizian (2013) 222 Cal.App.4th 419, 430.)

The following facts are undisputed: plaintiffs are owners of specified real property; defendants own certain real property; defendants acquired their real property with knowledge about the subject recorded easement agreement; in 1989 defendants' predecessor in interest, Thomas Martin, entered into a written easement agreement with plaintiff Loewen and three other neighboring property owners; the easement grants plaintiff Loewen and the other grantees with an easement for pedestrian access over and across defendants' property to access the Folsom Lake recreation area; the easement is identified in the agreement as "a six foot strip of land lying south of the north line of the servient tenement running east of the servient tenement on Guadalupe Drive to the west of the servient tenement"; the easement agreement provides "The Easement Agreement granted herein is for pedestrian access to Folsom Lake over the servient tenement" and "the easement granted herein is appurtenant to the dominant tenement…"; the easement agreement was recorded by the El Dorado County Recorder on July 6, 1989; in 2019 defendants caused to be erected a fence with locked gates, which precludes plaintiffs' access to the easement; Folsom Lake Recreation Area is a state park open to the public; and despite repeated requests by plaintiff Loewen, defendants refuse to provide to plaintiffs access codes to the gates which prevent use of the easement.

(Defendants' Responses to Plaintiffs' Separate Statement of Undisputed Material Facts, Fact Numbers 1-10, 13, 14, 16-22, 24, and 25.)

Fact number 11 is partially disputed concerning whether the plaintiffs Dunbar's property is a dominant tenement, which is discussed later, and does not dispute that plaintiffs Loewen's and Genis' real properties are dominant tenements benefited by the easement agreement.

Despite the defendants disputing fact number 23, which states that following the easement creation it was used by the benefitted property owners to access Folsom Lake, evidence in opposition to that fact that the easement was rarely used does not controvert the facts stated in the evidence cited supporting the assertion of fact number 23 that it was used by the benefitted property owners to access Folsom Lake. This is only a dispute as to frequency of use and the fact of use itself is not disputed.

Defendants contend that the asserted fact that that plaintiffs Dunbar's property is a dominant tenement that is benefited by the easement is disputed, because the description of the land granted to them is not exactly the same as any legal description of the land benefited by the easement in the easement agreement.

The plaintiffs argue in reply that the plaintiffs Dunbar's legal description is not identical to their predecessor in interest, Viola Coelho's property description, because the Dunbars only purchased a subdivided portion of the Coelho property and the grant deed of that parcel transferred the right to use the subject easement. Evidence was submitted to establish this fact by judicial notice of the recorded subdivision parcel map, plaintiffs' Exhibit C, the grant deed, and plaintiff's Exhibit Q, the recorded easement agreement. (Plaintiffs Supplemental Request for Judicial Notice, Exhibit A – Parcel Map; Plaintiffs' Exhibit C – Grant Deed; and Plaintiffs' Exhibit Q – Recorded Easement Agreement.) The Parcel Map describes the subdivision of Parcel A, of S.E. ¼, Section 9, Township 10 North, Range 8 East, M.D.M. into three numbered

parcels 1-3. The parcel map indicates it was filed in 1985 in Book 34, page 122. The description of Viola Coelho's property that was granted the subject easement is: Parcel A of the parcel map entitled portion of Southeast ¼ of Section 9, Township 10 North, Range 8 East, M.D.M. The Grant Deed conveys parcel 1, a portion of the Southeast ¼ of Section 9, Township 10 North, Range 8 East, M.D.B.&M. as shown on the parcel map filed December 3, 1985, in Book #34, page 122 of the El Dorado County Records.

"A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed." (Civil Code § 1104.)

The fact that the land description in the Dunbars' Grant Deed is not exactly the same as any legal description of the land benefited by the easement in the easement agreement is not evidence that raises a triable issue of material fact as to whether the plaintiffs Dunbar are dominant tenement holders. Taking judicial notice of the recorded parcel map, grant deed and easement agreement, it has been established as a matter of law that they purchased a portion of the Coelho property and, therefore, the easement rights also passed to the Dunbars.

There is evidence that plaintiffs have been deprived of use of the easement by defendants' fence with a locked gate obstructing access to the easement (See Plaintiff's Exhibit S – Declaration of Michael Loewen in Support of Motion, paragraph 3; Plaintiffs' Exhibit P – Declaration of John Fairbrook, paragraphs 2 and 3 authenticating plaintiffs' Exhibits L. M, N, and S; and Exhibits L, M., and N – Requests for Admission, Set One, Number 15 propounded on defendants Masten and their response.)

There is evidence that witnesses were not aware of anyone being injured using the easement. (See Declaration of Michael Loewen in Support of Motion, paragraph 9; Declaration of John Fairbrook, paragraphs 2-4 authenticating plaintiffs' Exhibits L. M, N, S and T; plaintiffs' Exhibits L, M., and N – Requests for Admission, Set One, Number 18 propounded on defendants Masten and their response; and plaintiffs' Exhibit T - Transcript of Deposition Testimony of Folsom Lake State Recreation Area (FLSRA) Superintendent Richard Preston-Lemay, page 9, line 2 to page 11, line 17; and page 46, line 12 to page 47, line 13.)

There is evidence that the easement provides pedestrian access to Folsom Lake and specifically provides access to the Brown's Ravine trail. (See Declaration of John Fairbrook, paragraph 4 authenticating plaintiffs' Exhibit T; and plaintiffs' Exhibit T - Transcript of Deposition Testimony of Folsom Lake State Recreation Area (FLSRA) Superintendent Richard Preston-Lemay, page 9, line 2 to page 11, line 17; and page 37, lines 2-6.)

As stated earlier in this ruling: ""In moving for summary **j**udgment, a 'plaintiff ... has met' his 'burden of showing that there is no defense to a cause of action if' he 'has proved each element of the cause of action entitling' him 'to judgment on that cause of action. Once the plaintiff ... has met that burden, the burden shifts to the defendant ... to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (Emphasis added.) (Law Offices of Dixon R. Howell v. Valley (2005) 129 Cal.App.4th 1076, 1091-1092.)

The plaintiffs have met their initial burden to prove that the pedestrian easement was expressly granted by a recorded easement agreement wherein plaintiffs as an original party to the agreement and successors in interest have a right to use that easement across defendants' land for the purposes of access to Folsom Lake; and that defendants are preventing plaintiffs' use of that easement. The burden of proof shifted to defendants to submit

admissible evidence to raise a triable issue of material fact as to the existence of the plaintiffs' easement rights and/or defenses to the quiet title and injunction causes of action.

- Lawful Access to the Folsom Lake State Recreation Area

The FLSRA General Plan states with respect to trails and connectivity: "Provide sufficient access to the SRA trail system to adequately serve the public and to discourage the creation of unauthorized and individual access points by adjacent neighbors. Establish new access points as appropriate and feasible, including furnishing and improving existing informal access points." (Emphasis added.) (Defense Exhibit 4 – Transcript of Deposition Testimony of Folsom Lake State Recreation Area (FLSRA) Superintendent Richard Preston-Lemay – Exhibit 4 to Deposition – FLSRA General Plan/Resource Management Plan, Trail Access and Connectivity, paragraph VISIT-50.)

The general plan does not state that any and all unauthorized and individual access points by adjacent neighbors are illegal. It only states that sufficient public access shall be provided to the trail systems in order to discourage such private access by adjacent neighbors to the FLSRA and, in fact, that paragraph expressly provides that the FLSRA will establish new access points as appropriate and feasible, including formalizing and improving existing informal access points.

FLSRA Superintendent Richard Preston-Lemay testified that the intent of that paragraph in the plan is to only discourage and work with persons concerning unauthorized and individual access points by adjacent neighbors and that such unauthorized and individual access points by adjacent neighbors are not illegal.

FLSRA Superintendent Richard Preston-Lemay testified: the barbed wire fence is the boundary fence between private land and federal property; the fence depicted in Exhibit 5 to the deposition is a boundary fence belonging to the Bureau Reclamation that has title to the

property and he manages that property; the pubic could enter the FLSRA through the fence if they wanted to; such entry is allowed if you want to; the fence is not there to keep people out; the fence is to delineate the boundary of the state or federal land and private property; authorized access points are to funnel the majority of traffic into certain locations of the park where the facilities are there to handle that type of influx of visitation; with respect to the language of VISIT-50, it is to discourage unauthorized and individual access points of adjacent neighbors so that we're not creating a whole bunch of trails and adverse impacts to the resources; he is not aware of any state law or federal law that prohibits persons from accessing the recreation area from wherever they like; and there is a trail adjacent to the subject property, Browns Ravine Trail. (Plaintiffs' Exhibit T – Transcript of Deposition Testimony of Folsom Lake State Recreation Area (FLSRA) Superintendent Richard Preston-Lemay, page 34, line 19 to page 36, line 12; and page 37, lines 2-6.)

The evidence establishes as a matter of law that it is not illegal for plaintiffs to access the FLSRA property even where the easement foot at the boundary of the FLSRA property is an unauthorized and individual access point by an adjacent neighbor. The evidence in opposition that defendants does not raise a triable issue of material facts as to legality in that the portions of the FLSRA general plan is not reasonably construed to bar entry from unauthorized access point at adjacent private property; and the FLSRA Superintendent has admitted under oath that the language relied upon by defendants to assert that entry from the easement is illegal is not considered illegal entry.

Strictly construing the moving party's evidence, liberally construing the evidence submitted in opposition to the motion, resolving doubts as to the propriety of granting the motion in favor of the party resisting the motion, and considering all of the evidence and all of the inferences reasonably drawn therefrom in the light most favorable to the opposing party (Aguilar v.

Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843; and Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal.App.4th 1509, 1524.), the court finds that there remains no triable issue of material fact as to legality of use of the easement to access the FLSRA.

- Affirmative Defenses Regarding Maintenance and Repair of the Easement and Condition of Easement

"" 'The object of the action is to finally settle and determine, as between the parties, all conflicting claims to the property in controversy, and to decree to each such interest or estate therein as he may be entitled to.' " (*Yuba Invest. Co. v. Yuba Consol. Gold Fields* (1926) 199 Cal. 203, 209, 248 P. 672; see *Gazos Creek Mill etc. Co. v. Coburn* (1908) 8 Cal.App. 150, 153, 96 P. 359 ["all parties were before the court with their grievances"].)" (Western Aggregates, Inc. v. County of Yuba (2002) 101 Cal.App.4th 278, 305.)

"An action may be brought under this chapter to establish title against adverse claims to real or personal property or any interest therein." (Code of Civil Procedure, § 760.020(a).) "The complaint shall be verified and shall include all of the following: ¶ (a) A description of the property that is the subject of the action. In the case of tangible personal property, the description shall include its usual location. In the case of real property, the description shall include both its legal description and its street address or common designation, if any. ¶ (b) The title of the plaintiff as to which a determination under this chapter is sought and the basis of the title. If the title is based upon adverse possession, the complaint shall allege the specific facts constituting the adverse possession. ¶ (c) The adverse claims to the title of the plaintiff against which a determination is sought. ¶ (d) The date as of which the determination is sought. If the determination is sought as of a date other than the date the complaint is filed, the complaint shall include a statement of the reasons why a determination as of that date is

sought. ¶ (e) A prayer for the determination of the title of the plaintiff against the adverse claims." (Code of Civil Procedure, § 761.020.)

The second affirmative defense asserted in the answer to the 1st amended complaint is that the easement agreement expressly breached their duty to keep the easement in a safe condition to prevent injuries to persons using the easement and this duty is included in agreement to grant the easement, therefore, the plaintiffs can not enforce the agreement as they have failed to perform.

The only maintenance and repair provision of the recorded agreement granting the easement is found at paragraph 6 of the Grant of Easement relating to Secondary Easements, which provides: "The easement herein includes incidental rights of maintenance and repair." (Plaintiffs' Exhibit Q – 1989 Recoded Easement Agreement, paragraph 6.)

In other words, the agreement merely granted incidental secondary easements to the dominant tenement holders to maintain and repair the easement as is already recognized by case law as being implied in any grant of easement. (See Dolnikov v. Ekizian (2013) 222 Cal.App.4th 419, 428-429,) The provision can not be reasonably construed to impose an affirmative obligation to improve, maintain and/or repair the easement in order to be able to use the easement or enforce their easement rights.

"The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." (Civil Code, § 1644.)

"Express conditions are stated in the contract and are determined by the intention of the parties as disclosed by the agreement. (*Schwab v. Bridge*, 27 Cal.App. 204, 207, 149 P. 603.) Provisions of a contract will not be construed as conditions precedent in the absence of

language plainly requiring such construction. (*Larson v. Thoresen*, 116 Cal.App.2d 790, 794, 254 P.2d 656.)" (Sosin v. Richardson (1962) 210 Cal.App.2d 258, 264.)

The answer to the 1st amended complaint also stated as a Third Affirmative Defense that the plaintiffs have failed and refused to keep the easement in a safe condition.

The issues/defenses raised and evidence submitted in support regarding the physical condition and barbed wire fence located on the FLSRA land are not material issues to the determination of the elements of a cause of action to quiet title to the claimed express easement. In quieting tile to property the court decrees to each such interest or estate therein as the parties may be entitled to. The responsibilities for improvement, repair and maintenance of the easement are set either by the grant of the express easement or by law and the responsibilities would not reasonably arise until after the easement interests are declared by a court judgment in a quiet title action.

The underlying easement agreement, which was recorded long ago, does not condition the existence of the rights and interests of the successor dominant tenement holders on making any improvements, repairs or maintenance. The plain meaning of the language of the easement agreement does not obligate the plaintiffs to make improvements, repairs, and/or repairs. The agreement does not contractually obligate plaintiffs to obtain an FLSRA approved and authorized access point that eliminates the boundary barbed fence on the FLSRA land as a condition precedent to enforcement of their rights to use the easement to access Folsom Lake.

While there is legal authority for the proposition that under certain circumstances the dominant tenement holders have a duty to maintain and repair the easement (Southern California Edison Co. v. Severns (2019) 39 Cal.App.5th 815, 823.), that duty to repair and maintain the easement only applies to a general easement that is nonspecific as to its

particular nature, extent and/or location and the duty extends to repair and maintain the facility, structure, or improvement that the dominant tenement holder creates. (Emphasis the court's.)

"An easement granted in general terms, nonspecific as to its particular nature, extent or location, is ... perfectly valid. It entitles the holder to choose a 'reasonable' location and to use such portion of the servient tenement as may be reasonably necessary for the purposes for which the easement was created. The use actually made by the holder over a period of time fixes the location and the nature and extent of the use. [Citation.] Such an easement necessarily carries with it not only the right but also the duty to maintain and repair the structure or facility for which it was created. [Citations.]" (*Colvin*, at p. 1312, 240 Cal.Rptr. 142; see 6 Miller & Starr, Cal. Real Estate (4th ed. 2018) § 15:50, pp. 184-186.)" (Southern California Edison Co. v. Severns (2019) 39 Cal.App.5th 815, 823.)

Southern California Edison Co., supra, is distinguishable from the facts before the court in this action. There is no evidence before the court that plaintiffs improved the pedestrian easement path in any manner that would obligate them to maintain and repair the easement such that the easement is safe. There is no mandatory duty or obligation imposed on plaintiffs to repair and maintain the easement. They only have a discretionary secondary easement right to improve, repair and maintain the easement within reason.

Even assuming for the sake of argument only that the dominate tenement holder has a general duty with regards to all easements to repair and maintain the easement, it does not bar a court from determining whether the easement exists and is enforceable subject to this duty to repair and maintain.

Plaintiffs contend that the owners of the servient tenement, such as the defendants, can not obstruct or hinder plaintiffs' access for the purpose of maintaining the easement, therefore,

defendants can not prevent plaintiffs' access and then claim then can not use the easement due to failure to maintain the easement.

"Incidental or secondary easement rights are limited by a rule of reason. "The rights and duties between the owner of an easement and the owner of the servient tenement ... are correlative. Each is required to respect the rights of the other. Neither party can conduct activities or place obstructions on the property that unreasonably interfere with the other party's use of the property. In this respect, there are no absolute rules of conduct. The responsibility of each party to the other and the 'reasonableness' of use of the property depends on the nature of the easement, its method of creation, and the facts and circumstances surrounding the transaction." (6 Miller & Starr, Cal. Real Estate (3d ed.2011) § 15:63, p. 15-215 (rel. 8/2006).) ¶ As applied to dominant owners, the rule of reason allows them to exercise secondary easement rights "so long as the owner thereof uses reasonable care and does not increase the burden on or go beyond the boundaries of the servient tenement, or make any material changes therein." (*Ward v. City of Monrovia* (1940) 16 Cal.2d 815, 821–822, 108 P.2d 425; see *North Fork Water Co. v. Edwards, supra,* 121 Cal. at p. 666, 54 P. 69; *Haley v. L.A. County Flood Control Dist.,supra,* 172 Cal.App.2d at p. 290, 342 P.2d 476.) A secondary easement may be exercised "only when necessary and in such reasonable manner as not to increase the burden needlessly on the servient estate or to enlarge it by alteration in the mode of operation." (*Smith v. Rock Creek Water Corp*., *supra,* 93 Cal.App.2d at p. 53, 208 P.2d 705.) The easement owner does not have the right to "so change the surface of the land as seriously to damage the usefulness of the servient estate ... [¶] 'It is well settled that the owner of an easement cannot change its character, or materially increase the burden upon the servient estate, or injuriously affect the rights of other persons, but within the limits named he may make repairs, improvements, or changes that do not affect its substance.' " (*White v. Walsh*

(1951) 105 Cal.App.2d 828, 832, 234 P.2d 276, citing *Burris v. People's Ditch Co.* (1894) 104 Cal. 248, 252, 37 P. 922.)" (Emphasis added.) (Dolnikov v. Ekizian (2013) 222 Cal.App.4th 419, 428-429.)

Plaintiff Loewen declares: to his knowledge, no maintenance has or is required with respect to the easement area; with exception of construction activities and landscaping efforts by defendants, the easement area remains in its natural state; and over a period of over three decades, he estimates he has used the easement 500-600 times, he never has had any difficulty with the easement; from his vantage point of the easement being right in front of his hem he has observed many people over a 36 year period and all of them were able to negotiate the easement without difficulty despite age or infirmity; he has never heard of or witnessed anyone slipping or falling while walking on the easement; and he has never heard of or observed anyone being injured while using the easement. (Declaration of Michael Loewen in Support of Motion, paragraphs 5-9.)

In addition, while there is evidence of the present dangerous condition of the easement (See Declaration of Curtis Brown in Opposition to Motion, paragraphs 2-4; and Declaration of Gary Waters, paragraphs 1-8.), there is no evidence before the court concerning the condition of the easement at the time the easement agreement was entered into or that the easement had previously existed in a different condition that did not pose a safety hazard, which deteriorated due to lack of repair and maintenance by plaintiffs. Therefore, evidence that the current natural condition of the easement poses safety dangers does not raise a triable issue of material fact that the current condition of the easement was the result of the plaintiffs' failure to repair and maintain the easement.

Defendants' argument that plaintiffs are barred from enforcing their easement rights due to a triable issue of material fact as to current safety condition of the easement as plaintiffs failed

to repair and maintain as they were obligated lacks merit. The only evidence of the condition of the easement at the time it was created is located in paragraph 5 of plaintiff Loewen's declaration wherein he declares under oath that the easement remains in its natural condition and has not required maintenance with respect to the easement area. As stated earlier, there is no evidence submitted in opposition to raise a triable issue of material fact as to whether the prior condition of the easement was different and safe at any time and a failure to repair and maintain caused it to deteriorate to an unsafe condition as it is presently in the opinions of the defendant's declarants.

Strictly construing the moving party's evidence, liberally construing the evidence submitted in opposition to the motion, resolving doubts as to the propriety of granting the motion in favor of the party resisting the motion, and considering all of the evidence and all of the inferences reasonably drawn therefrom in the light most favorable to the opposing party (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843; and Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal.App.4th 1509, 1524.), the court finds that no triable issues of fact remain as to

- Defendants' Liability Concerns

First, defendants have no entitlement to raise as a defense that the plaintiffs may be injured due to an unsafe condition of property owned and operated by the FLSRA, such as the barbed wire boundary fence. Defendants simply have no standing to raise such an issue as defendants have not cited to any law that would them liable for such injuries on someone else's property.

"Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." (Code of Civil Procedure, § 367.)

"" 'As a general principle, standing to invoke the judicial process requires an actual justiciable controversy as to which the complainant has a real interest in the ultimate

adjudication because he or she has either suffered or is about to suffer an injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented to the adjudicator. [Citations.] To have standing, a party must be beneficially interested in the controversy; that is, he or she must have "some special interest to be served or some particular right to be preserved and protected over and above the interest held in common with the public at large." [Citation.] The party must be able to demonstrate that he or she has some such beneficial interest that is concrete and actual, and not conjectural or hypothetical.' [Citation.]" (*County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 814, 81 Cal.Rptr.3d 461 (*County of San Diego*), italics omitted.)" (City of Palm Springs v. Luna Crest Inc. (2016) 245 Cal.App.4th 879, 883.)

"" '[A] plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.' " (*Independent Roofing Contractors v. California Apprenticeship Council* (2003) 114 Cal.App.4th 1330, 1341, 9 Cal.Rptr.3d 477.)" (United Farmers Agents Assn., Inc. v. Farmers Group, Inc. (2019) 32 Cal.App.5th 478, 488.)

Second, it does not appear that the Civil Code, § 846 recreational use immunity applies.

"(a) An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on those premises to persons entering for a recreational purpose, except as provided in this section. ¶ (b) A "recreational purpose," as used in this section, includes activities such as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening,

gleaning, hang gliding, private noncommercial aviation activities, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites. ¶ (c) An owner of any estate or any other interest in real property, whether possessory or nonpossessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby do any of the following: ¶ (1) Extend any assurance that the premises are safe for that purpose. ¶ (2) Constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed. ¶ (3) Assume responsibility for or incur liability for any injury to person or property caused by any act of the person to whom permission has been granted except as provided in this section. ¶ (d) This section does not limit the liability which otherwise exists for any of the following: ¶ (1) Willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity. ¶ (2) Injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose. ¶ (3) Any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner. ¶ (e) This section does not create a duty of care or ground of liability for injury to person or property." (Emphasis added.) (Civil Code, § 846.)

"Section 846 was enacted to encourage property owners to allow the general public to engage in recreational activities free of charge on privately owned property." (*Hubbard v. Brown* (1990) 50 Cal.3d 189, 193, 266 Cal.Rptr. 491, 785 P.2d 1183 (*Hubbard*); accord, *Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 Cal.3d 699, 707, 190 Cal.Rptr. 494, 660 P.2d 1168 (*Delta Farms*).) "The statutory goal was to constrain the growing tendency of private landowners to bar public access to their land for recreational uses out of fear of incurring tort liability." (*Hubbard*, at p. 193, 266 Cal.Rptr. 491, 785 P.2d 1183.) It expresses "a

strong policy that land should be open to recreational use." (*Id.* at p. 192, 266 Cal.Rptr. 491, 785 P.2d 1183.) The statute accomplishes this goal "by immunizing persons with interests in property from tort liability to recreational users, thus making recreational users responsible for their own safety and eliminating the financial risk that had kept land closed." (*Ibid*.)" (Pacific Gas & Electric Co. v. Superior Court (2017) 10 Cal.App.5th 563, 567-568.)

The intent of Section 846 was to open private land to be used for recreational purposes, not to open private land to grant easements to travel to public land or private land not owned by the servient tenement to engage in recreational activity on that other land.

However, evidence that the path is dangerous does not raise a triable issue of material fact that bars entry of summary adjudication of the quiet title cause of action and injunction cause of action.

Defendants have not cited any legal authority for the proposition that mandates that the dominant tenement holders of the easement have an affirmative obligation to make major improvements to a foot path in its natural state where there is no evidence whatsoever that the pedestrian foot path was ever in a state other than it currently is, particularly when the easement was granted by agreement of the parties.

The recorded easement agreement has no provision that the dominant tenement holders are obligated to improve, repair or maintain the path as a condition precedent to exercising their rights to use the easement such that the court can not determine the rights and interests of the parties related to the claimed easement. The court is only being asked to quiet title to the interests of the parties expressly granted in the recorded easement, which would presumably include any obligations under the law regarding the easement, including non-interference with use of the easement.

As stated earlier in this ruling, evidence that the path is dangerous is not a fact that is material to the quiet title cause of action as to whether the easement exists and the parties' relative interests concerning the easement, including the obligations of repair and maintenance implied by law. It is also not an issue of material fact that would bar the court from granting injunctive relief.

Strictly construing the moving party's evidence, liberally construing the evidence submitted in opposition to the motion, resolving doubts as to the propriety of granting the motion in favor of the party resisting the motion, and considering all of the evidence and all of the inferences reasonably drawn therefrom in the light most favorable to the opposing party (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843; and Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal.App.4th 1509, 1524.), the court finds defendants' concerns of liability from allowing use of a lawfully granted and recorded easement is not grounds to deny quieting title to the easement.

The motion for summary adjudication of the Quiet Title Cause of Action is granted.

Injunctive Relief Cause of Action

"An injunction is a writ or order requiring a person to refrain from a particular act. It may be granted by the court in which the action is brought, or by a judge thereof; and when granted by a judge, it may be enforced as an order of the court." (Code of Civil Procedure, § 525.)

"A permanent injunction is an equitable remedy, not a cause of action, and thus it is attendant to an underlying cause of action. (*Camp v. Board of Supervisors* (1981) 123 Cal.App.3d 334, 356, 176 Cal.Rptr. 620.)" (County of Del Norte v. City of Crescent City (1999) 71 Cal.App.4th 965, 973.)

"A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more

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

Therefore, injunctive relief can not be summarily adjudicated. It is an equitable remedy to grant or deny upon granting summary adjudication or entry of a final judgment on the underlying cause of action, such as to quiet title that requires a person to refrain from a particular act. It is not a cause of action, affirmative defense, claim for damages, or an issue of duty.

The "Injunction Cause of Action" is entirely premised upon wrongful interference with the express easement that the quiet tile cause of action seeks to confirm. (See 1st Amended Complaint, paragraphs 19-23.) Therefore, the quiet title is the underlying action that upon summary adjudication a permanent injunction may be granted as an equitable remedy. The court can completely dispose of that cause of action by determining whether this remedy should be granted.

The elements that must be proven in order to grant the equitable remedy of injunctive relief are: "…**(**1) a tort or other wrongful act constituting a cause of action (see *Bank of America v. Williams* (1948) 89 Cal.App.2d 21, 24, 200 P.2d 151); and (2) irreparable injury, i.e., a factual showing that the wrongful act constitutes an actual or threatened injury to property or personal rights which cannot be compensated by an ordinary damage award. (See *E.H. Renzel Co. v.*

Warehousemen's Union (1940) 16 Cal.2d 369, 373, 106 P.2d 1.)" (Brownfield v. Daniel Freeman Marina Hospital (1989) 208 Cal.App.3d 405, 410.)

Strictly construing the moving party's evidence, liberally construing the evidence submitted in opposition to the motion, resolving doubts as to the propriety of granting the motion in favor of the party resisting the motion, and considering all of the evidence and all of the inferences reasonably drawn therefrom in the light most favorable to the opposing party (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843; and Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal.App.4th 1509, 1524.), the court finds it appears appropriate from the evidence previously cited in this ruling that injunctive relief should be granted as a remedy for the summary adjudication of the quiet title cause of action subject to all parties to adhere to the case law concerning their mutual entitlements concerning the repair and maintenance of the easement.

TENTATIVE RULING # 10: PLAINTIFFS MOTION FOR SUMMARY ADJUDICATION OF THE QUIET TITLE CAUSE OF ACTION IS GRANTED AND THE COURT ALSO GRANTS INJUNCTIVE RELIEF. 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, NOVEMBER 4, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

11. MATTER OF VALLIAMMAL 22CV1330

OSC Re: Name Change.

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

The mandated CLETS report is not in the court's file. (See Code of Civil Procedure, § 1279.5(f).)

TENTATIVE RULING # 11: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, NOVEMBER 4, 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.

12. PEOPLE v. KUNG PC-20210120

Pre-Trial Conference – Petition for Forfeiture.

On March 11, 2021 the People filed a petition for forfeiture of cash in the amount of $29,000 that was seized by the El Dorado County Sheriff's Department. The petition states: the funds are currently in the hands of the El Dorado County District Attorney's Office; the property became subject to forfeiture pursuant to Health and Safety Code, § 11470(f), because that money was a thing of value furnished or intended to be furnished by a person in exchange for a controlled substance, the proceeds was traceable to such an exchange, and the money was used or intended to be used to facilitate a violation of various provisions of the Health and Safety Code; and that a criminal case alleging violations of Health and Safety Code, §§ 11360 and 11366 was filed on January 31, 2020. The People pray for judgment declaring that the money is forfeited to the State of California.

Counsel appeared on behalf of Giar Kung at the January 14, 2022 hearing.

Trial on the matter was set for September 6, 2022. At the pre-trial conference on August 29, 2022 the People requested that the matter be dropped and the trial date vacated. Both parties agreed. The trial date was vacated and this hearing continued to 8:30 a.m. on Friday, November 4, 2022.

TENTATIVE RULING # 12: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, NOVEMBER 4, 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. BROUSSARD 22CV0481

Petition for Forfeiture.

On March 15, 2022 the People filed a petition for forfeiture of cash seized by the El Dorado County Sheriff's Department. The petition states: $66,570 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; the property became subject to forfeiture pursuant to Health and Safety Code, § 11470(f), because that money was a thing of value furnished or intended to be furnished by a person in exchange for a controlled substance, the proceeds was traceable to such an exchange, and the money was used or intended to be used to facilitate a violation of various provisions of the Health and Safety Code. The People pray for judgment declaring that the money is forfeited to the State of California.

Petition for Forfeiture Proof of Service

"(c) The Attorney General or district attorney shall make service of process regarding this petition upon every individual designated in a receipt issued for the property seized. In addition, the Attorney General or district attorney shall cause a notice of the seizure, if any, and of the intended forfeiture proceeding, as well as a notice stating that any interested party may file a verified claim with the superior court of the county in which the property was seized or if the property was not seized, a notice of the initiation of forfeiture proceedings with respect to any interest in the property seized or subject to forfeiture, to be served by personal delivery or by registered mail upon any person who has an interest in the seized property or property subject to forfeiture other than persons designated in a receipt issued for the property seized. Whenever a notice is delivered pursuant to this section, it shall be accompanied by a claim

form as described in Section 11488.5 and directions for the filing and service of a claim." (Emphasis added.) (Health & Safety Code, § 11488.4(c).)

The proof of service declares that on April 14, 2022 the petition, notice of judicial asset forfeiture proceeding, blank claim form opposing forfeiture (MC-200), and disclaimer of interest was served by certified mail on Anthony Broussard at a street address and P.O. Box. At the time this ruling was prepared there was no response to the petition or claim opposing forfeiture in the court's file.

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

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

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

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

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

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

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

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

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

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

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

At the hearing on September 2, 2022 the People stated the criminal case was still pending and requested the hearing be continued. The matter was continued to November 4, 2022.

TENTATIVE RULING # 13: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, NOVEMBER 4, 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. ZOLLER v. NENTWICH 21CV0084

Defendant Bowes' Motion to Set Aside Default.

On November 2, 2021 plaintiff filed an action against defendants Nentwich and Bowes for assault and battery seeking compensatory and punitive damages according to proof. On February 23, 2022 plaintiff filed a 1st Amended Complaint asserting causes of action for premises liability and intentional tort seeking compensatory and punitive damages according to proof.

The proof of service of the summons and initial complaint filed on November 16, 2021 declares that on November 15, 2021 defendant Bowes was personally served the summons and initial complaint. The court record reflects that defendant Bowes did not file an answer to the initial compliant. The proof of service of the amended complaint filed on March 28, 2022 declares that defendant Bowes was served the amended complaint on March 14, 2022 by mail to the address where defendant Bowes had been personally served the summons and initial complaint. The court record reflects that defendant Bowes did not file an answer to the amended complaint.

Default was entered on May 13, 2022. A default judgment has not been entered against defendant Bowes.

Nearly four months after entry of the default, plaintiff filed a statement of damages setting forth allegations of general damages amounting to $67,000; special damages in the amount of $24,294; and $25,000 in punitive damages.

The proof of service filed on August 19, 2022 after entry of the default declares that on August 12, 2022 defendant Bowes was personally served the amended complaint. Attached to

that proof of service is the statement of damages with a proof of service declaring that on August 12, 2022 defendant Bowes was personally served the statement of damages.

Defendant moves to vacate and set aside the default pursuant to Code of Civil Procedure, § 473 and 473.5 on the ground that entry of the default was void, because plaintiff was never properly served with the amended complaint by mail when plaintiff was required to serve defendant by personal service.

The proofs of service in the court's file declares that on August 25, 2022 notice of the hearing and a copy of the moving papers were served on plaintiff and defendant Nentwich's counsel of record to their addresses of record by mail. There is no opposition to the motion by defendant Nentwich in the court's file.

Plaintiff opposes the motion on the following grounds: the default was validly entered after three defaults by defendant; defendant has failed to establish mistake, inadvertence, surprise or excusable neglect justifying relief from default; and the timeline suggests the default was the result of a deliberate strategic decision by defendant, rather than promptly responding or appearing in the action.

The opposition appears to have been mailed directly to defendant Bowes' address in Cameron Park and not to the address of defense counsel specified on the caption page of the moving papers.

Defendant Bowes replied to the opposition.

Code of Civil Procedure, § 473(d) provides that the court may set aside any void judgment or order. Defendant essentially contends that the default and default judgment are void, because of improper service. "Notice of the litigation does not confer personal jurisdiction absent substantial compliance with the statutory requirements for service of summons. (See

Ault v. Dinner For Two, Inc. (1972) 27 Cal.App.3d 145, 148, 103 Cal.Rptr. 572.)" (MJS Enterprises, Inc. v. Superior Court (1983) 153 Cal.App.3d 555, 557-558.)

The Supreme Court has stated: "Essentially, jurisdictional errors are of two types. "Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties." (*Id.* at p. 288, 109 P.2d 942.) When a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void, and "thus vulnerable to direct or collateral attack at any time." (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 119, 101 Cal.Rptr. 745, 496 P.2d 817 (*Barquis*).)" (People v. American Contractors Indem. Co. (2004) 33 Cal.4th 653, 660.)

The court takes judicial notice that defendant Bowes and defense counsel did not appear in this action until the motion for relief from default was filed; the initial complaint and 1st amended complaint fail to allege any amount of damages sought against defendant Bowes; the statement of damages was filed on August 9, 2022, nearly four months after default; and the court is unable to find any proof of personal service of the statement of damages on defendant Bowes prior to entry of default in the court's file.

Defendant Bowes declares: defendant has never been personally served with the 1st amended complaint prior to August 13, 2022; defendant learned of the default taken against defendant on August 22, 2022; defendant immediately sought legal assistance to have the default set aside; and defendant never authorized any attorneys to accept service in this matter on defendant's behalf. (Declaration of Defendant Bowes in Support of Motion, paragraphs 3-5.)

Defense counsel declares in support of the motion: on January 13, 2022 defendant Bowes retained counsel to provide him with legal representation in this matter; though counsel was aware a complaint was filed, counsel was informed and believed that a 1st amended complaint was to be filed by plaintiff; according to the records, the 1st amended complaint was filed on

February 23, 2022; the defendant's law firm received a copy by mail; on March 4, 2022 the office sent an email to the plaintiff stating that plaintiff was required to personally serve defendant Bowes with the 1st amended complaint; plaintiff responded by email that same day asking that counsel accept service on behalf of defendant Bowes; on March 7, 2022 the office informed plaintiff by email that it was not authorized to accept service on defendant Bowe, service by mail was improper and personal service on defendant was required; and the office has not agreed to accept service in this matter and has not previously appeared in this matter. (Declaration of Mahanvir Sahota in Support of Motion, paragraphs 2-7.)

"A summons may be served by mail as provided in this section. A copy of the summons and of the complaint shall be mailed (by first-class mail or airmail, postage prepaid) to the person to be served, together with two copies of the notice and acknowledgment provided for in subdivision (b) and a return envelope, postage prepaid, addressed to the sender." (Code of Civil Procedure, § 415.30(a).)

"Except with leave of the court, all pleadings subsequent to the complaint, together with proof of service unless a summons need be issued, shall be filed with the clerk or judge, and copies thereof served upon the adverse party or his or her attorney." (Code of Civil Procedure, § 465.)

"After a party has appeared in litigation and designated a counsel of record, the general rule is that future pleadings and notices may be served on that counsel. (See §§ 465, 1010 ["Notices and other papers may be served upon the party or attorney in the manner prescribed in this chapter, when not otherwise provided by this code."].)" (Emphasis added.) (Abers v. Rohrs (2013) 217 Cal.App.4th 1199, 1209.)

The 1st amended complaint superseded the initial complaint and furnished the sole basis for the entry of a default against defendant and the original complaint ceased to have any effect

either as a pleading or as a basis for judgment. (See State Compensation Ins. Fund v. Superior Court (2010) 184 Cal.App.4th 1124, 1130–1131.) Therefore, in order to have a valid default and default judgment entered against defendant Bowes, the 1st amended complaint must have been personally served on defendant and defendant failed to timely respond to that 1st amended complaint after such personal service prior to entry of default.

Since defendant Bowes did not personally appear or appear by counsel in this litigation until the motion to vacate default was filed, service of the amended complaint on defense counsel by mail or any other method is not sufficient service of the 1st amended complaint on defendant Bowes.

In addition, personal service of the 1st amended complaint and the statement of damages defendant Bowes was required prior to entry of his default.

"The law traditionally has not accepted actual notice as a substitute for proper service of process, taking the view that a defendant need not respond if the plaintiff has not observed the statutory requirements for service of summons and complaint. "Merely because an action sounds in equity, it does not justify the court in rewriting the code sections relating to personal jurisdiction by proclaiming that 'substituted service' is just as good as 'personal service' where the defendant in fact receives the papers." (*Sternbeck v. Buck* (1957) 148 Cal.App.2d 829, 834, 307 P.2d 970.) "Although a proper basis for personal jurisdiction exists and notice is given in a manner which satisfies the constitutional requirements of due process, service of summons is not effective and the court does not acquire jurisdiction of the party unless the statutory requirements for service of summons are met." (*Schering Corp. v. Superior Court* (1975) 52 Cal.App.3d 737, 741, 125 Cal.Rptr. 337. See also, *Tresway Aero, Inc. v. Superior Court* (1971) 5 Cal.3d 431, 435, 96 Cal.Rptr. 571, 487 P.2d 1211.) The cited authorities are pertinent here even though they relate to service of summons. Where the defendant has failed

to appear in the action, service of an amended complaint in the manner provided for service of summons, while not necessarily a requirement for personal jurisdiction (see Rest., Judgments, s 5, com. g), is an essential prerequisite to a valid default judgment (id., at s 8, com. a). ¶ We are aware that the statutes providing for service of process " ' "should be liberally construed to effectuate service and uphold the jurisdiction of the court if actual notice has been received by the defendant, and in the last analysis the question of service should be resolved by considering each situation from a practical standpoint." ' " (*Pasadena Medi-Center Associates v. Superior Court* (1973) 9 Cal.3d 773, 778, 108 Cal.Rptr. 828, 511 P.2d 1180.) We are not dealing here with a minor detail but with an entirely incorrect mode of service, and the defect is significant from a practical standpoint because, as we have explained, a defendant may assume that mailed notices relate to procedural steps in taking default rather than to material changes in the nature of the action." (Emphasis added.) (Engebretson & Co. v. Harrison (1981) 125 Cal.App.3d 436, 443–444.)

"Section 473, subdivision (d), authorizes the trial court to "set aside any void judgment or order" upon a noticed motion. (*Stevenson v. Turner* (1979) 94 Cal.App.3d 315, 318, 156 Cal.Rptr. 499.) The motion may be made at any time. (*Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 862, 121 Cal.Rptr.2d 695; *Plotitsa v. Superior Court* (1983) 140 Cal.App.3d 755, 761, 189 Cal.Rptr. 769.) It is immaterial how the invalidity is called to the court's attention. (*Baird v. Smith* (1932) 216 Cal. 408, 410, 14 P.2d 749.) A prematurely entered default is invalid, and any judgment entered after an invalid default is also invalid. (Ibid.; accord, *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1286, 111 Cal.Rptr.2d 439.) ¶ Section 585 establishes procedures for obtaining defaults and default judgments. A default may be entered only after the defendant has been served with a summons [FN9] and has failed to answer or file other responsive papers within the time prescribed in the summons, or such further time as

may be allowed. (§ 585, subds.(a)-(c) & (e).) ¶ FN9. A summons may be served in the manner prescribed in sections 415.10 through 415.50. A suspended corporation may be served with a summons in the manner prescribed in sections 416.10 and 416.20. (*Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 302-303, 78 Cal.Rptr.2d 892.) ¶ A complaint must state the amount of money damages or other relief it seeks. (§ 425.10.) An exception applies where a complaint seeks damages for personal injury or wrongful death. (§ 425.11.) In these cases, the nature and amount of money damages must not be stated in the complaint, but must be stated in a separate statement described in section 425.11. (Ibid.; § 425.10.) The statement must be served in the same manner as a summons, before a default may be entered on the underlying complaint. (§ 425.11, subd. (d)(1).) ¶ Together, the statutes require that, before a default may be entered, the defendant must be served, in the same manner as a summons, with notice of the amount of money damages or other relief sought. (§§ 425.10, 425.11, 585.) The statutes apply with equal force to cross-complaints and cross-defendants. (§§ 425.10, 587.5.) ¶ The statutes preserve the defendant's right to contest an action and protect the defendant from unlimited liability. "Section 580, and related sections 585, 586, 425.10 and 425.11, aim to ensure that a defendant who declines to contest an action does not thereby subject himself to open-ended liability." (*Greenup v. Rodman* (1986) 42 Cal.3d 822, 826, 231 Cal.Rptr. 220, 726 P.2d 1295 (*Greenup*).) "The notice requirement of section 580 was designed to insure fundamental fairness." (*Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489, 494, 165 Cal.Rptr. 825, 612 P.2d 915.) ¶ Our state appellate courts have long held that due process requires formal notice of the defendant's potential liability, by service in the same manner as a summons. Under this view, actual notice is insufficient. "[T]he Courts of Appeal have insisted that due process requires formal notice of potential liability; actual notice may not substitute for service of an amended complaint. [Citation.] [¶] ... [¶] It is precisely when there is

no trial ... that formal notice, and therefore the requirement of section 425.10, become[s] critical. Notice is at the heart of the provision, as the Legislature underscored by adding section 425.11...." (Greenup, supra, 42 Cal.3d at pp. 826-827, 231 Cal.Rptr. 220, 726 P.2d 1295, italics added.) "Section 580 constitutes a statutory expression of the mandates of due process, which require 'formal notice of potential liability.' " (*Parish v. Peters* (1991) 1 Cal.App.4th 202, 207, 1 Cal.Rptr.2d 836.) ¶ Our state Supreme Court has concluded that "due process requires notice to defendants, whether they default by inaction or by wilful obstruction, of the potential consequences of a refusal to pursue their defense. Such notice enables a defendant to exercise his right to choose--at any point before trial, even after discovery has begun--between (1) giving up his right to defend in exchange for the certainty that he cannot be held liable for more than a known amount, and (2) exercising his right to defend at the cost of exposing himself to greater liability." (*Greenup*, supra, 42 Cal.3d at p. 829, 231 Cal.Rptr. 220, 726 P.2d 1295, italics added.) ¶ The high court later observed that "[i]t is a fundamental concept of due process that a judgment against a defendant cannot be entered unless he was given proper notice and an opportunity to defend. [Citations.]" (*In re Marriage of Lippel* (1990) 51 Cal.3d 1160, 1166, 276 Cal.Rptr. 290, 801 P.2d 1041, italics added.) The federal constitutional standard is whether the notice is "reasonably calculated, under all the circumstances" to apprise the defendant of the relief sought. (*Dusenbery v. U.S.* (2002) 534 U.S. 161, 167-168, 122 S.Ct. 694, 151 L.Ed.2d 597; *Mullane v. Central Hanover B. & T. Co.* (1949) 339 U.S. 306, 313-315, 70 S.Ct. 652, 94 L.Ed. 865.) ¶ Regardless of whether formal notice is constitutionally required, formal notice is statutorily required. (§§ 425.10, 425.11, 585.) Formal notice is "an essential prerequisite to a valid default judgment." (*Engebretson & Co. v. Harrison* (1981) 125 Cal.App.3d 436, 443-444, 178 Cal.Rptr. 77 (*Engebretson*) [mail service of amended complaint inadequate notice].) ¶ And, where section 425.11 applies, the statement of damages must

separately state the amounts of special and general damages sought. "Section 425.11 has been construed to require 'a statement of both special and general damages sought [because] ... such information aids a defendant in evaluating the validity of plaintiff's damage claims with regard to their provability.' " (*Jones v. Interstate Recovery Service* (1984) 160 Cal.App.3d 925, 929, 206 Cal.Rptr. 924.)" (Schwab v. Southern California Gas Co. (2004) 114 Cal.App.4th 1308, 1320-1322.)

The 1st amended complaint added a premises liability cause of action asserted against both defendants. (See 1st Amended Complaint, paragraphs Prem.L-1., Prem.L-3., and Prem.L-5.b.) The 1st amended complaint was not personally served on defendant Bowes until more than four months after entry of the default against defendant.

In addition, the statement of damages was not filed until nearly four months after defendant Bowes was defaulted and not personally served on defendant Bowes until over four months after entry of default.

In appears, under the circumstances presented, that the default was prematurely entered against defendant Bowes, the entry of default is void, and the default must be vacated and set aside. Defendant Bowes' motion to vacate and set aside default is granted.

TENTATIVE RULING # 14: DEFENDANT BOWES' MOTION TO VACATE AND SET ASIDE DEFAULT 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, NOVEMBER 4, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

15. DANIELS v. CROSBY HOMES PC-20190135

Defendant Sonray Solar, Inc.'s Motion for Determination of Good Faith Settlement.

Defendant Sonray Solar, Inc. has agreed to pay $145,000 in settlement of plaintiff's claims. Defendant Sonray Solar, Inc. now moves 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 declares that the parties were served notice of the hearing and copies of the moving papers electronically through Case Anywhere on September 16, 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 counteraffidavits 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 Defendant Sonray Solar, Inc. The application, which is not opposed, sets forth the basic statutory elements. Accordingly, the court finds that settlement is in good faith.

TENTATIVE RULING # 15: DEFENDANT SONRAY SOLAR, INC.'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, NOVEMBER 4, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

16. CHOY v. RIBEIRO DEVELOPMENT, INC. PC-20120295

(1) Plaintiffs' Motion to Strike Costs.

(2) Defendants' Motion for Attorney Fees.

Plaintiffs' Motion to Strike Costs.

On August 21, 2015 judgment was entered in the amount of $466,456.40 in favor of plaintiff Choy, and jointly and severally against defendants Ribeiro Development, Inc., Johnny R. Ribeiro, and the Johnny R. Ribeiro Separate Property Trust (Trust); and in the amount of $350,142.30 in favor of plaintiff Oloriz, and jointly and severally against defendants Ribeiro Development, Inc., Johnny R. Ribeiro, and the Trust. The judgment also awarded attorney fees jointly and severally payable by defendants Ribeiro Development, Inc., Johnny R. Ribeiro, and the Trust in the amount of $85,000 and defendants Ribeiro Development, Inc., Johnny R. Ribeiro, and the Trust were also jointly and severally responsible to pay costs in the amount of $6,834.67.

The judgment was appealed. On November 3, 2020 the Third District Court of Appeal reversed the judgment entered against defendants Johnny R. Ribeiro as to plaintiffs Choy and Oloriz; reversed the judgment entered against the Trust as to plaintiff Oloriz; and remanded the case to the trial court with instructions to enter judgment in favor of defendant Johnny R. Ribeiro as to plaintiffs Choy and Oloriz, enter judgment in favor of the Trust as to plaintiff Oloriz, and for the trial court to reevaluate whether the judgment against the defendant Trust and in favor of plaintiff Choy should be reversed after considering the parties' offered extrinsic evidence.

Judge Sullivan held a hearing on March 25, 2022 to evaluate the credibility of the evidence offered at trial and issued a decision finding that the Trust is not liable for the severance pay

awarded to plaintiff Choy. On May 13, 2022 judgment was entered vacating the August 21, 2015 judgment only as to defendants Johnny R. Ribeiro and the Trust; stating that plaintiffs Choy and Oloriz shall take nothing against defendants Johnny R. Ribeiro and the Trust; and that defendants Johnny R. Ribeiro and the Trust are the prevailing parties in this action as against plaintiffs Choy and Oloriz.

. Defendants served notice of entry of the judgment on plaintiffs' counsel by email on July 6, 2022. Defendants Johnny R. Ribeiro and the Trust filed a memorandum of costs on July 25, 2022 claiming costs in the amount of $4,493.20. The proof of service declares that the memorandum of costs was served by mail and email on plaintiffs' counsel on July 25, 2022.

Plaintiff Choy moves to strike all claimed costs on the following grounds: they are duplicative of the costs on appeal that plaintiff has already paid defendants; and the memorandum of costs is untimely.

Defendants Johnny R. Ribeiro, and the Trust oppose the motion on the following grounds: the memorandum of costs was timely filed as it was filed within 17 days after email service of the notice of entry of judgment on plaintiff after taking into account that the 17th day fell on Saturday July 23, 2022 and the next date defendants were required to file the memorandum pursuant to the provisions of Rules of Court, Rule 1.10(b) was July 25, 2022; and the memorandum of costs claimed in the trial court are not the same costs on appeal claimed in the memorandum of costs on appeal.

Plaintiffs replied to the opposition.

Motion to Tax or Strike Costs General Principles

"If the items appearing in a cost bill appear to be proper charges, the burden is on the party seeking to tax costs to show that were not reasonable or necessary. On the other hand, if the items are properly objected to, they are put in issue and the burden of proof is on the party

claiming them as costs. (*Melnyk v. Robledo* (1976) 64 Cal.App.3d 618, 624, 134 Cal.Rptr. 602; *Oak Grove School Dist. v. City Title Ins. Co.* (1963) 217 Cal.App.2d 678, 698-699, 32 Cal.Rptr. 288.)" (Ladas v. California State Auto. Assn. (1993) 19 Cal.App.4th 761, 774.) "[T]he mere filing of a motion to tax costs may be a "proper objection" to an item, the necessity of which appears doubtful, or which does not appear to be proper on its face. (See *Oak Grove School Dist. v. City Title Ins. Co.* (1963) 217 Cal.App.2d 678, 698-699, 32 Cal.Rptr. 288.) However, "[i]f the items appear to be proper charges, the verified memorandum is prima facie evidence that the costs, expenses and services therein listed were necessarily incurred by the defendant [citations], and the burden of showing that an item is not properly chargeable or is unreasonable is upon the [objecting party]." (Id., at p. 699, 32 Cal.Rptr. 288; see also, Miller v. Highland Ditch Co. (1891) 91 Cal. 103, 105-106, 27 P. 536.)" (Nelson v. Anderson (1999) 72 Cal.App.4th 111, 131.)

"Allowable costs shall be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation" (Code of Civil Procedure, § 1033.5(c)(2).) and "Allowable costs shall be reasonable in amount" (Code of Civil Procedure, § 1033.5(c)(3).). In other words, "To recover a cost, it must be reasonably necessary to the litigation and reasonable in amount. (*Perko's Enterprises, Inc. v. RRNS Enterprises* (1992) 4 Cal.App.4th 238, 244, 5 Cal.Rptr.2d 470.)" (Thon v. Thompson (1994) 29 Cal.App.4th 1546, 1548.)

"…[T]he intent and effect of section 1033.5, subdivision (c)(2) is to authorize a trial court to disallow recovery of costs, including filing fees, when it determines the costs were incurred unnecessarily." (Perko's Enterprises, Inc. v. RRNS Enterprises (1992) 4 Cal.App.4th 238, 245.)

With the above legal principles in mind, the court will rule on plaintiff's motion to tax or strike the costs claimed in defendant's memorandum of costs.

Prevailing Parties

Plaintiff raises for the first time in the reply the contention that defendants are not entitled to an award of any costs, because they are not prevailing parties. Aside from being inappropriately raised in the reply leaving defendants no reasonable opportunity to respond to the argument, the court finds that the defendants are prevailing parties for the same reasons as stated in the ruling on the defendants' motion for award of attorney fees, which is being heard concurrently with this motion and that discussion and analysis is incorporated by reference into this ruling.

Plaintiffs did not ultimately prevail on any of their claims against the moving defendants; and the final judgment after remand entered on May 13, 2022 expressly found that defendants Johnny R. Ribeiro and the Trust are prevailing parties in this action as against plaintiffs Choy and Oloriz. The proof of service of notice of entry of the judgment declares that on July 6, 2022 defendants served the notice with a copy of the judgment attached by email on plaintiffs' counsel. The judgment is long final.

Timeliness of Filing Memorandum of Costs

"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.)

"(4) Electronic service of a document is complete at the time of the electronic transmission of the document or at the time that the electronic notification of service of the document is sent. However, any period of notice, or any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which time period or date is prescribed by statute or rule of court, shall be extended after service by electronic means by two court days, but the extension shall not apply to extend the time for filing any of the following: ¶(A) A notice of intention to move for new trial. ¶ (B) A notice of intention to move to vacate judgment under Section 663a. ¶ (C) A notice of appeal. ¶ This extension applies in the absence of a specific exception provided by any other statute or rule of court." (Code of Civil Procedure, § 1010.6(a)(4).)

Defendants served notice of entry of the judgment on plaintiffs' counsel by email on July 6, 2022. Defendants Johnny R. Ribeiro, and the Trust filed a memorandum of costs on July 25, 2022. Defendants had until 15 calendar days, plus two court days after defendants served notice of entry of the judgment by email to plaintiffs' counsel to file the memorandum of costs. The 17th day fell on Saturday, July 23, 2022.

"The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded." (Code Civil Procedure, § 12.)

"(a) If the last day for the performance of any act provided or required by law to be performed within a specified period of time is a holiday, then that period is hereby extended to and including the next day that is not a holiday. For purposes of this section, "holiday" means all day on Saturdays, all holidays specified in Section 135 and, to the extent provided in

Section 12b, all days that by terms of Section 12b are required to be considered as holidays. ¶ (b) This section applies to Sections 659, 659a, and 921, and to all other provisions of law providing or requiring an act to be performed on a particular day or within a specified period of time, whether expressed in this or any other code or statute, ordinance, rule, or regulation." (Code of Civil Procedure, § 12a.)

"Holidays within the meaning of this code are every Sunday and any other days that are specified or provided for as judicial holidays in Section 135." (Code of Civil Procedure, § 10.)

Therefore, defendants had until the next court day on Monday, July 25, 2022 to file the memorandum of costs. The memorandum is timely. It is irrelevant the memorandum was prematurely executed on June 25, 2022.

Duplicative Costs

Plaintiff Choy asserts that payment of costs on appeal claimed in the amount of $1,907.26 in a memorandum of costs on appeal (Judicial Council Form APP-013.) extinguishes plaintiff's responsibility for payment of costs incurred in the underlying action as payment of costs on appeal and costs incurred in the underlying action were duplicative.

The decision on appeal concluded in the Disposition section on page 24 that defendants Johnny R. Ribeiro and the Trust are entitled to recover their costs on appeal. (See Declaration of Jeffrey Fulton in Support of Motion, Exhibit 1 – Third District Court of Appeal Opinion,) The costs on appeal claimed in the memorandum of costs on appeal are $875 as a fling fee on appeal, $918.26 to prepare the original and copies of the clerk's transcript or appendix, and $114 for transmitting, filing and serving the record, briefs and other papers. (See Declaration of Jeffrey Fulton in Support of Motion, Exhibit 2 – Memorandum of Costs on Appeal (Form APP-013.).)

The Memorandum of Costs (Judicial Council Form MC-010.) filed with the trial court claims filing and motion fees in the amount of $1,605, court reporter fees of $2,424.50, and $463.70 for electronic filing or service.

Having reviewed both of the memorandums of costs, the court concludes that the costs claimed were no duplicated and defendants are entitled to recover $4,493.20 in costs.

Plaintiff Choy's motion to strike costs is denied.

Defendants' Motion for Attorney Fees.

On August 21, 2015 judgment was entered in the amount of $466,456.40 in favor of plaintiff Choy, and jointly and severally against defendants Ribeiro Development, Inc., Johnny R. Ribeiro, and the Johnny R. Ribeiro Separate Property Trust (Trust); and in the amount of $350,142.30 in favor of plaintiff Oloriz, and jointly and severally against defendants Ribeiro Development, Inc., Johnny R. Ribeiro, and the Trust. The judgment also awarded attorney fees jointly and severally payable by defendants Ribeiro Development, Inc., Johnny R. Ribeiro, and the Trust in the amount of $85,000 and defendants Ribeiro Development, Inc., Johnny R. Ribeiro, and the Trust were also jointly and severally responsible to pay costs in the amount of $6,834.67.

The judgment was appealed. On November 3, 2020 the Third District Court of Appeal reversed the judgment entered against defendants Johnny R. Ribeiro as to plaintiffs Choy and Oloriz; reversed the judgment entered against the Trust as to plaintiff Oloriz; and remanded the case to the trial court with instructions to enter judgment in favor of defendant Johnny R. Ribeiro as to plaintiffs Choy and Oloriz, enter judgment in favor of the Trust as to plaintiff Oloriz, and for the trial court to reevaluate whether the judgment against the defendant Trust and in favor of plaintiff Choy should be reversed after considering the parties' offered extrinsic evidence.

Judge Sullivan held a hearing on March 25, 2022 to evaluate the credibility of the evidence offered at trial and issued a decision finding that the Trust is not liable for the severance pay awarded to plaintiff Choy. On May 13, 2022 judgment was entered vacating the August 21, 2015 judgment only as to defendants Johnny R. Ribeiro and the Trust; stating that plaintiffs Choy and Oloriz shall take nothing against defendants Johnny R. Ribeiro, and the Trust; and that defendants Johnny R. Ribeiro, and the Trust are the prevailing parties in this action as against plaintiffs Choy and Oloriz.

Defendants Johnny R. Ribeiro, and the Trust move to recover attorney fees against plaintiffs in the amount of $233,594.84 and an additional $372.52 in costs not claimed in the memorandum of costs representing costs for electronic legal research. Defendants Johnny R. Ribeiro and the Trust argue they should be awarded attorney fees for the following reasons: they were sued under contracts that contained attorney fees provisions; had plaintiffs prevailed against defendants Johnny R. Ribeiro and the Trust in a final judgment, plaintiffs would have been prevailing parties entitled to an award of attorney fees; inasmuch as defendants Johnny R. Ribeiro and the Trust prevailed in the action brought against them by plaintiff, which as expressly found by the court in the judgment entered on May 13, 2022, defendants are entitled to an award of reasonable attorney fees incurred in defense against the action in the trial court and incurred in their successful appeal; the attorney fees incurred by the moving defendants were reasonable; the moving defendants are entitled to recover fees incurred to reply to any opposition to the motion and to appear at the hearing on the motion; and the fees can not be reduced on the ground that judgment was entered against defendant Ribeiro Development, Inc.

Plaintiff Choy opposes the motion on the following grounds: plaintiffs prevailed in this action, because they obtained a judgment against defendant Ribeiro Development, Inc. for

over $800,000, plaintiffs achieved their litigation objectives, and defendants Johnny R. Ribeiro and the Trust are the sole corporate officer and owner, respectively, who directed the litigation and took the case all the way to trial in an effort to delay and deny plaintiffs their rightful severance pay; plaintiffs prevailed on the contract action, which was the crux of the litigation, thereby making plaintiffs the prevailing party pursuant to the provisions of Civil Code, § 1717(b)(1); there is only one prevailing party and plaintiffs prevailed; the court should exercise its discretion to deny the unjust request for attorney fees; the fee request is improper, because defendants Johnny R. Ribeiro and the Trust were united in interest with defendant Ribeiro Development, Inc. which allows the court to deny the request for an award of fees; fees should be apportioned as some fees were incurred on behalf of the non-prevailing party's assertion of a defense; the fee request is duplicative and riddled with outrageous, inflated and non-compensable billing entries; it is not true that the Porter Scott bill claim was reduced by $3,975.96; the Porter Scott invoices seeking recovery of $1,804.60 in copying charges that are not recoverable; numerous attorney's fees invoiced by Porter Scott that are claimed to be recoverable by defendants Johnny R. Ribeiro and the Trust clearly were incurred by defendant Ribeiro Development, Inc. and not defendants Johnny R. Ribeiro and the Trust, such as fees to prepare defendant Ribeiro Development, Inc.'s responses to discovery and fees incurred to produce plaintiff's employment records from Ribeiro Development, Inc., which total $11,912.50; and defendants Johnny R. Ribeiro and the Trust are not entitled to recover $14,920 in attorney fees related to Johnny A. Ribeiro, the father, and his LLCs that settled the action against them and were dismissed before trial.

Defendants Johnny R. Ribeiro, and the Trust replied to the opposition: plaintiffs conceded that if defendants are prevailing parties they are entitled to an award of fees as they did not challenge the legal reason supporting plaintiffs' entitlement to an award of fees under the

contract as defendants were sued under the contract with a fee provision; since plaintiffs have not asserted the time set forth in the billing statements were unreasonable, with certain exceptions, the plaintiffs have conceded that the fees sought outside specific exceptions were reasonable in amount and reasonably incurred; by failing to address the request for additional fees to prepare a reply and appear at the hearing, plaintiffs have conceded that issue; the plaintiffs improperly seek to argue the moving defendants are not the prevailing parties after entry of a final judgment expressly finding defendants Johnny R. Ribeiro and the Trust are the prevailing parties in the action as against plaintiffs Choy and Oloriz, which leaves nothing for the court to adjudicate on that issue in ruling on this motion; even should the court revisit the issue of prevailing parties, the cases cited by plaintiffs support finding the moving defendants were the prevailing parties; the unity of interest test cited by plaintiffs was abolished in 1986 when Code of Civil Procedure, § 1032 was revised; Porter Scott did reduce the fees charged to defendants in the billing statements by not charging any fees for itemized work in the billing statements, which is the basis for the claim of a fee reduction and not that the fees actually charged were later reduced; the moving parties concede that the copying costs claimed in the amount of $1.804.60 are not recoverable; while moving defendants concede that some of the fees contested by plaintiffs are not recoverable as they were related to the defense of defendant Ribeiro Development, Inc., many of the fees claimed by the plaintiffs as not related to the moving defendants' defense are clearly incurred to defend the moving defendants; the moving defendants only concede that 24.9 hours are not recoverable by the moving defendants of the 47.7 hours plaintiffs claim are not recoverable as fees incurred by Ribeiro Development, Inc.; the attorneys for Ribeiro Development, Inc., Johnny R. Ribeiro, and the Trust did not represent Johnny A. Ribeiro and his trust and he was, in fact, represented by Jennifer Duggan of Palmer, Kazanjain, Wohl and Hoddson as reflected in the court's record,

therefore, there are no grounds to reduce the fee request by $14,920 that were asserted to have been incurred for representing defendant Johnny A. Ribeiro.

The moving defendants now seek $226,510.24 in attorney fees, which includes a reduction of $1,804.60 for copy costs claimed and fees in the amount of $5,280 incurred to defend Ribeiro Development, Inc. The moving defendants further request an award of $372.52 in additional costs.

Motion for Costs for Legal Research

"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.)

There is no evidence before the court that defendants Johnny R. Ribeiro, and the Trust filed a timely memorandum of costs that included a claim for legal research expenses. The portion of the motion seeking an additional award of costs for legal research expenses is denied.

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.'" (Emphasis added.) (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.

Prevailing Party

"Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section." (Civil Code, § 1717(b)(1).))

"Civil Code section 1717 defines the party prevailing on the contract as 'the party who recovered a greater relief in the action on the contract.' (Civ.Code, § 1717, subd. (b)(1).) Where the results of the litigation are mixed, a court has discretion to find there was no prevailing party. (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876, 39 Cal.Rptr.2d 824, 891 P.2d 804.) However, 'when a defendant defeats recovery by the plaintiff on the only contract claim in the action, the defendant is the party prevailing on the contract under section 1717 as a matter of law.' (Ibid.)" (Carole Ring & Associates v. Nicastro (2001) 87 Cal.App.4th 253, 261.)

"Typically, a determination of no prevailing party results when both parties seek relief, but neither prevails, or when the ostensibly prevailing party receives only a part of the relief sought. In other words, the judgment is ' "considered good news and bad news as to each of the parties [.]" ' (*Nasser v. Superior Court* (1984) 156 Cal.App.3d 52, 60, 202 Cal.Rptr. 552. See also *Bankes v. Lucas* (1992) 9 Cal.App.4th 365, 11 Cal.Rptr.2d 723; *McLarand, Vasquez & Partners, Inc. v. Downey Savings & Loan Assn.*, supra, 231 Cal.App.3d 1450, 282 Cal.Rptr. 828.)" (Deane Gardenhome Assn. v. Denktas (1993) 13 Cal.App.4th 1394, 1398.)

There can be more than one prevailing party in litigation where there are two or more defendants in the action, the plaintiff prevails on plaintiff's claims asserted against one or more defendants and one or more of the defendants prevail on their defense against plaintiff's action asserted against them.

"Here, Burkhalter's success on the breach of contract claim and recovery of its contractual attorney fees against Eclipse did not prevent Hamilton from recovering her contractual attorney fees against Burkhalter. Just as in *Pueblo Radiology*, Burkhalter's alter ego claim against Hamilton must be separately examined to determine the "prevailing party" as between those two litigants. This is an application of the general principle that a judgment's finality must be separately determined based on the plaintiff's claims against each defendant when there is more than one defendant. (See, e.g., *Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 9, 183 Cal.Rptr.3d 638 [there can be more than one final judgment " ' "when the case involves multiple parties and a judgment is entered which leaves no issue to be determined as to one party" ' "].) ¶ When viewed from the perspective of Burkhalter's alter ego claim against Hamilton, it is apparent that Hamilton is a prevailing party on the contract. Hamilton secured an unqualified victory against Burkhalter by obtaining a judgment of dismissal with prejudice. Indeed, even though Hamilton was not a party to the contract, she is entitled to recover her attorney fees under section 1717, because Burkhalter would have been entitled to recover its attorney fees against Hamilton had it prevailed on its alleged alter ego theory of liability. [Footnote omitted.] (See *Reynolds Metals Co. v. Alperson*, *supra*, 25 Cal.3d at pp. 128-129, 158 Cal.Rptr. 1, 599 P.2d 83.)" (Emphasis added.) (Burkhalter Kessler Clement & George LLP v. Hamilton (2018) 19 Cal.App.5th 38, 44–46.)

Plaintiffs claim that the fee request is improper, because defendants Johnny R. Ribeiro, and the Trust were united in interest with defendant Ribeiro Development, Inc. which allows the

court to deny the request for an award of fees is entirely without merit as the unity of interest exception to the entitlement to an award of costs has been abolished by the amendment of Code of Civil Procedure, § 1032 in 1986.

"The 1986 repeal and reenactment of *section 1032* substantially changed the statutory framework for determining which parties are entitled to recover costs as a matter of right. The new statute provides no exception to a party's right to recover costs when the party satisfies any of the four statutory definitions of a prevailing party. In doing so, the new statute eliminated any basis to apply the unity of interest exception found in the repealed version. Consequently, we conclude the Legislature intended to eliminate the unity of interest exception as a basis for denying costs to a prevailing defendant who otherwise is entitled to recover costs as a matter of right. (See *Zintel, supra,* 209 Cal.App.4th at p. 442, 147 Cal.Rptr.3d 157 [explaining in dicta, "Whether the Legislature intended the continued use of [the unity of interest exception] seems doubtful ... since it created four categories of litigants that automatically qualify as prevailing parties [citation], provided an award of costs must be made to those litigants '[e]xcept as otherwise expressly provided by statute' [citation], and eliminated the language in the prior version of *section 1032* upon which the unity of interest [exception] was based"].) ¶ Although the right to recover costs is entirely statutory (*Anthony, supra,* 166 Cal.App.4th at p. 1014, 83 Cal.Rptr.3d 306), Plaintiffs identify no statutory basis for the continued viability of the unity of interest exception after the 1986 repeal and reenactment of section 1032. Instead, Plaintiffs rely on a small handful of cases that have applied the exception despite the Legislature's action. (See *Benson v. Kwikset Corp.* (2007) 152 Cal.App.4th 1254, 1278[62 Cal.Rptr.3d 284] (*Benson*); *Wakefield, supra,* 145 Cal.App.4th at pp. 984-985, 52 Cal.Rptr.3d 400; *Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061, 1075-1076, 13 Cal.Rptr.3d 586 (*Textron*), disapproved on other grounds in *Zhang v. Superior Court* (2013) 57

Cal.4th 364, 382, 159 Cal.Rptr.3d 672, 304 P.3d 163; *Webber v. Inland Empire Investments, Inc.* (1999) 74 Cal.App.4th 884, 920, 88 Cal.Rptr.2d 594 (*Webber*); *Slavin v. Fink* (1994) 25 Cal.App.4th 722, 725–726, 30 Cal.Rptr.2d 750 (*Slavin*).) We decline to follow these cases because they fail to explain how the unity of interest exception remained viable after the Legislature's reenactment of *section 1032* omitted the language from the former statute that supported the exception. ¶ Three of the cases Plaintiffs rely on applied the unity of interest exception without acknowledging the Legislature repealed of the statutory basis for the exception. (*Benson, supra,* 152 Cal.App.4th at p. 1278, 62 Cal.Rptr.3d 284; *Textron, supra,* 118 Cal.App.4th at p. 1075, 13 Cal.Rptr.3d 586; *Webber, supra,* 74 Cal.App.4th at p. 920, 88 Cal.Rptr.2d 594.) The fourth case acknowledged "the statutory language has changed," but concluded "the underlying precept ... continues to apply" without providing any analysis or explanation to support that conclusion. (*Wakefield, supra,* 145 Cal.App.4th at p. 985, 52 Cal.Rptr.3d 400.) The final case similarly acknowledged the statutory language had changed, but nonetheless applied the unity of interest exception to deny a prevailing defendant costs without explaining how the exception survived the 1986 repeal and reenactment of *section 1032*. (*Slavin, supra,* 25 Cal.App.4th at p. 726 & fn. 2, 30 Cal.Rptr.2d 750.) ¶ We also note *Slavin* is internally inconsistent and misapplies *section 1032*. In one paragraph the court stated "[t]here is no doubt but that appellant has a *right* to recover costs incurred for his benefit because he was the prevailing party," but in the next paragraph the court denied the recovery. (*Slavin, supra,* 25 Cal.App.4th at pp. 725–726, 30 Cal.Rptr.2d 750, italics added.) *Slavin* summarily concluded "the circumstances of this case do not fall within the specific situations specified in ... *section 1032, subdivision (a)(4)*," because the underlying action was consolidated with another action and "appellant and [a nonprevailing defendant] were united in interest and shared the same counsel." (*Slavin,* at p. 726, 30 Cal.Rptr.2d

750.) *Slavin* provided no explanation how the appellant can be both a prevailing party entitled to recover costs as a matter of right, but not fall within any of the four definitions of a prevailing party entitled to recover costs as a matter of right. The fourth category of *section 1032, subdivision (a)(4)*, states a prevailing party includes "a defendant as against those plaintiffs who do not recover any relief against that defendant." The appellant in *Slavin* was a defendant against whom the plaintiff did not recover any relief and nothing in *section 1032*'s plain language removed the *Slavin* appellant from that category merely because the underlying actions were consolidated and the appellant shared counsel and was united in interest with another defendant who did not prevail. ¶ We therefore conclude the trial court did not err in refusing to apply the unity of interest exception and properly determined Harkey was a prevailing party entitled to recover costs as a matter of right. We next consider whether any interest Harkey shared with the nonprevailing defendants allowed the trial court to deny Harkey specific cost items." (Emphasia added.) (Charton v. Harkey (2016) 247 Cal.App.4th 730, 741–743.)

Plaintiffs did not ultimately prevail on any of their claims against the moving defendants and plaintiffs had sought and were initially awarded attorney fees premised upon the agreement which the Court of Appeal and the Trial Court ultimately determined did not bind these defendants and these defendants were not liable for any damages incurred by plaintiffs. In fact, the court's May 13, 2022 final judgment entered in this action after the Third District remanded the case to the trial court with instructions to enter judgment in favor of defendant Johnny R. Ribeiro and the Trust as to plaintiff Choy, enter judgment in favor of the Trust as to plaintiff Oloriz, and for the trial court to reevaluate whether the judgment against the defendant Trust and in favor of plaintiff Choy should be reversed after considering the parties' offered extrinsic evidence expressly found that defendants Johnny R. Ribeiro, and the Trust are prevailing

parties in this action as against plaintiffs Choy and Oloriz. The proof of service of notice of entry of the judgment filed on July 6, 2022 declares that on July 6, 2022 defendants served the notice with a copy of the judgment attached by email on plaintiffs' counsel. The judgment is long final.

Reasonable Amount of Fees

The moving defendants admit that the request for $1,804.60 in copying costs in the fee request was improper. The moving defendants also concede that 24.9 hours are not recoverable by the moving defendants of the 47.7 hours plaintiffs claim are not recoverable as fees incurred by Ribeiro Development, Inc., which amounts to a reduction in the fees requested by $5,280. (Moving Defendants' Reply, page 10, lines 4-9.) The moving parties also assert that the attorneys for Ribeiro Development, Inc., Johnny R. Ribeiro, and the Trust did not represent Johnny A. Ribeiro and his trust and he was, in fact, represented by Jennifer Duggan of Palmer, Kazanjain, Wohl and Hoddson as reflected in the court's record, therefore, there are no grounds to reduce the fee request by $14,920 that were asserted to have been incurred for representing defendant Johnny A. Ribeiro.

"That Huth was entitled to recover some portion of his attorney fees, however, does not mean the trial court's concern regarding the complete overlap of his defense with that of McLean, who was not so entitled, is irrelevant to its ultimate award. Huth may recover only reasonable attorney fees incurred in his defense of the action by Zintel. To the extent his shared counsel engaged in litigation activity on behalf of McLean for which fees are not recoverable, the court has broad discretion to apportion fees. (See *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129, 158 Cal.Rptr. 1, 599 P.2d 83 ["[w]here a cause of action based on the contract providing for attorney's fees is joined with other causes of action beyond the contract, the prevailing party may recover attorney's fees under section 1717 only as they

relate to the contract action"]; *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1604, 71 Cal.Rptr.3d 361 ["[w]here fees are authorized for some causes of action in a complaint but not for others, allocation is a matter within the trial court's discretion"].) "A court may apportion fees even where the issues are connected, related or intertwined." (*El Escorial Owners' Assn. v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337, 1365, 65 Cal.Rptr.3d 524; accord, *Shadoan v. World Savings & Loan Assn.* (1990) 219 Cal.App.3d 97, 108, 268 Cal.Rptr. 207; but see *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111, 51 Cal.Rptr.2d 286 [trial court need not apportion fees between contract and noncontract claims when claims are " ' "inextricably intertwined" ' " so it is " 'impracticable, if not impossible to separate the multitude of conjoined activities into compensable or noncompensable time units' "].) ¶ Huth and McLean's counsel submitted their billing records to the trial court and, recognizing the claim for an award of fees to Huth was stronger than the argument all fees incurred on behalf of both clients were properly awarded, presented two approaches to apportioning the fees (either $64,789.80 or $70,965 of the total of $79,585). Counsel for Zintel suggested an alternate approach that would result in an award of approximately $6,000. [FN 4] Faced with these conflicting positions, however, the trial court declined to apportion fees or to make any award at all, finding that defense counsel had failed "to specifically apportion those fees spent solely defending Mr. Huth against plaintiff's claims" and that combining the fees incurred on behalf of both McLean and Huth would result in unjust enrichment to McLean. This failure to exercise its discretion was error, and the matter must be remanded for a determination of the reasonable attorney fees to which Huth is entitled. (See *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265, 1297–1298, 87 Cal.Rptr.2d 497 [trial court abused its discretion by failing to apportion successful plaintiff's attorney fees between time spent on claims against subcontractor whose contract had attorney fee provision and those against

subcontractors without contractual fee provisions; case remanded for redetermination of fees]. ¶ FN 4. Zintel argued 70 percent of McLean and Huth's counsel's time was spent on the unsuccessful cross-complaint. Because of Huth's minor role in the litigation, Zintel also argued only 25 percent of the remaining 30 percent (7.5 percent) should be attributed to his defense of the complaint." (Zintel Holdings, LLC v. McLean (2012) 209 Cal.App.4th 431, 443–444.)

"Defendants argue that the trial court did not have enough information to support its findings, pointing to the trial court's comments about heavy redaction of the billing records. The trial court specified, however, that it awarded no fees with respect to billing items it considered to be excessively redacted, and that it resolved any doubts about the appropriateness of billing entries in favor of defendants. Moreover, unlike some other jurisdictions, California law does not require detailed billing records to support a fee award; "[a]n attorney's testimony as to the number of hours worked is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records." (*Steiny & Co. v. California Electric Supply Co.* (2000) 79 Cal.App.4th 285, 293, 93 Cal.Rptr.2d 920.) Furthermore, "[a]n award for attorney fees may be made in some instances solely on the basis of the experience and knowledge of the trial judge without the need to consider any evidence." (*Fed–Mart Corp. v. Pell Enterprises, Inc.* (1980) 111 Cal.App.3d 215, 227, 168 Cal.Rptr. 525.) Defendants' arguments about the sufficiency of the documentation submitted by the Association in support of its request for attorney fees are without merit. [FN 9.] ¶ FN 9. Moreover, defendants never objected to the adequacy of the documentation submitted by the Association in support of its motion for attorney fees, either at the hearing on the motion, or in their late-filed opposition papers. The court raised the issue of excessive redactions on its own motion, not at the prompting of defendants. As such, even if defendants' challenge to the adequacy of the evidentiary basis for the trial court's award of fees had merit, it would have been forfeited. (See *Robinson v. Grossman* (1997) 57

Cal.App.4th 634, 648, 67 Cal.Rptr.2d 380 [party that failed to object to the trial court that the opposing party's attorney fees were not sufficiently documented waived the right to object on appeal to the amount of the fee award].) ¶ Defendants also suggest that the trial court erred by not articulating in more detail its findings with respect to how it arrived at the number that it did for an award of attorney fees and costs. It is well settled, however, that the trial court was not required to issue any explanation of its decision with regard to the fee award. (*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 101, 100 Cal.Rptr.3d 152 (*Gorman*) ["We adhere to our earlier conclusion that there is no general rule requiring trial courts to explain their decisions on motions seeking attorney fees."].) To be sure, appellate review may well be "hindered" by the lack of any such explanation. (*Martino v. Denevi* (1986) 182 Cal.App.3d 553, 560, 227 Cal.Rptr. 354.) Without explanation, an award may appear arbitrary, requiring remand if the appellate court is unable to discern from the record any reasonable basis for the trial court's decision. (E.g. *Gorman, supra,* at p. 101, 100 Cal.Rptr.3d 152 ["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."].) Here, the trial court's reasoning is not so inscrutable, as discussed above." (Rancho Mirage Country Club Homeowners Association v. Hazelbaker (2016) 2 Cal.App.5th 252, 263–264.)

"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." (Emphasis added.) (Gorman v. Tassajara Development Corp. (2009) 178 Cal.App.4th 44, 101.)

The billing statements submitted in support of the request for an award of attorney fees have an extremely large number of entries. The court notes that the case was vigorously litigated by all parties. Many of the fees for legal work listed on the attorney billing statements objected to by plaintiffs are inextricably intertwined with legal work for all defendants.

The court reduces the request for award of attorney fees by the amounts of $1,804.60 in copying costs and $6,225 in attorney fees at $250 per hour that were incurred only to defend defendant Ribeiro Development, Inc. Since no fees could have been incurred by the moving defendants to defend against plaintiffs' claims asserted against Johnny A. Ribeiro and his LLCs, because he was represented by separate counsel, there is no basis to reduce the fee request by $14,920. The court awards defendants Johnny R. Ribeiro and the Trust $225,946.76 in attorney fees payable jointly and severally by plaintiffs Choy and Oloriz.

TENTATIVE RULING # 16: PLAINTIFF CHOY'S MOTION TO STRIKE COSTS IS DENIED. DEFENDANTS' MOTION FOR ATTORNEY FEES IS GRANTED IN PART AND DENIED IN PART AS DESCRIBED IN THE TEXT OF THE RULING. THE COURT AWARDS DEFENDANTS JOHNNY R. RIBEIRO AND THE TRUST $225,946.76. IN ATTORNEY FEES PAYABLE JOINTLY AND SEVERALLY BY PLAINTIFFS CHOY AND OLORIZ. 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, NOVEMBER 4, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

17. SCHIRO v. DOWNER 21CV0265

Hearing Re: Default Judgment.

On December 7, 2021 the plaintiff filed a complaint to quiet title and for declaratory relief against defendant. The proof of service filed on January 11, 2022 declares that defendant was served the summons and complaint by substituted service at defendant's residence on December 12, 2021 by serving defendant's son-in-law Dave Holmes with follow-up mailing of the summons and complaint to the address of service on December 14, 2022. Default was entered against defendant on January 27, 2022. Plaintiff requests entry of judgment against defendant. In the request for a hearing date received on July 29, 2022, plaintiff anticipates that the hearing on the judgment in the quiet title action will take less than 45 minutes.

There is an absolute ban on a judgment on default in quiet title actions and the traditional default prove-up does not apply. Even where a defendant is defaulted in a quiet title action, the plaintiff is not automatically entitled to judgment in his or her favor but must prove his or her case in an evidentiary hearing with live witnesses and any other admissible evidence. (Nickell v. Matlock (2012) 206 Cal.App.4th 934, 945-947.)

"In general, "after a plaintiff has obtained a default [against a defendant who failed to file a timely response to the complaint], the defendant no longer has any right to participate in the case.... Under section 764.010, by contrast, the court must 'in all cases' 'hear such evidence as may be offered respecting the claims of *any* of the defendants' ... before it can render judgment. 'Any' defendant has to include a defendant whose default has been taken, and 'all cases' must mean even cases in which a default has occurred. If a defendant shows up before judgment is entered, the court must 'hear such evidence' as this party may offer about its claims, even if the defendant is in default. We can see no other way of interpreting this statute."

(*Harbour Vista, supra,* 201 Cal.App.4th at p. 1504, 134 Cal.Rptr.3d 424, citation omitted.)" (Nickell v. Matlock (2012) 206 Cal.App.4th 934, 941-942.)

On the other hand, the defendant is not entitled to notice of the hearing or participation in any other hearings. ""[I]t is not true ... that allowing a defendant to participate in a quiet title judgment hearing nullifies the legal effect of a default.... [S]ection 764.010 does not prohibit a quiet title plaintiff from taking a defendant's default. Once that happens, the defendant is severely disadvantaged. The plaintiff is no longer required to serve documents on it or give notice of any future court dates.... This cuts the defendant off from the most readily available source of information about the case. The defendant also cannot participate in any other hearings or conferences with the court. In fact, the most likely outcome is that the defaulting defendant will not learn of the hearing to adjudicate title until it is too late to attend." (*Harbour Vista, supra,* 201 Cal.App.4th at pp. 1504–1505, 134 Cal.Rptr.3d 424, citation omitted.)" (Nickell v. Matlock (2012) 206 Cal.App.4th 934, 942.)

The request for entry of default does not include a declaration of non-military service, which is required to enter a judgment. "…if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court a declaration under penalty of perjury setting forth facts showing that the defendant is not in the military service…"(Military and Veterans Code, § 402(a).) This needs to be addressed.

TENTATIVE RULING # 17: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, NOVEMBER 4, 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.

18. PAINTER v. BENTON PC-20210202

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

Defendants Arnest and Filo Real Estate, Inc. has agreed to pay $32,500 in settlement of plaintiffs' claims. Defendants Arnest and Filo Real Estate, Inc. 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 declares that the parties were mailed and emailed notice of the hearing and copies of the moving papers on September 27, 2022. There was no opposition to the motion in the court's file when 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 counteraffidavits 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 Arnest and Filo Real Estate, Inc. The application, which is not opposed, sets forth the basic statutory elements. Accordingly, the court finds that settlement is in good faith.

TENTATIVE RUING # 18: DEFENDANTS ARNEST'S AND FILO REAL ESTATE, INC.'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, NOVEMBER 4, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.