1. NELSON v ALTA CALIFORNIA REGIONAL CENTER 22CV1401

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

TENTATIVE RULING # 1: THE ENTIRE ACTION HAVING BEEN VOLUNTARILY DISMISSED WITHOUT PREJUDICE UPON PETITIONER'S REQUEST ON NOVEMBER 8, 2022, THIS MATTER IS DROPPED FROM THE CALENDAR.

2. CAPITAL ONE BANK v. SILVA PCL-20210464

Plaintiff's Motion for Order Deeming Admitted Requests for Admission.

Plaintiff's counsel declares: on October 5, 2021 requests for admission were served on defendant; and despite a request for responses and production without objections, defendant failed to provide any responses to the discovery propounded. Plaintiff moves to deem admitted the requests for admission. Monetary sanctions have not been requested.

The proof of service in the court's file declares that on October 3, 2022 notice of the hearing and copies of the moving papers were served on defendant by mail to his address of record. There was no opposition to the motion in the court's file at the time this ruling was prepared.

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

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

Under the circumstances presented, it appears appropriate to grant the motion and deem admitted the requests for admission.

TENTATIVE RULING # 2: PLAINTIFF'S MOTION TO DEEM ADMITTED REQUESTS FOR ADMISSION, SET ONE PROPOUNDED UPON DEFENDANT IS GRANTED. THE COURT

ORDERS THAT REQUESTS FOR ADMISSION, SET ONE PROPOUNDED UPON DEFENDANT ARE DEEMED ADMITTED. PLAINTIFF NOT HAVING REQUESTED AN AWARD OF MONETARY SANCTIONS, NO MONETARY SANCTIONS ARE AWARDED. 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 BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED. 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 18, 2022 EITHER IN PERSON OR BY ZOOM APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

3. MCALPINE v. NORMAN SC-20160157

Defendant Norman's Motion for Summary Judgment.

TENTATIVE RULING # 3: THIS MATTER IS CONTINUED TO 8:30 A.M. ON FRIDAY, JANUARY 13, 2023 IN DEPARTMENT NINE.

4. COUNTY OF EL DORADO v MURILLO PC-20210310

(1) Motion for Order for Prejudgment Possession in Eminent Domain Case and Order for Certification of Taxes.

(2) Motion for Order for Service of Summons by Publication.

Motion for Order for Prejudgment Possession in Eminent Domain Case and Order for Certification of Taxes.

On June 15, 2021 plaintiff County of El Dorado filed a complaint seeking to obtain certain real property by means of eminent domain. Plaintiff moves pursuant to the provisions of Code of Civil Procedure, § 1255.010 for an order for prejudgment possession of the subject real property after allegedly depositing with the State Treasury the probable amount of compensation, based on an appraisal, that will be awarded in the instant proceeding. Plaintiff further seeks an order directing the County Tax Collector to certify the specific information enumerated in Code of Civil Procedure, § 1260.250(c).

Notice

"(b) The plaintiff shall serve a copy of the motion on the record owner of the property and on the occupants, if any. The plaintiff shall set the court hearing on the motion not less than 60 days after service of the notice of motion on the record owner of unoccupied property. If the property is lawfully occupied by a person dwelling thereon or by a farm or business operation, service of the notice of motion shall be made not less than 90 days prior to the hearing on the motion." (Code of Civil Procedure, § 1255.410(b).)

"…The motion shall include a statement substantially in the following form: "You have the right to oppose this motion for an order of possession of your property. If you oppose this motion you must serve the plaintiff and file with the court a written opposition to the motion

within 30 days from the date you were served with this motion." If the written opposition asserts a hardship, it shall be supported by a declaration signed under penalty of perjury stating facts supporting the hardship." (Code of Civil Procedure, § 1255.410(a).)

The notice of motion includes a statement in bold type in substantially the same form as mandated in Section 1255.410(a).

The proofs of service in the court's file declare: on August 18, 2022 notice of the hearing and the moving papers were served by mail to counsel for defendants Murillo.

"(c) Not later than 30 days after service of the plaintiff's motion seeking to take possession of the property, any defendant or occupant of the property may oppose the motion in writing by serving the plaintiff and filing with the court the opposition. If the written opposition asserts a hardship, it shall be supported by a declaration signed under penalty of perjury stating facts supporting the hardship. The plaintiff shall serve and file any reply to the opposition not less than 15 days before the hearing." (Code of Civil Procedure, § 1255.410(c).)

Defendants Murillo oppose the motion on the following grounds: the request for a 4,918 square foot temporary construction easement (TCE) on defendants Murillo's property to construct, maintain and design Phase 1B of the Diamond Springs Parkway for a period of 7 years (84 months) is not justified and should be denied, because the County has not explained why such lengthy easement period is required, particularly since the County admits in the Harrington Declaration in support of the motion that it is anticipated the project will commence in summer 2023 and the County has committed to complete the project by the end of 2025, a period of only 18-24 months.

The reply asserts the following: defendants do not contest that the County is entitled to take the subject fee simple interests, drainage and public utility easements, and TCE; and the claim that an 84 month TCE is an excessive amount of time is barred by the failure of defendants to

exhaust their administrative remedy to challenge the County's adoption of the Resolution of Necessity (RON), which is now conclusive as to the issue of whether the property sought to be acquired is necessary for the project.

Prejudgment Possession

"(a) At the time of filing the complaint or at any time after filing the complaint and prior to entry of judgment, the plaintiff may move the court for an order for possession under this article, demonstrating that the plaintiff is entitled to take the property by eminent domain and has deposited pursuant to Article 1 (commencing with Section 1255.010) an amount that satisfies the requirements of that article. ¶ The motion shall describe the property of which the plaintiff is seeking to take possession, which description may be by reference to the complaint, and shall state the date after which the plaintiff is seeking to take possession of the property. ..." (Code of Civil Procedure, § 1255.410(a).)

"(a) At any time before entry of judgment, the plaintiff may deposit with the State Treasury the probable amount of compensation, based on an appraisal, that will be awarded in the proceeding. The appraisal upon which the deposit is based shall be one that satisfies the requirements of subdivision (b). The deposit may be made whether or not the plaintiff applies for an order for possession or intends to do so." (Code of Civil Procedure, § 1255.010(a).)

"(b) Before making a deposit under this section, the plaintiff shall have an expert qualified to express an opinion as to the value of the property (1) make an appraisal of the property and (2) prepare a written statement of, or summary of the basis for, the appraisal. The statement or summary shall contain detail sufficient to indicate clearly the basis for the appraisal, including, but not limited to, all of the following information: ¶ (A) The date of valuation, highest and best use, and applicable zoning of the property. ¶ (B) The principal transactions, reproduction or replacement cost analysis, or capitalization analysis, supporting the appraisal. ¶ (C) If the

appraisal includes compensation for damages to the remainder, the compensation for the property and for damages to the remainder separately stated, and the calculations and a narrative explanation supporting the compensation, including any offsetting benefits." (Code of Civil Procedure, § 1255.010(b).)

"(2) If the motion is opposed by a defendant or occupant within 30 days of service, the court may make an order for possession of the property upon consideration of the relevant facts and any opposition, and upon completion of a hearing on the motion, if the court finds each of the following: ¶ (A) The plaintiff is entitled to take the property by eminent domain. ¶ (B) The plaintiff has deposited pursuant to Article 1 (commencing with Section 1255.010) an amount that satisfies the requirements of that article. ¶ (C) There is an overriding need for the plaintiff to possess the property prior to the issuance of final judgment in the case, and the plaintiff will suffer a substantial hardship if the application for possession is denied or limited. ¶ (D) The hardship that the plaintiff will suffer if possession is denied or limited outweighs any hardship on the defendant or occupant that would be caused by the granting of the order of possession." (Code of Civil Procedure, § 1255.410(d)(2).)

"The power of eminent domain may be exercised to acquire property for a proposed project only if all of the following are established: ¶ (a) The public interest and necessity require the project. ¶ (b) The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury. ¶ (c) The property sought to be acquired is necessary for the project." (Code of Civil Procedure, § 1240.030.)

"(a) Except as otherwise provided by statute, a resolution of necessity adopted by the governing body of the public entity pursuant to this article conclusively establishes the matters referred to in Section 1240.030." (Code of Civil Procedure, § 1245.250(a).)

"(a) A person having an interest in the property described in a resolution of necessity adopted by the governing body of the public entity pursuant to this article may obtain judicial review of the validity of the resolution: ¶ (1) Before the commencement of the eminent domain proceeding, by petition for a writ of mandate pursuant to Section 1085. The court having jurisdiction of the writ of mandate action, upon motion of any party, shall order the writ of mandate action dismissed without prejudice upon commencement of the eminent domain proceeding unless the court determines that dismissal will not be in the interest of justice. ¶ (2) After the commencement of the eminent domain proceeding, by objection to the right to take pursuant to this title. ¶ (b) A resolution of necessity does not have the effect prescribed in Section 1245.250 to the extent that its adoption or contents were influenced or affected by gross abuse of discretion by the governing body. ¶ (c) Nothing in this section precludes a public entity from rescinding a resolution of necessity and adopting a new resolution as to the same property subject, after the commencement of an eminent domain proceeding, to the same consequences as a conditional dismissal of the proceeding under Section 1260.120." (Code of Civil Procedure, § 1245.255.)

"Section 1245.255, subdivision (a), which provides for limited judicial review of the validity of a resolution of necessity, does not help appellants. It states that judicial review may be obtained "(1) Before the commencement of the eminent domain proceeding, by petition for a writ of mandate pursuant to Section 1085. The court having jurisdiction of the writ of mandate action, upon motion of any party, shall order the writ of mandate action dismissed without prejudice upon commencement of the eminent domain proceeding unless the court determines that dismissal will not be in the interest of justice. (2) After the commencement of the eminent domain proceeding, by objection to the right to take pursuant to this title." Thus, judicial review of the resolution of necessity is available by asserting a defense to the eminent domain

proceeding or by filing a petition for writ of mandate. (See *Anaheim Redevelopment Agency v. Dusek* (1987) 193 Cal.App.3d 249, 253, fn. 3, 239 Cal.Rptr. 319; *Huntington Park Redevelopment Agency v. Duncan* (1983) 142 Cal.App.3d 17, 25–26, 190 Cal.Rptr. 744, cert. denied 464 U.S. 895, 104 S.Ct. 243, 78 L.Ed.2d 232.) ¶ In this case, the trial court treated appellants' objections to the "quick take" and resolution of necessity as a request to stay the order of immediate possession pursuant to section 1255.430. Thus, appellants, in essence, availed themselves of the section 1255.430 remedy. In addition, appellants filed a writ of mandate to review the November 5 order. Accordingly, it is clear that appellants have had several opportunities to challenge the order of immediate possession. They may not now seek review of the order by appeal. As the foregoing discussion demonstrates, an order entered pursuant to section 1255.410 is not appealable. ¶ The appeal is dismissed." (City of Morgan Hill v. Alberti (1989) 211 Cal.App.3d 1435, 1437–1438.)

"For most governmental agencies in California, however, the adoption of a condemnation resolution by their governing board gives rise to a conclusive presumption that the taking is justified. The 1975 comprehensive revision of the California eminent domain statutes attempted to meet the questionable constitutionality of the conclusive presumption (see *Fuentes v. Shevin* (1972) 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556; *Blair v. Pitchess* (1971) 5 Cal.3d 258, 96 Cal.Rptr. 42, 486 P.2d 1242) by enacting Code of Civil Procedure section 1245.255(b) which permits attack on the otherwise conclusive presumption where there has been a gross abuse of discretion by the governing body. ¶ As we see it, once a defendant property owner establishes by substantial evidence that the resolution of necessity was invalidly adopted and because of a gross abuse of discretion is not entitled to its ordinary conclusive effect, the burden of proving the elements for a particular taking must rest on the governmental agency. In such a case, the trial court must then determine whether the agency

has made its case by a preponderance of the evidence. Appellate review of the trial court's decision is limited by the substantial evidence test. (See *City of Los Angeles v. Keck* (1971) 14 Cal.App.3d 920, 926, 92 Cal.Rptr. 599; *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429, 45 P.2d 183.)" (Redevelopment Agency v. Norm's Slauson (1985) 173 Cal.App.3d 1121, 1128.)

"However, a person having an interest in property described in a resolution of necessity may still obtain judicial review of the validity of the resolution. (§ 1245.255.) Review is available *before* the eminent domain action via a writ of mandate pursuant to section 1085. (*Ibid.*) Review is also available *after* the commencement of the eminent domain proceeding by objection to the right to take. (§ 1245.255; *Anaheim Redevelopment Agency v. Dusek* (1987) 193 Cal.App.3d 249, 255, 239 Cal.Rptr. 319; *City of Morgan Hill v. Alberti* (1989) 211 Cal.App.3d 1435, 1438, 260 Cal.Rptr. 42.) ¶ A resolution of necessity will not have a conclusive effect as to the three criteria set forth under section 1240.030 "to the extent that its adoption or contents were influenced or affected by gross abuse of discretion by the governing body." (§ 1245.255, subd. (b); *Anaheim Redevelopment Agency v. Dusek, supra,* 193 Cal.App.3d at p. 255, 239 Cal.Rptr. 319.) [Footnote omitted.] A gross abuse of discretion may be shown by a lack of substantial evidence supporting the resolution of necessity. (*Huntington Park Redevelopment Agency v. Duncan* (1983) 142 Cal.App.3d 17, 24, 190 Cal.Rptr. 744.) It may also be shown where at the time of the agency hearing, the condemnor had irrevocably committed itself to the taking of the property regardless of the evidence presented. (*Redevelopment Agency v. Norm's Slauson, supra,* 173 Cal.App.3d 1121, 219 Cal.Rptr. 365.)" (Emphasis added.) (Santa Cruz County Redevelopment Agency v. Izant (1995) 37 Cal.App.4th 141, 149.)

"Once an Agency adopts a resolution of necessity, it may then file a complaint in eminent domain. The property owner may object to the Agency's right to take. The objections may be raised by demurrer or answer, and they must be specifically pleaded. (§ 1250.350.)" (Emphasis added.) (Santa Cruz County Redevelopment Agency v. Izant (1995) 37 Cal.App.4th 141, 151.)

Defendants Murillo have not opposed the portion of the motion seeking prejudgment possession of two fee simple interests totaling 26,579 square feet and a slope, drainage, and public utility easements totaling 6099 square feet.

Professional Civil Engineer Dustin Harrington declares in paragraphs 16 and 19 of his declaration in support of the motion that the Count needs prejudgment possession of the property interests as soon as possible; the County must commence construction by sometime in the summer of 2023 to avoid increased construction costs and to allow the public to enjoy the full benefits of the project; prejudgment possession is also required for the project funding to be advanced; the County has received approximately $6.32 million in state funding, which requires specific timelines to be met to ensure timey use of the funds; and the County has committed to completing the project by the end of 2025.

The notice of deposit of the probable compensation with the State of California Condemnation Deposits Fund in the amount of $118,000 was filed on June 3, 2022. The proof of service declares that on June 2, 2022 the notice of deposit was served by email to defendants Murillo's counsel.

The County Resolution of Necessity (RON) passed and adopted by the Board of Supervisors on February 9, 2021 does not appear to have been challenged administratively. The RON expressly provided for an 84 month TCE at the top of page two of the RON. Defendants Murillo's answer failed to assert as a defense to the complaint in eminent domain

that the County's adoption of or contents of the RON were influenced or affected by gross abuse of discretion by the County Board of Supervisors. The failure to raise that issue in the answer leaves the court with the conclusive presumption pursuant to Section 1245.250(a) that the 84 month TCE sought to be acquired is necessary for the project.

Under the totality of the circumstances presented, the court finds that it has been conclusively established that the 84 month TCE sought to be acquired is necessary for the project; the plaintiff is entitled to take the property by eminent domain; the plaintiff has deposited pursuant to Article 1 (commencing with Section 1255.010) an amount that satisfies the requirements of that article; there is an overriding need for the plaintiff to possess the property prior to the issuance of final judgment in the case, and the plaintiff will suffer a substantial hardship if the application for possession is denied or limited; and the hardship that the plaintiff will suffer if possession is denied or limited outweighs any hardship on the defendant or occupant that would be caused by the granting of the order of possession.

Tax Certification

"(a) In a county where both the auditor and the tax collector are elected officials, the court shall by order give the auditor or tax collector the legal description of the property sought to be taken and direct the auditor or tax collector to certify to the court the information required by subdivision (c), and the auditor or tax collector shall promptly certify the required information to the court. In all other counties, the court shall by order give the tax collector the legal description of the property sought to be taken and direct the tax collector to certify to the court the information required by subdivision (c), and the tax collector shall promptly certify the required information to the court." (Code of Civil Procedure, § 1260.250(a).)

"(b) The court order shall be made on or before the earliest of the following dates: ¶ (1) The date the court makes an order for possession…" (Code of Civil Procedure, § 1260.250(b)(1).)

"(c) The court order shall require certification of the following information: ¶ (1) The current assessed value of the property together with its assessed identification number. ¶ (2) All unpaid taxes on the property, and any penalties and costs that have accrued thereon while on the secured roll, levied for prior tax years that constitute a lien on the property. ¶ (3) All unpaid taxes on the property, and any penalties and costs that have accrued thereon while on the secured roll, levied for the current tax year that constitute a lien on the property prorated to, but not including, the date of apportionment determined pursuant to Section 5082 of the Revenue and Taxation Code or the date of trial, whichever is earlier. If the amount of the current taxes is not ascertainable at the time of proration, the amount shall be estimated and computed based on the assessed value for the current assessment year and the tax rate levied on the property for the immediately prior tax year. ¶ (4) The actual or estimated amount of taxes on the property that are or will become a lien on the property in the next succeeding tax year prorated to, but not including, the date of apportionment determined pursuant to Section 5082 of the Revenue and Taxation Code or the date of trial, whichever is earlier. Any estimated amount of taxes shall be computed based on the assessed value of the property for the current assessment year and the tax rate levied on the property for the current tax year. ¶ (5) The amount of the taxes, penalties, and costs allocable to one day of the current tax year, and where applicable, the amount allocable to one day of the next succeeding tax year, hereinafter referred to as the "daily prorate." ¶ (6) The total of paragraphs (2), (3), and (4)." (Code of Civil Procedure, § 1260.250(c).)

"(d) If the property sought to be taken does not have a separate valuation on the assessment roll, the information required by this section shall be for the larger parcel of which the property is a part." (Code of Civil Procedure, § 1260.250(d).)

Plaintiff County's Motion for Order for Prejudgment Possession in Eminent Domain Case and Order for Certification of Taxes is granted and the court directs the County Tax Collector to certify the information enumerated in Section 1260.250(c).

Motion for Order for Service of Summons by Publication.

On June 15, 2021 plaintiff County of El Dorado filed a complaint seeking to obtain certain real property by means of eminent domain. Plaintiff moves for an order authorizing service on defendants James B. Throne, Pauline Raven Throne, their heirs, and/or their successors in interest, on the following grounds: they appear to own an easement of ingress and egress over the subject property to maintain a pipeline; after the exercise of due diligence the County believes that defendants James B. Throne and Pauline Raven Throne are deceased; and the County has been unable to verify the same or ascertain the whereabouts of their heirs or successors in interest.

The proof of service declares that on September 27, 2022 defendants Murillo were served notice of the hearing and the moving papers by email to their counsel. There was no opposition to the motion in the court's file at the time this ruling was prepared.

Code of Civil Procedure, § 415.50 provides: "(a) A summons may be served by publication if upon affidavit it appears to the satisfaction of the court in which the action is pending that the party to be served cannot with reasonable diligence be served in another manner specified in this article and that: ¶ (1) A cause of action exists against the party upon whom service is to be made or he or she is a necessary or proper party to the action; or ¶ (2) The party to be served has or claims an interest in real or personal property in this state that is subject to the jurisdiction of the court or the relief demanded in the action consists wholly or in part in excluding the party from any interest in the property. ¶ (b) The court shall order the summons to be published in a named newspaper, published in this state, that is most likely to give actual

notice to the party to be served and direct that a copy of the summons, the complaint, and the order for publication be forthwith mailed to the party if his or her address is ascertained before expiration of the time prescribed for publication of the summons. Except as otherwise provided by statute, the publication shall be made as provided by Section 6064 of the Government Code unless the court, in its discretion, orders publication for a longer period. ¶ (c) Service of a summons in this manner is deemed complete as provided in Section 6064 of the Government Code. ¶ (d) Notwithstanding an order for publication of the summons, a summons may be served in another manner authorized by this chapter, in which event the service shall supersede any published summons…"

The Judicial Council Comments to Section 415.50 state in pertinent part: "Section 415.50 provides a method for effecting service upon a defendant whose whereabouts are unknown and who has no known fixed location where service can be otherwise effected in a manner specified in this article. It is the traditional method of service of process by publication. The applicable rules dealing with such service are essentially the same as under the former law, except that service by publication under Section 415.50 is limited to instances where a better method of service specified in Sections 415.10 through 415.40 is not available, *i.e.*, by delivering process to the defendant or his agent personally (Sections 415.10, 416.90), or at his dwelling house, usual place of abode, or usual place of business (Section 415.20), or by means of ordinary first-class mail or airmail, or registered or certified airmail (Sections 415.30, 415.40). (See generally *Vorburg v. Vorburg* (1941) 18 Cal.2d 794, 117 P.2d 875; Rue v. Quinn (1902) 137 Cal. 651, 656, 70 P. 732; *Forbes v. Hyde* (1866) 31 Cal. 342, 350; see also Comment, 37 Cal.L.Rev. 80, 86-88.) These methods of service make service by publication unnecessary except where a defendant's whereabouts and his dwelling house or usual place of abode, etc., cannot be ascertained with reasonable diligence, and where no person who

may be served on his behalf can be located with reasonable diligence. ¶ The term "reasonable diligence" takes its meaning from the former law: it denotes a thorough, systematic investigation and inquiry conducted in good faith by the party or his agent or attorney (See *Vorburg v. Vorburg*, *supra*, at 797; *Stern v. Judson* (1912), 163 Cal. 726, 736, 127 P. 38; *Rue v. Quinn*, *supra*, at 657). A number of honest attempts to learn defendant's whereabouts or his address by inquiry of relatives, friends, and acquaintances, or of his employer, and by investigation of appropriate city and telephone directories, the voters' register, and the real and personal property index in the assessor's office, near the defendant's last known location, are generally sufficient. These are the likely sources of information, and consequently must be searched before resorting to service by publication. ¶The first step in service by publication is the filing of a prescribed affidavit showing in detail (1) probative facts indicating a sincere desire and a thorough search to locate the defendant, including the dates thereof and any attempts to serve the defendant by another method of service (*Rue v. Quinn*, *supra*, at 656; *Chapman v. Moore* (1907) 151 Cal. 509, 513, 91 P. 324; *Forbes v. Hyde*, *supra*, at 350), and either (2) that a cause of action exists against the defendant or that he is a necessary or proper party, or (3) that the action consists in whole or in part in excluding defendant from any interest in property in this state that is subject to the jurisdiction of the court. Such an affidavit in proper form is a jurisdictional basis of the order for publication. (*Forbes v. Hyde*, *supra*, at 350)…"

Plaintiff's counsel declares: the County ordered a litigation guarantee for the subject property in order to name all parties who have an interest in the subject property; the litigation listed an easement for the maintenance of a pipeline and for incidental purposes, which was recorded on October 27, 1947; the recorded easement identifies James B. Throne and Pauline Raven Throne as owners of the easement; counsel directed staff to attempt to locate these defendants using various specified methods to locate them; and the search resulted in

information that led to the belief that James B. Throne passed away in 1964 and Pauline Raven Throne passed away in 2005, however, they are unable to verify this belief or determine their whereabouts.

It appears under the circumstances presented that there are parties to be served who cannot with reasonable diligence be served in another manner; a cause of action exists against the parties upon whom service is to be made or they are necessary or proper parties to the action; and the parties to be served have or claim an interest in real or personal property in this state that is subject to the jurisdiction of the court or the relief demanded in the action consists wholly or in part in excluding those parties from any interest in the property.

The motion is granted.

TENTATIVE RUING # 4: PLAINTIFF COUNTY'S MOTION FOR ORDER FOR PREJUDGMENT POSSESSION IN EMINENT DOMAIN CASE AND ORDER FOR CERTIFICATION OF TAXES IS GRANTED AND THE COURT DIRECTS THE COUNTY TAX COLLECTOR TO CERTIFY THE INFORMATION ENUMERATED IN CODE OF CIVIL PROCEDURE, § 1260.250(c). THE MOTION FOR ORDER FOR SERVICE OF SUMMONS BY PUBLICATION IS GRANTED. NO HEARING ON THE MOTION FOR ORDER FOR SERVICE OF SUMMONS BY PUBLICATION 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 BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED. 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 18, 2022 EITHER IN PERSON OR BY ZOOM APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

5. EDWARDS SOLUTION v. 2 REAL, LLC PC-20170117

Hearing Re: Default Judgment.

Plaintiff filed an action against defendants asserting numerous causes of action related to a short term loan of $175,000 for the rehabilitation and resale of certain real property by defendant 2 Real, LLC at an interest rate of 10% and default interest rate of 25%. (See 1st Amended Complaint, paragraphs 13 and 15.)

Plaintiff seeks entry of a default judgment against defendants Lina Thi Pham, Tai Huu Pham, Thu Thi Dao, and Earnest Ray Mathews in the amount of $321,340 representing $175,000 in damages as stated in the complaint, $131,250 in prejudgment interest calculated at the contractual loan default interest rate of 25%, costs of $90, and attorney fees in the amount of $15,000.

On April 26, 2018 default was entered against defendants Lina Thi Pham and Tai Huu Pham. On August 9, 2018, default was entered against defendant Thu Thi Dao. On October 2, 2017, default was entered against defendant Earnest Mathews.

After default the plaintiff may apply to the court for the relief demanded in the complaint; the court shall hear the evidence offered by the plaintiff, and shall render judgment in his or her favor for such sum not exceeding the amount stated in the complaint, in the statement required by Section 425.11, or in the statement provided for by Section 425.115, as appears by such evidence to be just. (Code of Civil Procedure, § 585(b).)

The Third District Court of Appeal has held: “A defendant's failure to answer the complaint has the same effect as admitting the well-pleaded allegations of the complaint, and as to these admissions *no further proof of liability is required.* (§ 431.20, subd. (a); *Kim, supra,* 201 Cal.App.4th at pp. 281–282, 133 Cal.Rptr.3d 774.) Thus, in a default situation such as this, if

the complaint properly states a cause of action, the only additional proof required for the judgment is that needed to establish the amount of damages. (See *Beeman v. Burling, supra,* 216 Cal.App.3d at p. 1597, 265 Cal.Rptr. 719; see also *Ostling v. Loring, supra,* 27 Cal.App.4th at p. 1745, 33 Cal.Rptr.2d 391.) ¶ "The 'well-pleaded allegations' of a complaint refer to ' " 'all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.' " ' [Citations.]" (*Kim, supra*, 201 Cal.App.4th at p. 281, 133 Cal.Rptr.3d 774.) A well-pleaded complaint "set[s] forth the ultimate facts constituting the cause of action, not the evidence by which plaintiff proposes to prove those facts." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211–212, 197 Cal.Rptr. 783, 673 P.2d 660, fn. omitted; see also *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550, 67 Cal.Rptr.3d 330, 169 P.3d 559 ["[T]he complaint ordinarily is sufficient if it alleges ultimate rather than evidentiary facts."].) "The complaint delimits the legal theories a plaintiff may pursue and the nature of the evidence which is admissible. [Citation.] 'The court cannot allow a plaintiff to prove different claims or different damages at a default hearing than those pled in the complaint.' [Citation.]" (*Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, 1182, 36 Cal.Rptr.3d 663.) Thus, the plaintiff cannot supplement the general allegations of the complaint by reference to the plaintiff's showing in the summary judgment proceeding. (Cf. *FPI, supra*, 231 Cal.App.3d at pp. 383–384, 282 Cal.Rptr. 508.)" (Carlsen v. Koivumaki (2014) 227 Cal.App.4th 879, 898–899.)

"Plaintiffs in a default judgment proceeding must prove they are entitled to the damages claimed. (Code of Civ.Proc., § 585; *Taliaferro v. Hoogs* (1963) 219 Cal.App.2d 559, 560, 33 Cal.Rptr. 415.)" (Barragan v. Banco BCH (1986) 188 Cal.App.3d 283, 302.)

""It is imperative in a default case that the trial court take the time to analyze the complaint at issue and ensure that the judgment sought is not in excess of or inconsistent with it. It is not

in plaintiffs' interest to be conservative in their demands, and without any opposing party to point out the excesses, it is the duty of the court to act as gatekeeper, ensuring that only the appropriate claims get through." (*Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 868, 121 Cal.Rptr.2d 695 (*Heidary*).)" (Electronic Funds Solutions v. Murphy (2005) 134 Cal.App.4th 1161, 1179.)

Plaintiff's president declares that the loan was secured by a third trust deed on the subject residential property and personal guarantee; defendants misappropriated and misused he funds upon release; defendants ran out of money for the project and waked away and abandoned the house; the 1st trust deed holder foreclosed, which destroyed plaintiff's security in the house; and the evidence supporting entry of a judgment against the specified defaulted defendants as requested is located in the court's file, including the loan agreement, a statement of damages, and other exhibits related to the property.

Judicial Notice of Court Files

"Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451: ¶ * * * (d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States…" (Evidence Code, § 452(d).)

"The trial court shall take judicial notice of any matter specified in Section 452 if a party requests it and: ¶ (a) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and ¶ (b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter." (Evidence Code, § 453.)

"Evidence Code section 452(d) permits the court to take judicial notice of court records. However, a court cannot take judicial notice of the truth of hearsay statements simply because the statements are part of a court record. (*Ramsden v. Western Union* (1977) 71 Cal.App.3d

873, 879, 138 Cal.Rptr. 426; *People v. Thacker* (1985) 175 Cal.App.3d 594, 598-599, 221 Cal.Rptr. 37.) As stated in *Day v. Sharp* (1975) 50 Cal.App.3d 904, 123 Cal.Rptr. 918, '"A court may take judicial notice of the *existence* of each document in a court file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments."' (Id. at p. 914, 123 Cal.Rptr. 918, quoting Jefferson, Cal.Evid.Benchbook (1972) Judicial Notice, § 47.3, p. 840.)" (Magnolia Square Homeowners Assn. v. Safeco Ins. Co. (1990) 221 Cal.App.3d 1049, 1056.)

Plaintiff needs to provide copies of the documents relied upon to support entry of the default judgment against the specified defendants attached as authenticated documents to a declaration in support of the motion. It is not acceptable to state there are some documents available somewhere in the court's file, particularly since the court can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments.

Usury Law

"The rate of interest upon the loan or forbearance of any money, goods, or things in action, or on accounts after demand, shall be 7 percent per annum but it shall be competent for the parties to any loan or forbearance of any money, goods or things in action to contract in writing for a rate of interest: ¶ (1) For any loan or forbearance of any money, goods, or things in action, if the money, goods, or things in action are for use primarily for personal, family, or household purposes, at a rate not exceeding 10 percent per annum; provided, however, that any loan or forbearance of any money, goods or things in action the proceeds of which are used primarily for the purchase, construction or improvement of real property shall not be deemed to be a use primarily for personal, family or household purposes; or ¶ (2) For any loan or forbearance of any money, goods, or things in action for any use other than specified in

paragraph (1), at a rate not exceeding the higher of (a) 10 percent per annum or (b) 5 percent per annum plus the rate prevailing on the 25th day of the month preceding the earlier of (i) the date of execution of the contract to make the loan or forbearance, or (ii) the date of making the loan or forbearance established by the Federal Reserve Bank of San Francisco on advances to member banks under Sections 13 and 13a of the Federal Reserve Act as now in effect or hereafter from time to time amended (or if there is no such single determinable rate of advances, the closest counterpart of such rate as shall be designated by the Superintendent of Banks of the State of California unless some other person or agency is delegated such authority by the Legislature). ¶ No person, association, copartnership or corporation shall by charging any fee, bonus, commission, discount or other compensation receive from a borrower more than the interest authorized by this section upon any loan or forbearance of any money, goods or things in action. ¶ However, none of the above restrictions shall apply to any obligations of, loans made by, or forbearances of, any building and loan association as defined in and which is operated under that certain act known as the "Building and Loan Association Act," approved May 5, 1931, as amended, or to any corporation incorporated in the manner prescribed in and operating under that certain act entitled "An act defining industrial loan companies, providing for their incorporation, powers and supervision," approved May 18, 1917, as amended, or any corporation incorporated in the manner prescribed in and operating under that certain act entitled "An act defining credit unions, providing for their incorporation, powers, management and supervision," approved March 31, 1927, as amended or any duly licensed pawnbroker or personal property broker, or any loans made or arranged by any person licensed as a real estate broker by the State of California and secured in whole or in part by liens on real property, or any bank as defined in and operating under that certain act known as the "Bank Act," approved March 1, 1909, as amended, or any bank created and operating

under and pursuant to any laws of this State or of the United States of America or any nonprofit cooperative association organized under Chapter 1 (commencing with Section 54001) of Division 20 of the Food and Agricultural Code in loaning or advancing money in connection with any activity mentioned in said title or any corporation, association, syndicate, joint stock company, or partnership engaged exclusively in the business of marketing agricultural, horticultural, viticultural, dairy, live stock, poultry and bee products on a cooperative nonprofit basis in loaning or advancing money to the members thereof or in connection with any such business or any corporation securing money or credit from any federal intermediate credit bank, organized and existing pursuant to the provisions of an act of Congress entitled "Agricultural Credits Act of 1923," as amended in loaning or advancing credit so secured, or any other class of persons authorized by statute, or to any successor in interest to any loan or forbearance exempted under this article, nor shall any such charge of any said exempted classes of persons be considered in any action or for any purpose as increasing or affecting or as connected with the rate of interest hereinbefore fixed. The Legislature may from time to time prescribe the maximum rate per annum of, or provide for the supervision, or the filing of a schedule of, or in any manner fix, regulate or limit, the fees, bonuses, commissions, discounts or other compensation which all or any of the said exempted classes of persons may charge or receive from a borrower in connection with any loan or forbearance of any money, goods or things in action. ¶The rate of interest upon a judgment rendered in any court of this state shall be set by the Legislature at not more than 10 percent per annum. Such rate may be variable and based upon interest rates charged by federal agencies or economic indicators, or both. ¶ In the absence of the setting of such rate by the Legislature, the rate of interest on any judgment rendered in any court of the state shall be 7 percent per annum. ¶ The provisions of

this section shall supersede all provisions of this Constitution and laws enacted thereunder in conflict therewith." (Emphasis added.) (Cal. Const., Art. XV, § 1.)

Plaintiff is alleged to be a business organization. There is no evidence before the court that plaintiff is a licensed real estate broker who arranged the loan, a building and loan association, a credit union, or a bank. The "default interest" rate of 25% is unenforceable as usurious. Plaintiff may only recover 10% interest.

TENTATIVE RULING # 5: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, NOVEMBER 18, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

6. SMITH v. REPROGLE 22CV0247

Respondent's Motion to Set Aside Default and Default Judgment.

Petitioner filed a Petition for Civil Harassment Restraining Order. On June 2, 2022 respondent's counsel filed a response to the petition, which included an attached, executed Judicial Council Form CH-120 response to the petition. The hearing date was initially set for March 18, 2022. The hearing was continued to June 2, 2022 and then to September 1, 2022. On August 23, 2022 the court issued an ex parte minute order stating that due to court unavailability on September 1, 2022, the hearing was advanced to 8:30 a.m. on August 29, 2022. The minute order was served by email to petitioner and respondent's counsel on August 23, 2022.

Respondent did not appear at the August 29, 2022 hearing. Petitioner presented testimony on his own behalf and the court found clear and convincing evidence substantiated petitioner's claims. The restraining order was granted for a 1 year period with modification as to the stay away distance.

Respondent moves to set aside the judgment granting the petition pursuant to the provisions of Code of Civil Procedure, §§ 473 and 473.5 on the following grounds: counsel appeared in court for trial on September 1, 2022 and was informed by the clerk that the trial had been advanced to August 29, 2022 and the restraining order granted; neither respondent's counsel, nor respondent received notice of the advancement of the trial date; relief from the judgment granting the restraining order should be allowed as respondent and counsel did not receive actual notice of the advanced hearing in time to defend and respondent did not avoid service or engage in inexcusable neglect; and, in the alternative, relief should be granted due to inadvertence, surprise, or excusable neglect.

Petitioner opposes the motion on the following grounds: there is ample evidence that respondent received notice of the August 29, 2022 from multiple sources; it is highly probable that respondent's counsel received the same email that Sandra Smith received from the clerk; the court should have a record of that; respondent had already responded to what had been submitted to the court; there was little to no testimony taken from petitioner at the hearing and no testimony from other witnesses; respondent received a witness list and exhibit list from petitioner and subsequently decided not to appear in court; and petitioner believes that respondent failed to appear due to what was in those documents.

At the time this ruling was prepared there was no reply in the court's file.

"When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action. The notice of motion shall be served and filed within a reasonable time, but in no event exceeding the earlier of: (i) two years after entry of a default judgment against him or her; or (ii) 180 days after service on him or her of a written notice that the default or default judgment has been entered." (Code of Civil Procedure, § 473.5(a).)

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.

"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.)

Respondent's counsel declares: he did not receive notice of the trial date being advanced to August 29, 2022; after review of all folders in his email, he did not find any email informing him that the trial date was advanced; and he did not learn until September 1, 2022 when he was informed by co-counsel that the hearing had been advanced to August 29, 2022.

Sandra Smith declares in opposition: she received a phone call from the court clerk on August 23, 2022 advising her that the hearing was advanced to August 29, 2022; she received an email from the court clerk on August 23, 2022 at 3:01 p.m. with the minute order attached to the email, which stated to see the attached email advancing the September 1, 2022 hearing to August 29, 2022; attached as Exhibit 3A is her email to respondent's counsel on August 26, 2022 that stated to see the attached exhibit and witness list for Monday, August 29; and attached as Exhibit 3B is the witness list that states on page 1 that the trial is scheduled for 8/29/2022.

While Sandra Smith declares she received the court's email notification of the advancement of the hearing and sent an email to respondent's counsel on August 26, 2022 stating the witness and exhibit lists were attached for August 26, including a reference to the advanced trial date in the witness list attached to that email, respondents counsel has denied receipt of any notification that the trial date was advanced to August 26, 2022 and despite review of all folders in his email, he did not find any email informing him that the trial date was advanced.

(Emphasis the court's.) There is sufficient evidence to justify granting relief from the respondent's failure to appear at trial.

Defendant's motion to set aside default and default judgment is granted. Appearances are required at 8:30 a.m. on Friday, November 18, 2022 to set a new hearing date for the petition.

TENTATIVE RULING # 6: DEFENDANT'S MOTION TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT IS GRANTED. APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, NOVEMBER 18, 2022 TO SET A NEW HEARING DATE FOR THE PETITION. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED. NO HEARING ON MOTION TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT 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

BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED. 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 18, 2022 EITHER IN PERSON OR BY ZOOM APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

7. INTERWEST CONSULTING GROUP, INC. v. BPR CONSULTING GROUP, LLC 22CV0450

Defendants' Motion for Sanctions Pursuant to Code of Civil Procedure, § 128.7

On July 25, 2022 plaintiffs filed a 1st amended complaint against defendants asserting causes of action for breach of duty of loyalty, breach of fiduciary duty, breach of confidence, intentional interference with contract, intentional interference with prospective economic advantage, and violation of Business and Professions Code, §§ 17200, et seq.

Defendants move for the imposition of terminating sanctions and an award of $60,000 in attorney fees pursuant to the provisions of Code of Civil Procedure, § 128.7 on the following grounds: the complaint fails to state an actionable claim for breach of duty of loyalty; defendants are not fiduciaries and they did not hold secret information; the employees of plaintiffs are free to be hired by BPR and can use the resumes of those employees in proposals for jobs while the employees prepare to compete; there is no claim for intentional interference with contract or intentional interference with prospective economic advantage, because there was no independent wrongfulness committed by defendants that proximately caused damage to plaintiffs by termination of a non-terminable contract; and the complaint fails to state a claim for injunctive relief for violation of Business and Profession Code, §§ 17200, et seq., because the complaint fails to sufficiently allege defendant BPR claims it was small business in order to obtain a contract in violation of Government Code, § 14842,5

Plaintiffs assert the following grounds in opposition: California recognizes a duty of loyalty owed by all employees, regardless of whether they are fiduciaries; there was substantial conduct by the former Interwest executives in breach of their fiduciary duty dating from before their departure from Interwest; Beehler's improper use of information from Interwest's Book of Business and information he obtained through the course of his management employment with

Interwest was critical to Interwest's business and not shared with the public resulting in a breach of confidence; defendant Zapien's misuse of hundreds of documents that were not available to the public that he emailed to himself from his Interwest email account to his newly created BPR email account regarding the Madera County Hall of Justice project two days after he terminated employment from employment with Interwest breached defendant's duty of confidence; defendants BPR and Zapien intentionally interfered with plaintiffs' contracts and prospective economic advantage by soliciting business using the names and credentials of defendants' current employees representing they were BPR employees who were available to service the contracts solicited at a time when they were still employed and being paid a salary by plaintiffs and by defendant Zapien emailing Madera County on August 23, 2021 that defendant BPR was replacing Interwest in providing services on the County's Hall of Justice effective immediately where the Madera County contract for the Hall of Justice with Interwest was not cancelled until September 24, 2021; and defendant BPR engaged in unfair business practices and violated Government Code, § 1482.5(a)(4), which contains no requirement that that defendant claim it is a small business or microbusiness.

Plaintiffs request an award of $12,632 in attorney fees incurred to oppose this motion pursuant to the provisions of Code of Civil Procedure, § 128.7(c)(1).

Defendants replied to the opposition.

"By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, petition, written notice of motion, or other similar paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met: ¶ (1) It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. ¶ (2) The claims, defenses,

and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. ¶ (3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. ¶ (4) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief." (Code of Civil Procedure, § 128.7(b).)

"If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation. In determining what sanctions, if any, should be ordered, the court shall consider whether a party seeking sanctions has exercised due diligence. ¶ (1) A motion for sanctions under this section shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). Notice of motion shall be served as provided in Section 1010, but shall not be filed with or presented to the court unless, within 21 days after service of the motion, or any other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees. ¶ (2) On its own motion, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b), unless, within 21 days of service of the order to show cause, the

challenged paper, claim, defense, contention, allegation, or denial is withdrawn or appropriately corrected." (Emphasis added.) (Code of Civil Procedure, § 128.7(c).)

"A sanction imposed for violation of subdivision (b) shall be limited to what is sufficient to deter repetition of this conduct or comparable conduct by others similarly situated. Subject to the limitations in paragraphs (1) and (2), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation. ¶ (1) Monetary sanctions may not be awarded against a represented party for a violation of paragraph (2) of subdivision (b). ¶ (2) Monetary sanctions may not be awarded on the court's motion unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned." (Code of Civil Procedure, § 128.7(d).)

"…[S]anctions under section 128.7 are not limited to the filing of papers that violate all of the requirements of subdivision (b). The subdivision requires that "all of the following conditions [be] met." A violation of any of them may give rise to sanctions. (§ 128.7, subd. (c).)" (Eichenbaum v. Alon (2003) 106 Cal.App.4th 967, 976.)

The court's broad discretion to impose sanctions pursuant to Section 128.7 includes the discretion to impose a terminating sanction. (See Peake v. Underwood (2014) 227 Cal.App.4th 428, 432-433.)

Standard to Apply Concerning Imposition of Section 128.7 Sanctions

"A court has broad discretion to impose sanctions if the moving party satisfies the elements of the sanctions statute. (See *Kojababian v. Genuine Home Loans, Inc.* (2009) 174 Cal.App.4th 408, 421, 94 Cal.Rptr.3d 288.) However, the sanctions statute " 'must not be

construed so as to conflict with the primary duty of an attorney to represent his or her client zealously. Forceful representation often requires that an attorney attempt to read a case or an agreement in an innovative though sensible way. Our law is constantly evolving, and effective representation sometimes compels attorneys to take the lead in that evolution.' " (*Guillemin, supra,* 104 Cal.App.4th at pp. 167–168, 128 Cal.Rptr.2d 65.) Moreover, a sanction "shall be limited to what is sufficient to deter repetition of [the improper] conduct or comparable conduct by others similarly situated." (Code Civ. Proc., § 128.7, subd. (d).) ¶ We review a Code of Civil Procedure section 128.7 sanctions award under the abuse of discretion standard. (*Guillemin, supra,* 104 Cal.App.4th at p. 167, 128 Cal.Rptr.2d 65.) We presume the trial court's order is correct and do not substitute our judgment for that of the trial court. (*Shelton v. Rancho Mortgage & Investment Corp.* (2002) 94 Cal.App.4th 1337, 1345, 115 Cal. Rptr. 2d 82.) To be entitled to relief on appeal, the court's action must be sufficiently grave to amount to a manifest miscarriage of justice. (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 867, 64 Cal.Rptr.2d 324.)" (Peake v. Underwood (2014) 227 Cal.App.4th 428, 441.)

The Third District Court of Appeal has stated: "Writing in *Operating Engineers Pension Trust v. A–C Co.* (1988) 859 F.2d 1336, the Ninth Circuit Court of Appeals held that "[r]ule 11 must not be construed so as to conflict with the primary duty of an attorney to represent his or her client zealously. Forceful representation often requires that an attorney attempt to read a case or an agreement in an innovative though sensible way. Our law is constantly evolving, and effective representation sometimes compels attorneys to take the lead in that evolution. Rule 11 must not be turned into a bar to legal progress." (*Id.* at p. 1344.) We find that these principles are equally applicable to Code of Civil Procedure section 128.7. ¶ The trial court was not faced with a motion that was being prosecuted for an improper motive. Its finding of frivolousness was based solely on the conclusion that any reasonable attorney would agree

that the motion is totally and completely without merit. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650, 183 Cal.Rptr. 508, 646 P.2d 179 [frivolousness of appeal determined if (1) appeal is taken for an improper motive; or (2) it indisputably has no merit].) In so finding, the trial court acted unreasonably and arbitrarily. The argument advanced by Guillemin that cross-defendants were not covered by section 6103.5 because they are individuals rather than public agencies is arguable. The term *public agency* does not usually connote an individual. One must read the statute with companion provisions of the Government Code and correctly interpret legislative intent in order to understand the more expansive meaning the Legislature assigned to the term. Thus, although Guillemin's contention lacks persuasive force, his motion was not frivolous and he was entitled to zealously argue the point. We will vacate the order awarding sanctions for filing the motion to tax costs." (Emphasis added.) (Guillemin v. Stein (2002) 104 Cal.App.4th 156, 167-168.)

The Third District Court of Appeal in discussing the grounds for sanctioning a party under Code of Civil Procedure, § 128.7 has stated: "Code of Civil Procedure section 128.7 imposes a lower threshold for sanctions than is required under Code of Civil Procedure section 128.5. This is because Code of Civil Procedure section 128.7 requires only that the conduct be "objectively unreasonable," while Code of Civil Procedure section 128.5 also requires "a showing of subjective bad faith." (*In re Marriage of Reese & Guy* (1999) 73 Cal.App.4th 1214, 1221, 87 Cal.Rptr.2d 339.) ¶ Code of Civil Procedure section 128.7 was adopted to apply rule 11 of the Federal Rules of Civil Procedure (hereinafter rule 11), as amended in 1993, to cases brought on or after January 1, 1995. (See Assem. Com. on Judiciary, 3d reading analysis of Assem. Bill No. 3594 (1993-1994 Reg. Sess.) as amended May 23, 1994, pp. 1-2; Sen. Com. on Judiciary, Analysis of Assem. Bill No. 3594 (1993-1994 Reg. Sess.) as amended May 23, 1994, pp. 3-5; Sen. Com. on Judiciary, Analysis of Assem. Bill No. 3594 (1993-1994 Reg.

Sess.) August 23, 1994, p. 2; *Goodstone v. Southwest Airlines Co.* (1998) 63 Cal.App.4th 406, 423, 73 Cal.Rptr.2d 655 (*Goodstone*).) Because of this intent and the fact that the wording of Code of Civil Procedure section 128.7, subdivisions (b)(2) and (c) is almost identical to that found in rule 11(b)(2) and (c), federal case law construing Rule 11 is persuasive authority with regard to the meaning of Code of Civil Procedure section 128.7. (*Goodstone*, supra, 63 Cal.App.4th at p. 422, 73 Cal.Rptr.2d 655; *Cromwell v. Cummings* (1998) 76 Cal.Rptr.2d 171, 65 Cal.App.4th Supp. 10, 14, fn. 6.) ¶ Under both Code of Civil Procedure section 128.7 and rule 11, there are basically three types of submitted papers that warrant sanctions: factually frivolous (not well grounded in fact); legally frivolous (not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law); and papers interposed for an improper purpose. (Code Civ. Proc., § 128.7; Fed. Rules Civ.Proc., rule 11, 28 U.S.C.)" (Guillemin v. Stein (2002) 104 Cal.App.4th 156, 167.)

"A claim is factually frivolous if it is "not well grounded in fact" and is legally frivolous if it is "not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." (*Guillemin v. supra,* 104 Cal.App.4th at p. 167, 128 Cal.Rptr.2d 65.) In either case, to obtain sanctions, the moving party must show the party's conduct in asserting the claim was objectively unreasonable. (*Ibid*.) A claim is objectively unreasonable if "any reasonable attorney would agree that [it] is totally and completely without merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650, 183 Cal.Rptr. 508, 646 P.2d 179; *Guillemin, supra,* at p. 168, 128 Cal.Rptr.2d 65.) ¶ The Legislature enacted section 128.7 based on rule 11 of the Federal Rules of Civil Procedure (28 U.S.C.), as amended in 1993 (rule 11). (*Musaelian v. Adams* (2009) 45 Cal.4th 512, 518, fn. 2, 87 Cal.Rptr.3d 475, 198 P.3d 560; *Guillemin, supra,* 104 Cal.App.4th at p. 167, 128 Cal.Rptr.2d 65.) Therefore, federal case law construing rule 11 is persuasive authority on the meaning of section 128.7. (*Guillemin, supra,*

p. 167, 128 Cal.Rptr.2d 65.) Under rule 11, even though an action may not be frivolous when it is filed, it may become so if later-acquired evidence refutes the findings of a prefiling investigation and the attorney continues to file papers supporting the client's claims. (*Childs v. State Farm Mut. Auto. Ins. Co.* (5th Cir.1994) 29 F.3d 1018, 1025.) Thus, a plaintiff's attorney cannot "just cling tenaciously to the investigation he had done at the outset of the litigation and bury his head in the sand." (*Ibid.*) Instead, "to satisfy [the] obligation under [section 128.7] to conduct a reasonable inquiry to determine if his [or her] client's claim was well-grounded in fact," the attorney must "take into account [the adverse party's] evidence...." (*Ibid.*)" (Bucur v. Ahmad (2016) 244 Cal.App.4th 175, 189–190.)

This motion is not a proceeding on demurrer. The above-cited legal authorities set forth the legal principle that in order for a Section 128.7 sanction to be imposed it must be established that the claims are factually frivolous (not well grounded in fact), legally frivolous (not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law), or the papers were filed for an improper purpose. In order to be found factually or legally frivolous, it must be established that it was not objectively reasonable to maintain the claim as any reasonable attorney would agree that it is totally and completely without merit.

With the above-cited legal principles in mind the court will rule on the Section 128.7 motion for terminating sanctions.

Breach of Duty of Loyalty Cause of Action – Against All Defendants

Defendants argued that no causes of action for breach of loyalty exists in California and it is merely a cause of action for breach of fiduciary duty. Defendants contend that this cause of action fails along with the breach of fiduciary duty cause of action, because defendants are not fiduciaries, they did not hold secret information, and the employees of plaintiffs are free to be hired by BPR and BPR can use the resumes from those employees in proposals for jobs.

The court rejects the defendants' argument that there is no separate cause of action for breach of loyalty by employees.

"Plaintiffs alleged in their complaint that defendants Nguyen and Luu, while employed by plaintiffs "in a position of trust and confidence" as managing agents, owed a duty of loyalty to plaintiffs, which they breached by, in essence, using their positions at Huong Que, and information acquired in those positions, to compete with it. The elements of a cause of action for breach of a duty of loyalty, by analogy to a claim for breach of fiduciary duty, are as follows: (1) the existence of a relationship giving rise to a duty of loyalty; (2) one or more breaches of that duty; and (3) damage proximately caused by that breach. (See *Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1101, 3 Cal.Rptr.2d 236.)" (Emphasis added.) (Huong Que, Inc. v. Luu (2007) 150 Cal.App.4th 400, 410.)

"Moreover *employees* are deemed agents for present purposes even if they are employed in a wholly non-representative capacity. (Rest.3d, Agency, § 1.01, com. c, pp. 19–20 ["The common law of agency ... encompasses the employment relation, even as to employees whom an employer has not designated to contract on its behalf or otherwise to interact with parties external to the employer's organization"].) Thus an employee, while employed, owes undivided loyalty to his employer. (*Fowler v. Varian Associates, Inc.* (1987) 196 Cal.App.3d 34, 41, 241 Cal.Rptr. 539.) "While California law does permit an employee to seek other employment and even to make some 'preparations to compete' before resigning [citation], California law does not authorize an employee to transfer his loyalty to a competitor." (*Ibid.*) The duty of loyalty is breached, and the breach "may give rise to a cause of action in the employer, when the employee takes action which is inimical to the best interests of the employer." (*Stokes v. Dole Nut Co.* (1995) 41 Cal.App.4th 285, 295, 48 Cal.Rptr.2d 673.) Indeed, by statute, "[a]n employee who has any business to transact on his own account, similar to that entrusted to

him by his employer, shall always give the preference to the business of the employer." (Lab.Code, § 2863.)" (Huong Que, Inc. v. Luu (2007) 150 Cal.App.4th 400, 414.)

As held in Huong Que, Inc., supra, any and all employees owe a duty of loyalty that if breached when the employee takes action which is inimical to the best interests of the employer and damages result to the employer renders the employee liable to the employer for that breach of loyalty.

A partner of defendant BPR Consulting Group, LLC declares: he and his partners commenced operation of defendant BPR Consulting Group, LLC (BPR) in July of 2021; he and his two BPR partners never served as an officer or director of plaintiff Interwest or plaintiff Safebuilt; his position at Interwest was an at-will management position of Director of Building Safety Services; on June 10, 2021 Safebuilt sought to change his duties to a role in account management/business development; he proposed a slightly different position model than proposed in his June 14, 2021 email response attached as Exhibit 1; on June 28, 2022 he received an email from Safebuilt containing the "Book of Business", which contained a list of Northern California Clients and revenue generated by those clients, which he already knew about; on July 1, 2021 he travelled to Florida and met with Safebuilt representatives where they looked at the Book of Business on a computer screen and discussed its contents; thereafter he told DeRosa, Chief Executive Officer (See Exhibit 1, page 1 - Email to Ron Beehler from Mr. DeRosa), that he did not think the new role was a good fit for him and he returned to California; upon return to California he was advised by Mr. DeRosa that he was terminated and received notice of termination on July 2 2021 (Exhibit 1, page 4.); after he was terminated he had no access to the Book of Business and have not looked at it since the meeting in Florida; defendant BPR responded to the County of Madera's request for proposal for building consulting services in July 2021 and a purchase order issued by the County on

July 29, 2022; in August 2021 Madera County issued a 30 day notice exercising its right to cancel its contract with plaintiff Interwest; at the same time that the cancellation was announced, defendant Zapien sent an email to all interested parties announcing BPR was now providing inspection services for the Hall of Justice project; he became a Safebuilt employee in January 2020; he had countless relationships with public entities in the State; he and his two other partners decided to start their own company and in July 2021 they incorporated BPR Consulting Group, but did not start operations until the two other partners ended their employment with plaintiffs on July 15 and 16, 2021; defendant BPR obtains work by monitor web sites used by public entities to announce contracting availability; when members of BPR sees these postings, they discuss whether they should bid for the job; BPR regularly bids against multiple companies who provide the same services as BPR, such as plaintiffs; and BPR submits proposals in response to requests for proposals on these web sites and competes with other companies for the jobs, including plaintiffs. (Declaration of Ron Beehler in Support of Motion for Sanctions, paragraphs 1-4, and 6-12; and Exhibits 1 and 4.)

The CEO of plaintiff Safebuilt, Inc. declares: in December 2019 Safebuilt acquired Interwest making Interwest a wholly owned subsidiary; after its acquisition, Interwest continued to control its employees' duties and working conditions, those employees' titles and responsibilities did not change, and they continued to use Interwest email addresses; until July 2021, Ron Beehler, Roger Peterson, and Bill Rodgers were longtime, management level employees of Interwest; Beehler worked for Interwest for 15 years and was Interwest's Director of Building Safety Services thereby making him head of Interwest's Building Safety Services division, which served California and Nevada; declarant discovered through an internet search that in April 2021 Beehler registered the domain name www.bpr-grp.com, which is defendant BPR Consulting's website address; in June 2021 Interwest advised Beehler that his job was being

eliminated and asked if he was interested in taking on an account manager position at Interwest, which was a sales role; Beehler expressed interest in doing so; Interwest gave Beehler the 2021 Account Management Book of Business at a meeting on June 28, 2021, which contained the monthly revenue Interwest received from customers and revenue targets for every Northern California customer of Interwest; Interwest does not share the above-described information in the Book of Business with the public; that information is not publicly available; the Book of Business information is critical to Interwest's business operation; after receiving the Book of Business, Beehler told Interwest he was not interested in the account manager position; a few days later, on July 1, 2021, Beehler formed defendant BPR Consulting Group, LLC by filing articles of organization with the California Secretary of State's Office; due to his lack of interest in the account manager position, Beehler Interwest terminated him on July 2, 2021; shortly afterwards, Peterson and Rodgers voluntarily left Interwest employment; defendant Zapien worked for Interwest through August 21, 2021; defendant Zapien assisted with building inspection tasks Interwest was performing on a construction project for Madera County known as the Hall of Justice; on August 23, 2021, two days after leaving Interwest, defendant Zapien logged onto his Interwest email account and used it to send hundreds of pages of documents related to the Hall of Justice project to a newly created email account at defendant BPR; these documents included nonpublic inspection reports, invoices, and communications with Madera County; on August 23, 2021 defendant Zapien emailed officials from Madera County telling them that defendant BPR would replace Interwest in providing services at the Hall of Justice project immediately; later Madera County sent Interwest an undated notice stating it was terminating its contract with Interwest for convenience as of September 24, 2021; the county later began working with defendant BPR on the Hall of Justice project; the inspections reports, invoices, and communications defendant Zapien sent to

defendant BPR via his Interwest email account are not publicly available and were essential to Interwest's provision of services to Madera County; defendants Berg and Maddox worked for Interwest until they voluntarily left employment in January 2022; defendant Berg worked for Interwest for nearly six years; defendant Berg supervised building inspection staff, recommended revisions to municipal building ordinances and policies, and reviewed municipalities' building plans; defendant Maddox worked for Interwest for eight years; defendant Maddox supervised teams of electrical plan inspectors for residential and commercial building project; attached as Exhibit A is a true and correct copy of excerpts from defendant BPR's October 27, 2021 proposal to provide On-Call Plan Review and Building Inspection services to the City of Rio Vista, which lists defendants Berg and Maddox as BPR employees and sets forth their credentials, despite the fact they were still employed at Interwest until January 2022; attached as Exhibit B is a true and correct copy of excerpts from defendant BPR's November 15, 2021 Statement of Qualifications to Provide Community Development Services to Yuba County, which lists defendants Berg and Maddox as BPR employees and sets forth their credentials, despite the fact they were still employed at Interwest until January 2022; attached as Exhibit C is a true and correct copy of an email sent by a Madera County official to defendant Zapien's Interwest email address on August 23 2022, two days after he separated employment advising him that the County still had a contract with Interwest and requesting that the official be advised as to whether defendant Zapien was no longer employed by Interwest; attached as Exhibit D is an August 16, 2021 BPR proposal for services to be provided to the City of South Lake Tahoe, which lists defendant Zapien as an employee and sets forth defendant Zapien's credentials, despite the fact that he did not terminate employment with Interwest until five days later on August 21, 2021; attached as Exhibit E is a Linked In profile of defendant Berg; attached as Exhibit F is a true and correct

copy of the publicly available WHOIS search results for defendant BPR's domain name, which indicates it was registered by BPR on April 23, 2021; and attached as Exhibit G is a true and correct copy of the Articles of Organization of BPR filed with the Secretary of State's Office on July 1, 2021, one day prior to Beehler's termination of employment with Interwest. (Declaration of Gary Amato in Opposition to Motion for Sanctions, paragraphs 1 and 3-27; and Exhibits A-G.)

Defendant Zapien declares in reply: he did not supervise anyone at Interwest or Safebuilt, was not a responsible for management duties, and had no authority to bind Interwest or Safebuilt to any contractual agreements; in late July 2021 he heard that Safebuilt terminated Ron Beehler's employment; in July 2021 while working for Safebuilt at the Madera County Hall of Justice he received requests for inspection by email from the general contractor, Harris Construction, which he forwarded to others, including Smith Emery, special inspection company on the project, Jorge Mendoza, project manager for Tichell Construction, and the County; on or around August 2 or 3, 2021 he provided Safebuilt with two weeks' notice that he was leaving his position and copied other Safebuilt employees affected by his departure; he stopped working for Safebuilt on August 20, 2021; he had no access to confidential information while working for Interwest or Safebuilt; and before it was produced in discovery in this action, he had never seen the Book of Business. (Reply Declaration of Defendant Zapien, paragraphs 2-7 and 9.)

Defendant Maddox declares in reply: he last worked for plaintiff Interwest in California on December 8, 2017; he started working in a part-time temporary status for Interwest on February 14, 2020 averaging 8.5 hours per week in 2020 and 27.5 hours per week in 2021; at all times mentioned in the complaint he was a part-time at-will employee of both Interwest and defendant BPR Consulting Group, LLC (BPR); and he never had any authority to manage any

issues for either plaintiff or defendant BPR, never supervised any employees for either plaintiff or defendant BPR, he never approved timecards or provided directions to any employee of either plaintiff or defendant BPR, never functioned as an agent for either plaintiff or defendant BPR, and has not functioned as an executive of either plaintiff or BPR. (Reply Declaration of Defendant Maddox, paragraphs 3, 5, and 6.)

There is evidence that defendant BPR was in the process of being formed months before Beehler, a principal of defendant BPR, was terminated from his management position at Interwest; Beehler obtained information about Interwest clients/customers as a management employee that was not public and held as sensitive business information; defendant Zapien used his Interwest email account on August 23, 2021, two days after separation from employment, to transfer hundreds of pages of documents related to the Hall of Justice project, including nonpublic inspection reports, invoices, and communications with Madera County, to a newly created email account at defendant BR; on the same date as the transfer of documents, defendant Zapien emailed officials from Madera County telling them that defendant BPR would replace Interwest in providing services at the Hall of Justice project immediately; approximately one month later the Madera County contract with Interwest concerning the Hall of Justice project was officially terminated; defendants Berg and Maddox worked as supervising employees for Interwest until they voluntarily left employment in January 2022; months before their separation from Interwest employment they were apparently working for defendant BPR as defendant BPR was listing them and their credentials to solicit business for BPR; and five days before terminating employment with Interwest, defendant Zapien was apparently working for defendant BPR as he was listed as a BPR employee and his credentials were set forth in BPR's August 16, 2021 proposal to provide services to the City of South Lake Tahoe.

Having reviewed and consider the moving papers, opposition papers, reply and evidence submitted in support of the motion, in opposition to the motion and in reply, the court finds that defendants have failed to prove that any reasonable attorney would agree that the breach of loyalty cause of action is totally and completely without merit such that the claim is legally or factually frivolous, or that the 1st amended complaint was interposed for an improper purpose.

The motion for a terminating sanction of dismissal of the breach of loyalty cause of action is denied.

Breach of Fiduciary Duty Cause of Action – Against Defendants BPR, Berg and Maddox

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

"A fiduciary relationship is " 'any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent....' " (Herbert *v. Lankershim* (1937) 9 Cal.2d 409, 483, 71 P.2d 220; *In re Marriage of Varner* (1997) 55 Cal.App.4th 128, 141, 63 Cal.Rptr.2d 894; see also *Rickel v. Schwinn Bicycle Co.* (1983) 144 Cal.App.3d 648, 654, 192 Cal.Rptr. 732 [" 'A "fiduciary relation" in law is ordinarily synonymous with a "confidential relation." It is ... founded upon the trust or confidence reposed by one person in the integrity and fidelity of another, and likewise precludes the idea of profit or advantage resulting from the dealings of the parties and the person in whom the confidence is

reposed.' "].) ¶ Traditional examples of fiduciary relationships in the commercial context include trustee/beneficiary, directors and majority shareholders of a corporation, business partners, joint adventurers, and agent/principal. (See, e.g., *Evangelho v. Presoto* (1998) 67 Cal.App.4th 615, 621, 79 Cal.Rptr.2d 146 [trustee and beneficiary]; *Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 108-109, 81 Cal.Rptr. 592, 460 P.2d 464 [controlling shareholder of corporation]; *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 818-819, 195 Cal.Rptr. 421 [joint adventurers]; *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1580, 36 Cal.Rptr.2d 343 [agent/principal].) ¶ Inherent in each of these relationships is the duty of undivided loyalty the fiduciary owes to its beneficiary, imposing on the fiduciary obligations far more stringent than those required of ordinary contractors. As Justice Cardozo observed, "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior." (Meinhard *v. Salmon* (1928) 249 N.Y. 458, 164 N.E. 545, 546.) ¶ Wolf concedes the complaint is devoid of allegations showing an agency, trust, joint venture, partnership or other "traditionally recognized" fiduciary relationship and further admits that the complaint cannot be amended to state facts alleging such a relationship." (Wolf v. Superior Court (2003) 107 Cal.App.,4th 25, 29-30.)

"Management, of course, is the very essence of an officer's role. "Executive officers normally manage the day-to-day operations of the business of the corporation pursuant to provisions of the bylaws or delegation of the board." (1 Ballantine & Sterling, Cal. Corporation Laws (4th ed.1999) § 88.03, p. 5–42 (rel.52–9/93), § 102.02, p. 6–14.2, fn. 28 (rel.70–8/98) ["corporate officers ordinarily have the direct managerial responsibility for the actual conduct of the affairs of a corporation"].) And, as any student of business knows, management

necessarily involves the exercise of discretion. ¶ We conclude an officer who participates in management of the corporation, exercising some discretionary authority, is a fiduciary of the corporation as a matter of law. Conversely, a "nominal" officer with no management authority is not a fiduciary. Whether a particular officer participates in management is a question of fact. We expect that in most cases this test will be easily met. And, as in all legally recognized fiduciary relationships, once this factual prerequisite is established, the law imposes a fiduciary duty. (See, e.g., *Violette v. Shoup* (1993) 16 Cal.App.4th 611, 619, 20 Cal.Rptr.2d 358 [existence of agency relationship is question of fact, agent's fiduciary duty is a matter of law]; *Maglica v. Maglica, supra,* 66 Cal.App.4th 442, 448, 78 Cal.Rptr.2d 101 [factual finding of formal marriage is prerequisite to imposition of statutory fiduciary duty between spouses regarding management and control of community assets]; *Johnson v. Superior Court* (1995) 38 Cal.App.4th 463, 477, 45 Cal.Rptr.2d 312 [finder of fact must resolve conflicting evidence bearing upon question of existence of attorney-client relationship, issue of duty is resolved as a matter of law].)" (Emphasis added.) (GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc. (2000) 83 Cal.App.4th 409, 420–421, overruled on other grounds by Reeves v. Hanlon (2004) 33 Cal.4th 1140.)

The complaint alleges: defendants were management personnel of Interwest who exercised discretionary authority while working for Interwest and owed a fiduciary duty to both Interwest and to Safebuilt after it acquired Interwest; defendants Berg and Maddox breached their fiduciary duties to Interwest and Safebuilt by performing work on behalf of BPR, a competitor of Interwest and Safebuilt, while still employed by Interwest and Safebuilt and receiving a salary from them; defendant BPR's founder breached his fiduciary duty to Interwest by receiving the Book of Business while still employed by Interwest under the false pretense of intending to transition to the role of account manager at Interwest, while he intended to and did use the

Book of Business to benefit defendant BPR; and BPR induced, ratified, and approved the previously described conduct of Beehler, defendant Maddox, and defendant Berg and knowingly received the benefits of their breaches of fiduciary duty. (Complaint, paragraphs 71-74.)

While there is evidence that defendants Maddox and Berg supervised Interwest employees, there is no evidence that they were managerial employees or holding a position involving a fiduciary type relationship with Interwest and Safebuilt.

The court finds that defendants Berg and Maddox have met their burden to prove that any reasonable attorney would agree that the breach of fiduciary duty cause of action asserted against them is totally and completely without merit such that the claim is legally or factually frivolous.

The motion for a terminating sanction of dismissal of the breach of fiduciary duty cause of action asserted defendants Berg and Maddox is granted. Monetary sanctions are denied.

There is evidence that the organizer and a principal of defendant BPR Consulting Group, LLC, Mr. Beehler, was a longtime, management level employee of Interwest; he worked for Interwest for 15 years and was Interwest's Director of Building Safety Services making him head of Interwest's Building Safety Services Division; and he engaged in conduct that can reasonably be construed as breaching his fiduciary duty to Interwest and its parent corporation Safebuilt.

Having reviewed and considered the moving papers, opposition papers, reply and evidence submitted in support of the motion, in opposition to the motion and in reply, the court finds that defendants have failed to prove that any reasonable attorney would agree that the breach of fiduciary duty cause of action asserted against defendant BPR is totally and completely without

merit such that the claim is legally or factually frivolous, or that the 1st amended complaint was interposed for an improper purpose.

The motion to impose a terminating sanction of dismissal of the breach of fiduciary duty cause of action against defendant BPR is denied.

Breach of Confidence Cause of Action – Against Defendants BPR and Zapien

Defendants' motion does not address the breach of confidence cause of action. Assuming for the sake of argument only that defendants' assertion in the moving papers that defendants did not have possession of and did not disclose trade secrets as there is no evidence of trade secrets or confidential information misused or disclosed by defendants is an attack on the breach of confidentiality cause of action, the court will address the breach of confidence cause of action.

"…defendants assert that a cause of action for breach of confidence has not been recognized by the California Supreme Court. We know of no authority, and none is cited, that requires approval of legal theory by the California Supreme Court before it can be pleaded. In any event, we have no difficulty in concluding that a cause of action for breach of confidence is recognized in California, including the Supreme Court. (*Ruhl v. Mott* (1898) 120 Cal. 668, 679, 53 P. 304; *Davies v. Krasna*, 245 Cal.App.2d 535, 549, 54 Cal.Rptr. 37; *Davies v. Krasna*, 14 Cal.3d 502, 508-510, 121 Cal.Rptr. 705, 535 P.2d 1161; *Thompson v. California Brewing Co*., 150 Cal.App.2d 469, 474, 310 P.2d 436; *Fink v. Goodson-Todman Enterprises, Ltd.*, 9 Cal.App.3d 996, 1009-1010, 88 Cal.Rptr. 679.) ¶ It is defendants' major contention that a literary work has to be protectable under copyright law in order to be the basis of a breach of confidence action. They argue that since Faris I held that the sports quiz show format was not protectable, plaintiff should have no access to a cause of action for breach of confidence. ¶ In *Thompson v. California Brewing Co*., supra,

plaintiff alleged that he submitted a new and novel idea to defendant "in confidence," and that defendant accepted the confidence with an understanding the idea would not be used without plaintiff's consent. The Court of Appeal reversed the trial court's granting of a demurrer, holding that the allegation of confidential relationship and defendants' voluntary assumption thereof overcame the demurrer. In discussion, the court noted that this cause of action was not limited to fiduciary relationships, but could exist in any number of situations, such as principal and agent, partners, joint adventurers, and in a buyer/seller relationship where a trade secret is disclosed in the course of confidential negotiations on the price to be paid for the secret. Further, the court, citing Restatement of Torts section 757, comment b, [Footnote omitted.] held that this principle applies even where there was no trade secret: " '(O)ne who receives the information in confidential relation or discovers it by improper means may be under some duty not to disclose or use the information. Because of the confidential relation or the impropriety of the means of discovery, he may be compelled to go to other sources for the information. . . .' " (150 Cal.App.2d 476, 310 P.2d 440.) ¶ In *Davies v. Krasna* (1966) 245 Cal.App.2d 535, 54 Cal.Rptr. 37; Davies, a writer, submitted a story to Jerry Wald. Later Wald's business partner, Norman Krasna, authored the film "Who Was That Lady I Saw You With," which was similar to the plaintiff's idea. Plaintiff sued for breach of implied contract and breach of confidence. The court said: "Implicit in an agreement of the nature of that herein involved (an implied-in-fact contract) is the obligation to guard the idea so submitted from disclosure to third persons by any act or omission on the part of the corporation, its officers or employees. (Citations.) A violation of that duty would constitute a breach of confidence. (Citations.)" (245 Cal.App.2d 549, 54 Cal.Rptr. 46.) The court found sufficient evidence to warrant a trial on the claim of breach of confidence from the inference that one could draw that Krasna had access to Davies' script through Wald, and the two stories were similar. ¶ After the

case went to trial, it reappeared in the Supreme Court. In deciding an issue unrelated to that before us here, the Supreme Court explained that a cause of action for breach of confidence "arises whenever an idea offered and received in confidence, is later disclosed without permission." (*Davies v. Krasna*, 14 Cal.3d 502, 510, 121 Cal.Rptr. 705, 710, 535 P.2d 1161, 1166.) ¶ In *Fink v. Goodson-Todman Enterprises, Ltd.,* 9 Cal.App.3d 996, 88 Cal.Rptr. 679, plaintiff charged defendants with a breach of fiduciary obligation not to use something submitted in confidence. The court believed that protection by reason of sufficient novelty and elaboration was a necessity for the "unjust enrichment-breach of confidence count," reasoning: "This is because they are not based upon, and so do not have the limitations of, contractual promises. . . . It is not based on apparent intentions of the involved parties; it is an obligation created by law for reasons of justice. (Citations.) The scope of common law copyright and quasi contract 'reaches and renders liable persons other than the limited number who may have consented to a contractual relationship.' There is the danger of monopoly and restraint in progress in art." (9 Cal.App.3d 1009-1010, 88 Cal.Rptr. 690.) ¶ Nimmer on Copyright, section 16.06, states that protection of the disclosure takes place "only if the confidential nature of the disclosure is made clear prior to the exhibition." Nimmer explains that "Probably proof that the plaintiff offered the idea upon condition of confidence and a clear understanding that payment would be made upon use would suffice in some instances" to establish a confidential relationship. ¶ We conclude that copyright protectability of a literary work is not a necessary element of proof in a cause of action for breach of confidence. An actionable breach of confidence will arise when an idea, whether or not protectable, is offered to another in confidence, and is voluntarily received by the offeree in confidence with the understanding that it is not to be disclosed to others, and is not to be used by the offeree for purposes beyond the limits of the confidence without the offeror's permission. In order to

prevent the unwarranted creation or extension of a monopoly and restrain on progress in art, a confidential relationship will not be created from the mere submission of an idea to another. There must exist evidence of the communication of the confidentiality of the submission or evidence from which a confidential relationship can be inferred. Among the factors from which such an inference can be drawn are: proof of the existence of an implied-in-fact contract (*Davies v. Krasna*, 245 Cal.App.2d 535, 54 Cal.Rptr. 37); proof that the material submitted was protected by reason of sufficient novelty and elaboration (*Fink v. Goodson-Todman Enterprises, Ltd.*, 9 Cal.App.3d 996, 88 Cal.Rptr. 679); or proof of a particular relationship such as partners, joint adventurers, principal and agent or buyer and seller under certain circumstances. (*Blaustein v. Burton*, 9 Cal.App.3d 161, 187, 88 Cal.Rptr. 319; *Thompson v. California Brewing Co.,* 150 Cal.App.2d 467, 475, 310 P.2d 436.)" (Faris v. Enberg (1979) 97 Cal.App.3d 309, 321–323.)

"In *Faris, supra,* 97 Cal.App.3d, at page 324, 158 Cal.Rptr. 704, the court stated that information must be submitted and accepted "in confidence" to state a cause of action for breach of confidence. (See also *Thompson v. California Brewing Co.* (1957) 150 Cal.App.2d 469, 474, 310 P.2d 436.) And in *Thompson, supra,* at page 475, 310 P.2d 436, citing Restatement of the Law of Torts, section 757, [Footnote omitted.] the court characterized the breach of confidence cause of action as follows: " 'One who discloses or uses another's *trade secret,* without a privilege to do so, is liable to the other if ... his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the *secret* to him....' " (Emphasis added.) But the court added that "under appropriate circumstances these principles apply to information which is not a trade secret...." (Id., at p. 476, 310 P.2d 436.)" (Emphasis added.) (Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co. (1985) 168 Cal.App.3d 455, 462–463.)

Having reviewed and consider the moving papers, opposition papers, reply and evidence submitted in support of the motion, in opposition to the motion and in reply, the court finds that defendants have failed to prove that any reasonable attorney would agree that the breach of confidence cause of action against defendants BPR and Zapien is totally and completely without merit such that the claim is legally or factually frivolous, or that the 1st amended complaint was interposed for an improper purpose.

The motion to impose a terminating sanction of dismissal of the breach of confidence cause of action against defendants BPR and Zapien is denied.

Intentional Interference with Contract Cause of Action - Against Defendants BPR and Zapien

The California Supreme Court held that interference with an existing contract is not "merely a subevent of the "more inclusive" class of acts that interfere with economic relations" and courts should "firmly distinguish the two kinds of business contexts, bringing a greater solicitude to those relationships that have ripened into agreements, while recognizing that relationships short of that subsist in a zone where the rewards and risks of competition are dominant." (Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal.4th 376, 392.) ""[A] stranger to a contract may be liable in tort for intentionally interfering with the performance of the contract." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126, 270 Cal.Rptr. 1, 791 P.2d 587 (*PG & E*).) The elements of the tort are: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. " (*Ibid.*) ¶ The *PG & E* court addressed the question of "whether inducing a party to a contract to seek to terminate the contract according to its terms is ever actionable interference with contractual or prospective economic relations." (*PG & E, supra,* 50 Cal.3d at p. 1126, 270 Cal.Rptr. 1, 791

P.2d 587.) The court concluded that "it may be actionable to induce a party to a contract to terminate the contract according to its terms." (*Id.* at p. 1127, 270 Cal.Rptr. 1, 791 P.2d 587.) The court explained, "it is the contractual relationship, not any term of the contract, which is protected against outside interference." (*Ibid.*) Even an at-will contract is subject to a claim for interference. Just because the contract is " ' "at the will of the parties, respectively does not make it one at the will of others." ' [Citation.]" (*Ibid.*) Thus, " '[t]he actionable wrong lies in the inducement to break the contract or to sever the relationship, not in the kind of contract or relationship so disrupted, whether it is written or oral, enforceable or not enforceable.' [Citations.]" (*Ibid.*) ¶ In addition, "a person is not justified in inducing a breach of contract simply because he is in competition with one of the parties to the contract and seeks to further his own economic advantage at the expense of the other. " (*Imperial Ice Co. v. Rossier* (1941) 18 Cal.2d 33, 36, 112 P.2d 631.) This is because, "[w]hatever interest society has in encouraging free and open competition by means not in themselves unlawful, contractual stability is generally accepted as of greater importance than competitive freedom." (*Ibid.*) A party may not, "under the guise of competition actively and affirmatively induce the breach of a competitor's contract." (*Id.* at p. 37, 112 P.2d 631.)" (I-CA Enterprises, Inc. v. Palram Americas, Inc. (2015) 235 Cal.App.4th 257, 289–290.)

Having reviewed and consider the moving papers, opposition papers, reply and evidence submitted in support of the motion, in opposition to the motion and in reply, the court finds that defendants have failed to prove that any reasonable attorney would agree that the intentional interference with contract cause of action against defendants BPR and Zapien is totally and completely without merit such that the claim is legally or factually frivolous, or that the 1st amended complaint was interposed for an improper purpose.

The motion to impose a terminating sanction of dismissal of the intentional interference with contract cause of action against defendants BPR and Zapien is denied.

Intentional Interference with Prospective Economic Advantage Cause of Action - Against Defendants BPR and Zapien

"To establish a prima facie case of intentional interference with prospective economic advantage, a plaintiff must demonstrate (1) an economic relationship between the plaintiff and a third party, with a probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of this relationship; (3) intentional and wrongful conduct on the part of the defendant, designed to interfere with or disrupt the relationship; (4) actual disruption or interference; and (5) economic harm to the plaintiff as a proximate result of the defendant's wrongful conduct. (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 241, 26 Cal.Rptr.3d 798.) A plaintiff's burden includes pleading and proving "that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself." (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393, 45 Cal.Rptr.2d 436, 902 P.2d 740.) We consider an act independently wrongful "if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1159, 131 Cal.Rptr.2d 29, 63 P.3d 937, fn. omitted.)" (Overstock.com, Inc. v. Gradient Analytics, Inc. (2007) 151 Cal.App.4th 688, 713.)

"We first articulated the elements of the tort of intentional interference with prospective economic advantage in *Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 827, 122 Cal.Rptr. 745, 537 P.2d 865 (*Buckaloo*). These elements are usually stated as follows: " '(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on

the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.' [Citations.]" (*Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 521-522, 49 Cal.Rptr.2d 793.) ¶ We most recently considered this tort in *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 45 Cal.Rptr.2d 436, 902 P.2d 740 (*Della Penna*), where we held that a plaintiff seeking to recover damages for interference with prospective economic advantage must plead and prove as part of its case-in-chief that the defendant's conduct was "wrongful by some legal measure other than the fact of interference itself." (*Id.* at p. 393, 45 Cal.Rptr.2d 436, 902 P.2d 740.) In *Della Penna,* we did not address the elements of the tort as we had formulated them in *Buckaloo,* other than noting that "[t]o the extent that language in *Buckaloo* ... addressing the pleading and proof requirements in the economic relations tort is inconsistent with the formulation we adopt in this case, it is disapproved." (*Della Penna, supra,* 11 Cal.4th at p. 393, fn. 5, 45 Cal.Rptr.2d 436, 902 P.2d 740.) ¶ Since our opinion in *Della Penna,* lower courts considering this tort have continued to apply the elements we articulated in *Buckaloo,* with the added ***1154** understanding that a plaintiff must plead that the defendant engaged in an act that is wrongful apart from the interference itself. (See, e.g., *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 339, 60 Cal.Rptr.2d 539; *Arntz Contracting Co. v. St. Paul Fire and Marine Insurance Company* (1996) 47 Cal.App.4th 464, 475, 54 Cal.Rptr.2d 888; *Westside Center Associates v. Safeway Stores 23, Inc., supra,* 42 Cal.App.4th at pp. 521-522, 49 Cal.Rptr.2d 793.) The Court of Appeal in the present case, however, in considering whether a plaintiff must plead specific intent, determined that after *Della Penna,* "it is no longer appropriate to apply the elements formulated in *Buckaloo* in all actions for interference with prospective advantage." ¶ We disagree with the Court of Appeal's conclusion that the elements we first articulated in

Buckaloo, supra, 14 Cal.3d 815, 122 Cal.Rptr. 745, 537 P.2d 865, do not still apply to this tort. In *Della Penna,* we did not abandon these elements. Instead, we specifically stated that "[w]e do not in this case ... go beyond approving the requirement of a showing of wrongfulness as part of the plaintiff's case." (*Della Penna, supra,* 11 Cal.4th at p. 378, 45 Cal.Rptr.2d 436, 902 P.2d 740.) In fact, we explicitly approved the trial court's modified version of the standard jury instruction on intentional interference with prospective economic advantage, BAJI No. 7.82. The instruction at issue articulated the traditional elements of the tort, but changed the third element to provide that the defendant " 'intentionally engaged in [*wrongful*] acts or conduct designed to interfere with or disrupt' the relationship." (*Della Penna,* at p. 380, fn. 1, 45 Cal.Rptr.2d 436, 902 P.2d 740, italics and brackets added.) Rather than overrule the established elements of this tort, *Della Penna* merely clarified the plaintiff's burden as to the third element, stating that to meet this element, a plaintiff must plead and prove that the defendant's acts are wrongful apart from the interference itself. (*Id.* at p. 393, 45 Cal.Rptr.2d 436, 902 P.2d 740.) Thus, as the majority of the Courts of Appeal have understood, after *Della Penna* the elements of the tort of interference with prospective economic advantage remain the same, except that the third element also requires a plaintiff to plead intentional *wrongful* acts on the part of the defendant designed to disrupt the relationship." (Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1153-1154.)

Having reviewed and consider the moving papers, opposition papers, reply and evidence submitted in support of the motion, in opposition to the motion and in reply, the court finds that defendants have failed to prove that any reasonable attorney would agree that the intentional interference with prospective economic advantage asserted against defendants BPR and Zapien is totally and completely without merit such that the claim is legally or factually frivolous, or that the 1st amended complaint was interposed for an improper purpose.

The motion to impose a terminating sanction of dismissal of the intentional interference with prospective economic advantage asserted against defendants BPR and Zapien is denied.

Violation of Business and Professions Code, §§ 1700, et seq. Cause of Action – Against BPR

"As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code." (Business and Professions Code, § 17200.)

"In contrast to its limited remedies, the unfair competition law's scope is broad. Unlike the Unfair Practices Act, it does not proscribe specific practices. Rather, as relevant here, it defines "unfair competition" to include "any unlawful, unfair or fraudulent business act or practice." (§ 17200.)[8] Its coverage is "sweeping, embracing ' "anything that can properly be called a business practice and that at the same time is forbidden by law." ' " (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1200, 17 Cal.Rptr.2d 828, 847 P.2d 1044, quoting *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 113, 101 Cal.Rptr. 745, 496 P.2d 817.) It governs "anti-competitive business practices" as well as injuries to consumers, and has as a major purpose "the preservation of fair business competition." (*Barquis v. Merchants Collection Assn., supra,* 7 Cal.3d at p. 110, 101 Cal.Rptr. 745, 496 P.2d 817; see also *People v. McKale* (1979) 25 Cal.3d 626, 631–632, 159 Cal.Rptr. 811, 602 P.2d 731; *People ex rel. Mosk v. National Research Co. of Cal.* (1962) 201 Cal.App.2d 765, 771, 20 Cal.Rptr. 516.) By proscribing "any unlawful" business practice, "section 17200 'borrows' violations of other laws and treats them as unlawful practices" that the unfair competition law makes independently actionable. (*State Farm Fire & Casualty Co. v. Superior Court* (1996) 45 Cal.App.4th 1093, 1103, 53 Cal.Rptr.2d 229, citing *Farmers Ins. Exchange v. Superior Court, supra,* 2 Cal.4th at p. 383, 6 Cal.Rptr.2d 487, 826 P.2d 730.) ¶ However, the law does more than just borrow. The statutory language

referring to "any unlawful, unfair *or* fraudulent" practice (italics added) makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law. "Because Business and Professions Code section 17200 is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent. 'In other words, a practice is prohibited as "unfair" or "deceptive" even if not "unlawful" and vice versa.' " (*Podolsky v. First Healthcare Corp.* (1996) 50 Cal.App.4th 632, 647, 58 Cal.Rptr.2d 89, quoting *State Farm Fire & Casualty Co. v. Superior Court, supra,* 45 Cal.App.4th at p. 1102, 53 Cal.Rptr.2d 229.) The case of *Motors, Inc. v. Times Mirror Co.* (1980) 102 Cal.App.3d 735, 162 Cal.Rptr. 543 is an example of the unfair competition law's independent force. There, the plaintiff challenged a newspaper's two-tiered advertising rate structure. The Court of Appeal held that the plaintiff stated a valid cause of action under the unfair competition law even though the Unfair Practices Act did not itself prohibit the pricing policy at issue. (*Motors, Inc. v. Times Mirror Co., supra,* 102 Cal.App.3d at p. 741, 162 Cal.Rptr. 543 [citing § 17042, which states that nothing in the Unfair Practices Act "prohibits" certain price differentials].) ¶ The unfair competition law, which has lesser sanctions than the Unfair Practices Act, has a broader scope for a reason. "[T]he Legislature ... intended by this sweeping language to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur. Indeed, ... the section was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable ' "new schemes which the fertility of man's invention would contrive." ' (*American Philatelic Soc. v. Claibourne* (1935) 3 Cal.2d 689, 698 [46 P.2d 135].) As the *Claibourne* court observed: 'When a scheme is evolved which on its face violates the fundamental rules of honesty and fair dealing, a court of equity is not impotent to frustrate its consummation because the scheme is an original one....' (3 Cal.2d at pp. 698–699 [46 P.2d 135] ...; accord, *FTC v. The Sperry & Hutchinson Co.* (1972) 405 U.S.

233, 240 [92 S.Ct. 898, 903, 31 L.Ed.2d 170, 177].) With respect to 'unlawful' or 'unfair' business practices, [former] section 3369 [today section 17200] specifically grants our courts that power. [¶] In permitting the restraining of all 'unfair' business practices, [former] section 3369 [today section 17200] undeniably establishes only a wide standard to guide courts of equity; as noted above, given the creative nature of the scheming mind, the Legislature evidently concluded that a less inclusive standard would not be adequate." (*Barquis v. Merchants Collection Assn., supra,* 7 Cal.3d at pp. 111–112, 101 Cal.Rptr. 745, 496 P.2d 817, fn. omitted.) "[I]t would be impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited [citations], since unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery." (*People ex rel. Mosk v. National Research Co. of Cal., supra,* 201 Cal.App.2d at p. 772, 20 Cal.Rptr. 516.) [FN 9.] ¶ FN 9. Apparently taking her cue from the brief of amicus curiae American Council of Life Insurance, Justice Kennard asserts the unfair competition law did nothing more than codify the common law. (Conc. & dis. opn. of Kennard, J., post, 83 Cal.Rptr.2d at p. 570, 973 P.2d at p. 549.) (Even L.A. Cellular does not make such a sweeping argument.) She relies primarily on International etc. Workers v. Landowitz (1942) 20 Cal.2d 418, 126 P.2d 609. (Conc. & dis. opn. of Kennard, J., post, 83 Cal.Rptr.2d at pp. 570, 571, 572, 574, 973 P.2d at pp. 549, 550, 551, 553.) That decision does, indeed, contain some language supporting her position. However, in Barquis v. Merchants Collection Assn., supra, 7 Cal.3d at page 109, 101 Cal.Rptr. 745, 496 P.2d 817, we unanimously concluded "that 'unfair competition' as used in the section cannot be equated with the common law definition of 'unfair competition,' but instead specifies that, for the purposes of its provisions, unfair competition 'shall mean and include unlawful, unfair or fraudulent business practice....' (Italics added.)" Regarding the language Justice Kennard cites, we stated, "Although the Landowitz opinion does contain some language which may be read to

limit [Civil Code former] section 3369 [the original unfair competition law] to common law 'unfair competition,' subsequent cases ... have not confined the section so narrowly; in view of the factual context of Landowitz, such language was not crucial to the decision." (Id. at pp. 111–112, fn. 12, 101 Cal.Rptr. 745, 496 P.2d 817; see also Rubin v. Green, supra, 4 Cal.4th at p. 1200, 17 Cal.Rptr.2d 828, 847 P.2d 1044 ["to state a claim under the act one need not plead and prove the elements of a tort"]; Bank of the West v. Superior Court, supra, 2 Cal.4th at p. 1264, 10 Cal.Rptr.2d 538, 833 P.2d 545 ["the statutory definition of 'unfair competition' 'cannot be equated with the common law definition....' "]; Motors, Inc. v. Times Mirror Co., supra, 102 Cal.App.3d 735, 162 Cal.Rptr. 543 [discussed in the text].) ¶ A year after the decision in People ex rel. Mosk v. National Research Co. of Cal., supra, 201 Cal.App.2d 765, 20 Cal.Rptr. 516, again about three months after the decision in Barquis v. Merchants Collection Assn., supra, 7 Cal.3d 94, 101 Cal.Rptr. 745, 496 P.2d 817, and on occasion since, the Legislature amended the unfair competition law. On these occasions, rather than overrule these cases or Motors, Inc. v. Times Mirror Co., supra, 102 Cal.App.3d 735, 162 Cal.Rptr. 543, the Legislature expanded the law's coverage. (Stats.1963, ch. 1606, § 1, p. 3184; Stats.1972, ch. 1084, § 1, pp.2020–2021; see Stop Youth Addiction, Inc. v. Lucky Stores, Inc., supra, 17 Cal.4th at pp. 569–570, 71 Cal.Rptr.2d 731, 950 P.2d 1086.) (Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 180–181.)

When a UCL claim is derivative of other substantive causes of action, the claim "stand [s] or fall[s] depending on the fate of the antecedent substantive causes of action." (Krantz v. BT Visual Images, L.L.C. (2001) 89 Cal.App.4th 164, 178.)

There is evidence that defendant BPR engaged in unfair business practices that caused damages to plaintiff.

Having reviewed and consider the moving papers, opposition papers, reply and evidence submitted in support of the motion, in opposition to the motion and in reply, the court finds that defendants have failed to prove that any reasonable attorney would agree that the violation of Business and Professions Code, §§ 1700, et seq. cause of action asserted against defendant BPR is totally and completely without merit such that the claim is legally or factually frivolous, or that the 1st amended complaint was interposed for an improper purpose.

The motion to impose a terminating sanction of dismissal the violation of Business and Professions Code, §§ 1700, et seq. cause of action asserted against defendant BPR is denied.

TENTATIVE RULING # 7: DEFENDANTS' MOTION FOR SANCTIONS PURSUANT TO CODE OF CIVIL PROCEDURE, § 128.7 IS GRANTED IN PART AND DENIED IN PART AS STATED IN THE TEXT OF THE RULING. THE MOTION FOR A TERMINATING SANCTION OF DISMISSAL OF THE BREACH OF FIDUCIARY DUTY CAUSE OF ACTION ASSERTED DEFENDANTS BERG AND MADDOX IS GRANTED. THE REMAINDER OF THE MOTION IS DENIED. THE REQUEST FOR MONETARY SANCTIONS IS DENIED. SINCE PLAINTIFFS AND DEFENDANTS HAVE PREVAILED IN PART IN THIS MOTION PROCEEDING, THE COURT FINDS THAT AN AWARD OF ATTORNEY FEES INCURRED IN PRESENTING OR OPPOSING THE MOTION TO EITHER THE PLAINTIFFS OR DEFENDANTS IS NOT WARRANTED. 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 BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED. 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 18, 2022 EITHER IN PERSON OR BY ZOOM APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

8. NAPOLEON v. UNITED SERVICES AUTOMOBILE ASSOC. PC-20210289

Defendant United Services Automobile Association's Demurrer to Complaint.

Plaintiff filed an action asserting causes of action for breach of contract and breach of the covenant of good faith and fair dealing against defendants United Services Automobile Association, a Reciprocal Interinsuracne Exchange (USAA), and USAA Life Insurance Company, a corporation and subsidiary of United Services Automobile Association (USAA Life.).

Defendant USAA demurs to both causes of action on the ground that plaintiff has failed to allege sufficient facts to establish defendant USAA was the alter ego of defendant USAA Life or that USAA and USAA Life were joint venturers related to the subject policy of life insurance; and since defendant USAA was not a party to the life insurance policy contract, it can not be held liable for breach of contract or bad faith.

Plaintiff opposes the demurrer on the following grounds: plaintiff has alleged sufficient facts to establish that USAA is the alter ego of USAA Life and they operated as a single enterprise as set forth in paragraphs 2, 11, 12, 15, 18-20, 22(a), 22(b), 22(c), 22(f), 22(g), 53, and 59-61 of the complaint; the court should disregard defendants' answer and website printouts as they do not establish that defendant is not undercapitalized; the facts alleged in paragraphs 11, 12, 21, and 55(b) of the complaint adequately alleges that defendants USAA and USAA Life are engaged in a joint venture regarding the subject life insurance policy; plaintiff has adequately alleged joint control of the venture in paragraphs 11, 14, 18, 21, 22(a) and 22(g) of the complaint as it is alleged that USAA implemented policies and procedures set by USAA and USAA Life's own conduct was authorized and ratified by USAA; joint control of a joint venture can be unequal; plaintiff has adequately alleged that defendants USAA and USAA Life share

the profits of the life insurance business as USAA received dividends from USAA Life (See Complaint, paragraphs 22(a) and 22(d).); and the complaint alleges sufficient facts to establish that defendant USAA Life has an ownership interest in the joint venture (See Complaint, paragraphs 12, 21, 22(a), 22(c), and 22(e).).

Defendant USAA replied to the opposition.

Requests for Judicial Notice

The court does not take judicial notice of the fact of the contents of the USAA Life Insurance Policy attached as Exhibit A to the defendants' answer. While the court may take judicial notice of court records, it may not take as true the contents of the filed document and while the complaint references a life insurance policy of the same number, that does not make the contents of the policy attached to the answer not reasonably subject to dispute as there is no admission by plaintiff that the policy attached to the answer to the complaint is a true and correct copy of the exact same policy referenced in the complaint.

"Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451: ¶ * * * (d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States…" (Evidence Code, § 452(d).) "Evidence Code section 452(d) permits the court to take judicial notice of court records. However, a court cannot take judicial notice of the truth of hearsay statements simply because the statements are part of a court record. (*Ramsden v. Western Union* (1977) 71 Cal.App.3d 873, 879, 138 Cal.Rptr. 426; *People v. Thacker* (1985) 175 Cal.App.3d 594, 598-599, 221 Cal.Rptr. 37.) As stated in *Day v. Sharp* (1975) 50 Cal.App.3d 904, 123 Cal.Rptr. 918, '"A court may take judicial notice of the *existence* of each document in a court file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments."' (Id. at p. 914, 123 Cal.Rptr. 918, quoting Jefferson,

Cal.Evid.Benchbook (1972) Judicial Notice, § 47.3, p. 840.)" (Magnolia Square Homeowners Assn. v. Safeco Ins. Co. (1990) 221 Cal.App.3d 1049, 1056.)

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

While the court may take judicial notice of the fact that while USAA Life is authorized by the State of California to transact life insurance business in California and USAA is not, the court is not authorized to take judicial notice that such authorization bars liability of defendant USAA under the theories of joint venture and alter ego regarding life insurance policies even though it could not issue those policies itself, but those policies could be issued by a subsidiary that it was the alter ego of or engaged in a joint venture with that subsidiary. This fact is subject to reasonable dispute. In addition, the court can not and does not take judicial notice of a purported fact that defendant USAA Life is not undercapitalized. The regulation of USAA Life related to the objective to make sure it remains financially stable and maintains sufficient reserves does not make its capitalization not reasonably subject to dispute. While the State has an objective to make sure USAA Life remains financially stable and maintains sufficient reserves, that does not establish that it has sufficient capitalization at all times. Therefore, that fact remains reasonably subject to dispute.

Demurrer Principles

When any ground for objection to an answer appears on its face, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by demurrer to the pleading. (Code of Civil Procedure, § 430.30(a).)

"'A demurrer admits all material and issuable facts properly pleaded. [Citations.] However, it does not admit contentions, deductions or conclusions of fact or law alleged therein.' (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 713 [63 Cal.Rptr. 724, 433 P.2d 732].) Also, '... "plaintiff need only plead facts showing that he may be entitled to some relief [citation]." [Citation.] Furthermore, we are not concerned with plaintiff's possible inability or difficulty in proving the allegations of the complaint.' (*Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 572 [108 Cal.Rptr. 480, 510 P.2d 1032].)" (Highlanders, Inc. v. Olsan (1978) 77 Cal.App.3d 690, 696-697.)

"A demurrer challenges only the legal sufficiency of the complaint, not the truth of its factual allegations or the plaintiff's ability to prove those allegations. (*Amarel v. Connell* (1988) 202 Cal.App.3d 137, 140 [248 Cal.Rptr. 276].) We therefore treat as true all of the complaint's material factual allegations, but not contentions, deductions or conclusions of fact or law. (*Id*. at p. 141; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58].) We can also consider the facts appearing in exhibits attached to the complaint. (See *Dodd v. Citizens Bank of Costa Mesa*, supra, 222 Cal.App.3d at p. 1627.) We are required to construe the complaint liberally to determine whether a cause of action has been stated, given the assumed truth of the facts pleaded. (*Rogoff v. Grabowski* (1988) 200 Cal.App.3d 624, 628 [246 Cal.Rptr. 185].)" (Picton v. Anderson Union High School Dist. (1996) 50 Cal.App.4th 726, 732-733.)

""To determine whether a cause of action is stated, the appropriate question is whether, upon a consideration of all the facts alleged, it appears that the plaintiff is entitled to any judicial relief against the defendant, notwithstanding that the facts may not be clearly stated, or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he is not entitled under the facts alleged. (*Elliott v. City of Pacific Grove*, 54 Cal.App.3d 53, 56, 126 Cal.Rptr. 371.) Mistaken labels and

confusion of legal theory are not fatal because the doctrine of "theory of the pleading" has long been repudiated in this state. (*Lacy v. Laurentide Finance Corp*., 28 Cal.App.3d 251, 256-257, 104 Cal.Rptr. 547.)" (Spurr v. Spurr (1979) 88 Cal.App.3d 614, 617.)

The rule is that a general demurrer should be overruled if the pleading, liberally construed, states a cause of action under any theory. (Brousseau v. Jarrett (1977) 73 Cal.App.3d 864, 870-871.)

With the above cited principles in mind, the court will rule on the demurrers to the complaint.

Ago Ego and Joint Venture Theories of Liability

Insurance companies are subject to the application of the alter ego theory of liability.

"An interinsurance exchange is not a corporation, but we see no reason why the distinction between the exchange and its attorney-in-fact may not be disregarded in cases meeting the requirements of the "alter ego" or "single enterprise" doctrine authorizing disregard of the corporate entity. (11 Witkin, Summary of Cal. Law (9th ed. 1989) Corporations, § 12 et seq.; *Las Palmas Associates v. Las Palmas Center Associates, supra,* 235 Cal.App.3d 1220, 1248–1250, 1 Cal.Rptr.2d 301.) Tran did not brief this theory of liability, although her complaint and the proof she adduced in the summary adjudication proceedings abundantly tended to show the unitary nature of the Farmers Group insurance business. We have exercised our discretion to address the issue, after obtaining supplemental briefing from the parties. (*Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 972, 103 Cal.Rptr.2d 672, 16 P.3d 94; *Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1341, fn. 6, 67 Cal.Rptr.2d 726.) Respondents do not dispute the suitability of the "alter ego" or "single enterprise" doctrine in this context. ¶ Two conditions are generally required for application of the doctrine to two related corporations: (1) such a unity of interest and ownership that the separate corporate personalities are merged, so that one corporation is

a mere adjunct of another or the two companies form a single enterprise; and (2) an inequitable result if the acts in question are treated as those of one corporation alone. (*Las Palmas Associates v. Las Palmas Center Associates, supra,* 235 Cal.App.3d 1220, 1249–1250, 1 Cal.Rptr.2d 301; *Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538–539, 99 Cal.Rptr.2d 824.) Whether these conditions have been satisfied is a question of fact. (*Las Palmas Associates v. Las Palmas Center Associates, supra,* 235 Cal.App.3d at p. 1248, 1 Cal.Rptr.2d 301.)" (Tran v. Farmers Group, Inc. (2002) 104 Cal.App.4th 1202, 1218-1219.)

"In the insurance context, bad faith liability may be imposed on a person or entity shown to be a corporate insurer's "alter-ego." To justify piercing the corporate veil on an alter-ego theory in order to hold a parent corporation liable for the acts or omissions of its subsidiary, a plaintiff must establish two elements: "(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow." *See* Hon. William W. Schwarzer, et al., *supra* § 12:97.5 (citing *Mesler v. Bragg Management Co.,* 39 Cal.3d 290, 300, 216 Cal.Rptr. 443, 702 P.2d 601 (1985)); *Laird v. Capital Cities/ABC, Inc.,* 68 Cal.App.4th 727, 737, 80 Cal.Rptr.2d 454 (1998)." (Monaco v. Liberty Life Assur. Co. (N.D. Cal., 2007) 2007 WL 420139, at *5.)

"Defendants argue that even if we reverse the judgment as to PDR, we should not reverse it as to Caswell because Rutherford failed to adequately allege that Caswell and PDR are alter egos. We conclude that Rutherford made sufficient allegations of alter ego to avoid a demurrer. ¶ Rutherford alleged that Caswell dominated and controlled PDR; that a unity of interest and ownership existed between Caswell and PDR; that PDR was a mere shell and conduit for Caswell's affairs; that PDR was inadequately capitalized; that PDR failed to abide by the

formalities of corporate existence; that Caswell used PDR assets as her own; and that recognizing the separate existence of PDR would promote injustice. These allegations mirror those held to pass muster in *First Western Bank & Trust Co. v. Bookasta* (1968) 267 Cal.App.2d 910, 915–916, 73 Cal.Rptr. 657. As in *First Western,* "[a]ssuming these facts can be proved, [Caswell] ... may be held liable ... under the *alter ego* principle." (*Id.* at p. 916, 73 Cal.Rptr. 657.) Defendants argue that Rutherford failed to allege specific facts to support an alter ego theory, but Rutherford was required to allege only "ultimate rather than evidentiary facts." (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550, 67 Cal.Rptr.3d 330, 169 P.3d 559.) Moreover, the "less particularity [of pleading] is required where the defendant may be assumed to possess knowledge of the facts at least equal, if not superior, to that possessed by the plaintiff," which certainly is the case here. (*Burks v. Poppy Construction Co.* (1962) 57 Cal.2d 463, 474, 20 Cal.Rptr. 609, 370 P.2d 313.) Therefore, we affirm the trial court's ruling that Rutherford sufficiently pled an alter ego theory of liability." (Emphasis added.) (Rutherford Holdings, LLC v. Plaza Del Rey (2014) 223 Cal.App.4th 221, 235–236.)

"A joint venture is defined as an undertaking by two or more persons, or entities, jointly to carry out a single business enterprise for profit. (*580 Folsom Associates v. Prometheus Development Co.* (1990) 223 Cal.App.3d 1, 15, 272 Cal.Rptr. 227; *Connor v. Great Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850, 863, 73 Cal.Rptr. 369, 447 P.2d 609.) It requires an agreement under which the parties have (1) a joint interest in a common business, (2) an understanding that profits and losses will be shared, and (3) a right to joint control. (*Connor v. Great Western Sav. & Loan Assn., supra,* at p. 863, 73 Cal.Rptr. 369, 447 P.2d 609; *580 Folsom Associates v. Prometheus Development Co., supra,* at pp. 15–16, 272 Cal.Rptr. 227.)" (Ramirez v. Long Beach Unified School Dist. (2002) 105 Cal.App.4th 182, 193.)

"…although joint control of the undertaking and equal power to direct the enterprise is an essential element of a joint venture, "this is not to say that there cannot be a joint venture where the parties have unequal control of operations." (*Stilwell v. Trutanich,* 178 Cal.App.2d 614, 619 [3 Cal.Rptr. 285].)" (Rosen v. E. C. Losch, Inc. (1965) 234 Cal.App.2d 324, 332.)

Aa started earlier, allegations of ultimate fact are acceptable. An appellate court has held: "In order to plead a cause of action, the complaint must contain a "statement of the facts constituting the cause of action, in ordinary and concise language." (Code of Civil Procedure, § 425.10, subd.(a).) While it is true that pleading conclusions of law does not fulfill this requirement, it has long been recognized that "[t]he distinction between conclusions of law and ultimate facts is not at all clear and involves at most a matter of degree. [Citations.] For example, the courts have permitted allegations which obviously included conclusions of law and have termed them 'ultimate facts' or 'conclusions of fact.'" (*Burks v. Poppy Construction Co*. (1962) 57 Cal.2d 463, 473 [20 Cal.Rptr. 609, 370 P.2d 313].)" (Perkins v. Superior Court (1981) 117 Cal.App.3d 1, 6.)

"A well-pleaded complaint "set[s] forth the ultimate facts constituting the cause of action, not the evidence by which plaintiff proposes to prove those facts." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211–212, 197 Cal.Rptr. 783, 673 P.2d 660, fn. omitted; see also *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550, 67 Cal.Rptr.3d 330, 169 P.3d 559 ["[T]he complaint ordinarily is sufficient if it alleges ultimate rather than evidentiary facts."].)" (Carlsen v. Koivumaki (2014) 227 Cal.App.4th 879, 898.)

Having read and considered the moving papers, opposition papers, reply, and complaint paragraphs 11, 12, 14, 15, 18-21, 22(a), 22(b), 22(c), 22(e), 22(f), 22(g), 53, and 59-61, treating as true all of the complaint's material, ultimate factual allegations, and construing the complaint liberally to determine whether a cause of action has been stated, given the assumed

truth of the facts pleaded, for the purposes of demurrer (Picton v. Anderson Union High School Dist. (1996) 50 Cal.App.4th 726, 732-733.), the court finds that plaintiff has adequately alleged defendant USAA's liability for breach of contract and breach of the duty of good faith and fair dealing under the theories of alter ego liability and joint venture.

Defendant United Services Automobile Association's demurrers to the complaint are overruled.

TENTATIVE RULING # 8: DEFENDANT UNITED SERVICES AUTOMOBILE ASSOCIATION'S DEMURRERS TO THE COMPLAINT ARE OVERRULED. 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 BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL

BE PROVIDED. 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 18, 2022 EITHER IN PERSON OR BY ZOOM APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

9. MATTER OF ANTONIO G. 22CV1439

Petition for Approval of Compromise of Disputed Claim of Minor.

The petition states the minor sustained injuries arising from a motor vehicle accident consisting of compound fractures of the tibia and fibula of the leg, back and neck pain, anteriolithesis of the cervical spine, delayed healing, fascia scarring, de-mineralization of the spine, post traumatic stress, anxiety, and subsequently broke his wrist when transitioning from his wheelchair to a boot and crutches. Petitioner requests the court authorize a compromise of the minor's claim against defendant/respondent in the gross amount of $72,000.

The petition states the minor incurred $100,000 in medical expenses before reductions, with the expenses paid by medical insurance in the amount of $7,891.55. The verified petition states in paragraphs 12.b.(2)(f)(i) and 12.b.(5) that the insurer did not request reimbursement and that there are no statutory or contractual liens for payment of the medical expenses. There are copies of the bills substantiating the claimed medical expenses attached to the petitions as required by Local Rule 7.10.12A.(6).

The petition states that the minor has fully recovered from the injuries allegedly suffered. There is no current doctor's report concerning the minor's condition and prognosis of recovery as required by Local Rule 7.10.12A.(3).

The petition states that the petitioning parent received no assistance from any counsel, therefore, attorney's fees were not incurred and costs are not claimed. The gross settlement amount is to be placed into a blocked account.

Pursuant to Rules of Court, Rule 7.952(a) the petitioner and the minor are required to appear at hearings on petitions to approve minor compromises, unless the court dispenses with the requirement upon finding good cause.

TENTATIVE RULING # 9: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, NOVEMBER 18, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

10. MATTER OF AVA G. 22CV1440

Petition for Approval of Compromise of Disputed Claim of Minor.

The petition states the minor sustained injuries consisting of a head injury, hematoma on the head, hip bruising, neck pain, head pain, headaches, dizziness, blurred vision, anxiety, and trauma. Petitioner requests the court authorize a compromise of the minor's claim against defendant/respondent in the gross amount of $86,000.

The petition states the minor incurred $15,964.97 in medical expenses before reductions, with the expenses paid by medical insurance in the amount of $4,896.37. The verified petition states in paragraphs 12.b.(2)(f)(i) and 12.b.(5) that the insurer did not request reimbursement and that there are no statutory or contractual liens for payment of the medical expenses.. There are copies of the bills substantiating the claimed medical expenses attached to the petitions as required by Local Rule 7.10.12A.(6).

The petition states that the minor has fully recovered from the injuries allegedly suffered. There is a doctor's report for an office appointment on June 22, 2017 at U.C. Davis Health concerning the minor's condition and prognosis of recovery as required by Local Rule 7.10.12A.(3). The report stated that the plan was observation, reassurance, avoid activities for another week, follow-up as needed and a yearly check.

The petition states that the petitioning parent received no assistance from any counsel, therefore, attorney's fees were not incurred and costs are not claimed. The gross settlement amount is to be placed into a blocked account.

Pursuant to Rules of Court, Rule 7.952(a) the petitioner and the minor are required to appear at hearings on petitions to approve minor compromises, unless the court dispenses with the requirement upon finding good cause.

TENTATIVE RULING # 10: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, NOVEMBER 18, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

11. MATTER OF TORRELL 22CV1345

OSC Re: Name Change.

TENTATIVE RULING # 11: THE PETITION IS GRANTED.

12. PEOPLE v. KRYLOV PC-20200443

Claim Opposing Forfeiture.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

At the hearing on September 16, 2022 the People advised the court the criminal matter had resolved, however, more time ws needed for further review. The hearing was continued to November 18, 2022.

TENTATIVE RULING # 12: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, NOVEMBER 18, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

13. PEOPLE v MACEIUNAS 22CV0482

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: $27,000 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: on April 19, 2022 the petition for forfeiture, notice of judicial asset forfeiture proceeding, blank claim form opposing forfeiture (MC-200) and disclaimer of interest were served by certified mail on John Maceiunas to a certain street address.

On May 12, 2022 respondent filed a claim opposing forfeiture.

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

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

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

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

"(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 July 1, 2022 the court was advised the criminal case was resolved and the People requested a continuance of this hearing. The hearing was continued to November 18, 2022.

TENTATIVE RULING # 13: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, NOVEMBER 18, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.

14. O'CONNOR v. DELTA DENTAL OF CALIFORNIA 22CV0138

Defendant Los Angeles Community College District's Demurrer to 1st Amended Complaint.

TENTATIVE RULING # 14: THIS MATTER IS CONTINUED TO 8:30 A.M. ON JANUARY 20, 2023 IN DEPARTMENT NINE.

15. FISHER v. MARSHALL MEDICAL CENTER PC-20200630

Defendant Vance's Motion for Summary Judgment.

TENTATIVE RULING # 15: THIS MATTER IS DROPPED FROM THE CALENDAR UPON REQUEST OF THE MOVING PARTY.

16. THE POTOSKY REVOCABLE TRUST v. THE BEDFORD ESTATES HOA 21CV0356

OSC Re: Preliminary Injunction.

On August 26, 2022 plaintiff filed a 2nd amended complaint against the defendant HOA and Bruce Shoff asserting causes of action for breach of contract, breach of fiduciary duty, breach of the covenant of good faith and fair dealing, fraud and declaratory relief arising from a dispute over a fencing project and shed project proposed by plaintiffs, which the HOA rejected; and the alleged improper adoption of an amendment to the C,C,&Rs to allegedly allow the HOA to harass and punish plaintiff for its alleged violation of the C,C,&Rs. The 2nd amended complaint alleges in paragraphs 30 and 34 that plaintiff has been damaged in excess of $100,000.

Plaintiff filed an ex parte application for OSC and TRO preventing the defendant HOA from holding a vote of its members regarding the imposition of a special assessment in the total amount of $75,000 to defend against this litigation. On October 21, 2022 the court granted the application and set this hearing on the request for preliminary injunction.

Inasmuch as defendant HOA filed a Case Management Statement on October 31, 2022 acknowledging in paragraph 18 regarding other issues that the parties will be appearing at 8:30 a.m. on November 18, 2022 in Department Nine to argue a preliminary injunction, it appears that defendant HOA has notice of the hearing date, time and location.

Plaintiff contends: the complaint seeks to prevent the HOA from improperly using the power of the HOA to harass and intimidate the plaintiffs by wrongfully asserting and enforcing the C,C,&Rs; a special assessment to fund a defense against an HOA member's lawsuit against the HOA is a nonsensical misuse of the C,C,&Rs; the special assessment for legal fees is not authorized by the C,C,&Rs or Civil Code, § 5605, which is limited by Civil Code, § 5610(a) to

impose special assessments for extraordinary situations only by court order, which has not been requested or issued.

Defendant HOA opposed the TRO and OSC on the following grounds: the defendant HOA is composed of seven members; the powers of the HOA under the C,C,&Rs and Davis-Stirling Act expressly authorize the defendant HOA to specially assess its embers as necessary to perform its duties under the Act and C,C,&Rs; seeking a vote on the proposed special assessment of a total amount of $75,000 to defend the association against plaintiff's lawsuit is authorized by Civil Code, §§ 5600, 5605(b) and 4805 and C,C,&Rs paragraphs 4.7 and 6.3; Civil Code, § 5515(e) mandates that the defendant HOA maintain the integrity of its reserve accounts and shall, if necessary, levy a special assessment subject to the limitations of Section 5605, the $350 annual assessment the HOA collects from its seven members is inadequate to support its defense against this lawsuit, and the HOA reserve account has long been exhausted by the defense against this action; the Davis-Stirling Act provisions control in the event that the C,C,&Rs are inconsistent; plaintiff's argument that paragraphs 4.2 and 4.4 of the C,C,&Rs only allows special assessments for the sole purpose of maintaining liability insurance and/or the costs to construct or repair the Belford Estates Road common area lacks merit; Civil Code, § 5610(a) only applies to imposing emergency assessments without member approval in three specified circumstances, which does not apply to a special assessment with the approval by vote of the HOA membership; and the motion for a preliminary inunction should be denied on the grounds that plaintiff is unlikely to prevail on the merits of its assertion that the membership of the HOA can not vote to impose a special assessment to defend against litigation seeking damages against the HOA, the injunction will result in irreparable harm to the defendant HOA caused by having no funds to defend against the lawsuit that leads to the HOA being unable to defend against the action for the benefit of its membership and

leaves the HOA with no funds that are necessary to perform its other duties such as maintenance of the road, and the relative interim harms weighs in favor of defendant HOA and denial of the preliminary injunction.

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

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

"An injunction may be granted in the following cases: ¶ (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually. ¶ (2) When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action. ¶ (3) When it appears, during the litigation, that a party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render the judgment ineffectual. ¶ (4) When pecuniary compensation would not afford adequate relief. ¶ (5) Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief. ¶ (6) Where the restraint is necessary to prevent a multiplicity of judicial proceedings. ¶ (7) Where the obligation arises from a trust." (Code of Civil Procedure, § 526(a).)

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

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

"It is said: "To issue an injunction is the exercise of a delicate power, requiring great caution and sound discretion, and rarely, if ever, should (it) be exercised in a doubtful case. . . ." (*Willis v. Lauridson*, 161 Cal. 106, 117, 118 P. 530, 535; *West v. Lind*, 186 Cal.App.2d 563, 569, 9 Cal.Rptr. 288; *Mallon v. City of Long Beach*, 164 Cal.App.2d 178, 190, 330 P.2d 423.)" (Ancora-Citronelle Corp. v. Green (1974) 41 Cal.App.3d 146, 148.)

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

"The trial court considers two interrelated factors when deciding whether to issue preliminary injunctions: the interim harm the applicant is likely to sustain if the injunction is denied as compared to the harm to the defendant if it issues, and the likelihood the applicant

will prevail on the merits at trial. (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286, 219 Cal.Rptr. 467, 707 P.2d 840; *IT Corp. v. County of Imperial, supra,* 35 Cal.3d at pp. 69–70, 196 Cal.Rptr. 715, 672 P.2d 121.) However, before the trial court can exercise its discretion the applicant must make a prima facie showing of entitlement to injunctive relief. The applicant must demonstrate a real threat of immediate and irreparable injury (6 Witkin, Cal.Procedure (3d ed. 1985) Provisional Remedies, § 254; *E.H. Renzel Co. v. Warehousemen's Union* (1940) 16 Cal.2d 369, 373, 106 P.2d 1) due to the inadequacy of legal remedies. (6 Witkin, *op. cit. supra,* § 253.)" (Triple A Machine Shop, Inc. v. State of California (1989) 213 Cal.App.3d 131, 138.)

""To obtain a preliminary injunction, a plaintiff ordinarily is required to present evidence of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending an adjudication of the merits." (*White v. Davis, supra,* 30 Cal.4th at p. 554, 133 Cal.Rptr.2d 648, 68 P.3d 74; see generally Code Civ. Proc. § 526, subd. (a)(2) [preliminary injunction may issue when it appears the plaintiff would suffer great or irreparable injury from the commission or continuance of some act during the litigation].) While the mere possibility of harm to the plaintiffs is insufficient to justify a preliminary injunction, the plaintiff are "not required to wait until they have suffered *actual harm* before they apply for an injunction, but may seek injunctive relief against the *threatened infringement* of their rights." (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1292, 240 Cal.Rptr. 872, 743 P.2d 932, italics added; accord, *City of Torrance v. Transitional Living Centers for Los Angeles, Inc.* (1982) 30 Cal.3d 516, 526, 179 Cal.Rptr. 907, 638 P.2d 1304 [injunctive relief is available where the injury sought to be avoided is " 'actual or threatened' "]; *7978 Corporation v. Pitchess* (1974) 41 Cal.App.3d 42, 46, 115 Cal.Rptr. 746 [same].) ¶ If the threshold requirement of irreparable injury is established, then we must examine two interrelated factors to determine whether the trial court's decision to issue a

preliminary injunction should be upheld: "(1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction." (*Butt v. State of California* (1992) 4 Cal.4th 668, 677–678, 15 Cal.Rptr.2d 480, 842 P.2d 1240.) Appellate review is generally limited to whether the trial court's decision constituted an abuse of discretion. (*Ibid.*). (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1463, 47 Cal.Rptr.3d 147.) However, [t]o the extent that the trial court's assessment of likelihood of success on the merits depends on legal rather than factual questions, [such as when the meaning of a contract or a statute are at issue,] our review is de novo.' " (*City of Lake Forest v. Evergreen Holistic Collective* (2012) 203 Cal.App.4th 1413, 1428, 138 Cal.Rptr.3d 332; *Garamendi v. Executive Life Ins. Co.* (1993) 17 Cal.App.4th 504, 512, 21 Cal.Rptr.2d 578.)" (Costa Mesa City Employees' Assn. v. City of Costa Mesa (2012) 209 Cal.App.4th 298, 305–306.)

An irreparable injury is established where the evidence submitted shows actual or threatened injury to property or personal rights which cannot be compensated by an ordinary damage award. (See Brownfield v. Daniel Freeman Marina Hospital (1989) 208 Cal.App.3d 405, 410.)

A trial court's decision on a motion for preliminary injunction is not a adjudication of the ultimate rights in controversy (Association for Los Angeles Deputy Sheriffs v. County of Los Angeles (2008) 166 Cal.App.4th 1625, 1634.); the order is not a determination of the merits of the case; and the order may not be given issue-preclusive effect with respect to the merits of the action (Upland Police Officers Ass'n v. City of Upland (2003) 111 Cal.App.4th 1294, 1300.).

With the above-cited principles in mind, the court will rule on the request for issuance of a preliminary injunction preventing an HOA membership election to consider whether to approve

a special assessment in the amount pf $75,000 to fund the legal defense of the HOA against this lawsuit.

Plaintiff's counsel declares in support of the injunction: plaintiff attempted to resolve the issue informally, including at the most recent annual meeting of the HOA on October 8, 2022, but the defendants are proceeding to levy the special assessment; plaintiff will be irreparably harmed by the levy as defendant HOA will be able to file a lien on plaintiff's property if plaintiff fails to pay the special assessment; Exhibit A is a true and correct copy of the email sent to all association members by the HOA president informing them about the date and time of the special assessment vote; and Exhibit B is a true and correct copy of the Belford Estates C,C,&Rs. (Declaration of Thomas M. Papez in Support of Application for Injunction, paragraphs 3, 4, 6, and 7; and Exhibits A and B.)

Exhibit A consists of the HOA president's email informing all members that the date to open the special election ballots was moved to October 21, 2022 at 5:00 p.m. at a specific address; and copies of the ballot, special assessment payment plan to be voted on, a ballot envelope, and return envelope.

The Belford Estates C,C,&Rs provides for assessments levied to promote the health, safety and welfare of the residents and for improvement and maintenance of the Belford Estates Road; and special assessment for construction, reconstruction or repair of the Bedford Estates Road. (Declaration of Thomas M. Papez in Support of Application for Injunction, Exhibit B – C,C,&Rs of Belford Estates, Article IV, paragraphs 4.2 and 4.4.) The C,C,&Rs also provide for enforcement of the assessments and C,C,&Rs provisions by member lawsuit. (Declaration of Thomas M. Papez in Support of Application for Injunction, Exhibit B – C,C,&Rs of Belford Estates, Article IV, paragraph 4.7 and Article VI, paragraph 6.3.)

"A common interest development shall be managed by an association that may be incorporated or unincorporated. The association may be referred to as an owners' association or a community association." (Civil Code, § 4800, formerly Civil Code, § 1363.)

"The association is governed by a board of directors and the powers of the directors are enumerated in the development's governing documents. State and federal statutes as well as common law impose obligations on the directors." (Ritter & Ritter, Inc. Pension & Profit Plan v. The Churchill Condominium Assn. (2008) 166 Cal.App.4th 103, 118.)

"In the event of a conflict between CC & R's and the Act, the Act prevails as a matter of law. (*14859 Moorpark Homeowner's Assn. v. VRT Corp.* (1998) 63 Cal.App.4th 1396, 1406–1407, 74 Cal.Rptr.2d 712.)" (Thaler v. Household Finance Corp. (2000) 80 Cal.App.4th 1093, 1102.)

The court rejects plaintiff's argument that a special assessment can only be levied for the sole purpose of maintaining liability insurance and/or the costs for repair of the Belford Estates Road common area. While Article IV, paragraphs 4.2 and 4.4 provide for annual assessments for road repair and to pay for liability insurance and for special assessments for road repairs, those C,C,&Rs do not and can not prohibit the operation of state statutes and case law that special assessments can be imposed as provided in those statutes or case law.

"(a) Except as provided in Section 5605, the association shall levy regular and special assessments sufficient to perform its obligations under the governing documents and this act." (Civil Code, § 5600(a).)

"(b) Notwithstanding more restrictive limitations placed on the board by the governing documents, the board may not impose a regular assessment that is more than 20 percent greater than the regular assessment for the association's preceding fiscal year or impose special assessments which in the aggregate exceed 5 percent of the budgeted gross expenses

of the association for that fiscal year without the approval of a majority of a quorum of members, pursuant to Section 4070, at a member meeting or election." (Civil Code, § 5605(b).)

"Section 5605 does not limit assessment increases necessary for emergency situations. For purposes of this section, an emergency situation is any one of the following: ¶ (a) An extraordinary expense required by an order of a court. ¶ * * * However, prior to the imposition or collection of an assessment under this subdivision, the board shall pass a resolution containing written findings as to the necessity of the extraordinary expense involved and why the expense was not or could not have been reasonably foreseen in the budgeting process, and the resolution shall be distributed to the members with the notice of assessment." (Civil Code, § 5610(a).)

"(e) The board shall exercise prudent fiscal management in maintaining the integrity of the reserve account, and shall, if necessary, levy a special assessment to recover the full amount of the expended funds within the time limits required by this section. This special assessment is subject to the limitation imposed by Section 5605. The board may, at its discretion, extend the date the payment on the special assessment is due. Any extension shall not prevent the board from pursuing any legal remedy to enforce the collection of an unpaid special assessment." (Civil Code, § 5515(e).)

Civil Code, § 5610(a) does not apply to special assessments to pay legal expenses to defend against a lawsuit as the obligation of the HOA to pay its own attorney fees is not premised upon a court order, and Section 5610 in its entirety does not apply as the defendant HOA is not seeking to impose an emergency assessment by passing a resolution without a vote of the membership. The HOA is seeking approval of the membership by a vote of the membership on the question of whether to impose a special assessment on themselves in a specific amount with a specified payment schedule.

The HOA Board is mandated by statute to levy regular and special assessments sufficient to perform its obligations under the governing documents and the Davis-Stirling Act and to exercise prudent fiscal management to maintain the integrity of the reserve. The reserve has apparently been exhausted by the expenses of this litigation leaving no reserve fund to maintain the road, which is one of the main purposes of the HOA as delineated in the C,C,&Rs attached as Exhibit B to the Declaration of Thomas M. Papez in Support of Application for Injunction. It would also appear to be an exercise of the defendant HOA's obligation to exercise prudent fiscal management to maintain the integrity of the reserve by defending against a lawsuit brought by a member allegedly arising from a dispute over a fencing project and shed project proposed by plaintiffs that the HOA rejected pursuant to the provisions of the HOA, which seeks damages against the defendant HOA in excess of $100,000 in the 2nd amended complaint at paragraphs 30 and 34 and prays for an additional sum of an unspecified amount to be paid to plaintiffs as an award of attorney fees at page 9, line 9 of the 2nd amended complaint. The HOA would not be acting prudently if it failed to expend funds to defend against the HOA and allow a default judgment to be entered against the HOA, which would lead to enforcement of the court judgment against all funds held by the HOA and inevitably lead to a special emergency assessment against all members pursuant to the provisions of Civil Code, § 5610(a) in order to pay that judgment as it appears that there would be insufficient funds in the HOA accounts to pay damages in excess of $100,000, plus attorney fees, as the annual assessments are limited to $350 from seven members. (See Declaration of Thomas M. Papez in Support of Application for Injunction Exhibit B – C,C,&Rs of Belford Estates, Article IV, paragraph 4.3.1.)

Civil Code, § 5605(b) expressly provides that the defendant HOA is authorized to impose special assessments which in the aggregate exceed 5 percent of the budgeted gross expenses

of the association for that fiscal year, provided it obtains approval of a majority of a quorum of members at an election, which is what defendant HOA is attempting to accomplish by the election that plaintiff seeks to prevent by this injunction pending the conclusion of this litigation.

Having reviewed the evidence in support of the motion and weighing the likelihood of the moving party ultimately prevailing on the merits of a claim that the HOA is barred from imposing special assessments by vote of the membership to finance a defense against this litigation and the relative interim harm to the parties from the issuance of a preliminary injunction (Butt v. State of California (1992) 4 Cal.4th 668, 677-678.), the court finds that the scale tips in favor of defendant HOA and denial of the application for a preliminary injunction.

Plaintiff's application for a preliminary injunction is denied.

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

TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED. 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 18, 2022 EITHER IN PERSON OR BY ZOOM APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

17. WELLS FARGO BANK v. DOWD PCL-20210439

Plaintiff's Motion to Vacate Dismissal and Enter Judgment.

On September 11, 2021 plaintiff and defendant entered into a written settlement agreement and requested the court to retain jurisdiction to enforce the agreement. It appears that the individual parties executed the agreement. On October 18, 2021 the court dismissed the action upon request of the plaintiff and retained jurisdiction pursuant to the provisions of Code of Civil Procedure, § 664.6 upon request of the plaintiff/parties and to enter judgment against defendant in the event of default by defendant.

Plaintiff moves to enter judgment pursuant to the terms of the settlement agreement on the grounds that defendant is in default of defendant's obligation to make monthly payments as required by the stipulation; plaintiff provided defendant with notice of the default and time to cure the default as provided in the settlement agreement; defendant did not cure the default; and according to the terms of the agreement, plaintiff is entitled to entry of judgment against defendant in the amount of $5,799.09, less credits in the amount of $180.04 for previous payments, plus costs of $290.

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

The court may enter judgment pursuant to the terms of a settlement agreement and if requested by the parties, retain jurisdiction to enforce the settlement. (Code of Civil Procedure, § 664.6.)

Section 664.6 was enacted to provide a summary procedure for enforcing settlement agreements. In order to be enforceable under that statute, the settlement agreement must be

either entered into orally before a court, or must be in writing and signed by the parties. (Weddington Productions, Inc. v. Flick (1998) 60 Cal.App.4th 793, 810.) The written settlement agreement must be signed by the parties themselves (Levy v. Superior Court (1995) 10 Cal.4th 578, 585-586.) and must be signed by the individual parties seeking enforcement and the individual parties against whom enforcement is sought. (Harris v. Rudin, Richman & Appel (1999) 74 Cal.App.4th 299, 305.)

"Section 664.6 states that if the parties to pending litigation enter into a settlement either in a writing signed by the parties or orally before the court, the court, upon a motion, may enter judgment pursuant to the terms of the settlement. [Footnote Omitted.] The court retains jurisdiction to enforce a settlement under the statute even after a dismissal, but only if the parties requested such a retention of jurisdiction before the dismissal. (*Ibid.*) Such a request must be made either in a writing signed by the parties or orally before the court. (*Wackeen v. Malis* (2002) 97 Cal.App.4th 429, 439–440, 118 Cal.Rptr.2d 502.)" (Hines v. Lukes (2008) 167 Cal.App.4th 1174, 1182.)

In finding that a dismissal of the action with prejudice after the parties agree to settle the action deprives the court of subject matter jurisdiction to subsequently enforce the settlement agreement, the Third District Court of Appeal has held: "The dismissal with prejudice of the lawsuit deprived the superior court of subject matter jurisdiction. Absent a pending lawsuit, a court cannot issue judgments or orders. A superior court has subject matter jurisdiction over most original "causes." (Cal. Const., art. VI, § 10.) A cause commences with the filing of an action or special proceeding. (Code Civ. Proc., §§ 20-30.) A dismissal terminates an action. (See id., § 581.) A superior court thereafter has no subject matter jurisdiction to grant relief other than costs and fees as appropriate. (*Harris v. Billings* (1993) 16 Cal.App.4th 1396, 1405, 20 Cal.Rptr.2d 718 (*Harris*); *Egly v. Superior Court* (1970) 6 Cal.App.3d 476, 483, 86 Cal.Rptr.

18.) A court may also entertain a motion to vacate on grounds of mistake, excusable neglect and so forth (Code Civ. Proc., § 473). (*Basinger*, supra, 220 Cal.App.3d at pp. 21-22, 269 Cal.Rptr. 332; see *H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1364-1366, 118 Cal.Rptr.2d 71 [rejecting Basinger's conclusion that an order vacating a voluntary dismissal is appealable].) ¶ The settlement language purporting to vest the trial court with retained jurisdiction after the dismissal was a nullity: Subject matter jurisdiction cannot be conferred by consent, waiver or estoppel. (*Housing Group v. United Nat. Ins. Co.* (2001) 90 Cal.App.4th 1106, 1113, 109 Cal.Rptr.2d 497 [parties sought enforcement in court where no action filed] (Housing Group); 2 Witkin, Summary of Cal. Law (4th ed. 1996) Jurisdiction, § 12, pp. 556-558.)" (Hagan Engineering, Inc. v. Mills (2003) 115 Cal.App.4th 1004, 1007-1008.)

However, if prior to the dismissal of the action the parties made a formal request directly to the court to retain jurisdiction despite dismissal of the action pursuant to the provisions of Code of Civil Procedure, § 664.6, then the court retains jurisdiction despite the dismissal. (See Hagan Engineering, Inc. v. Mills (2003) 115 Cal.App.4th 1004, 1010-1011.)

"Code of Civil Procedure section 664.6 provides a summary procedure to enforce a settlement agreement by entering judgment pursuant to the terms of the settlement. (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 809, 71 Cal.Rptr.2d 265.) Section 664.6 states that if the parties to pending litigation enter into a settlement either in a writing signed by the parties or orally before the court, the court, upon a motion, may enter judgment pursuant to the terms of the settlement. [Footnote Omitted.] The court retains jurisdiction to enforce a settlement under the statute even after a dismissal, but only if the parties requested such a retention of jurisdiction before the dismissal. (*Ibid.*) Such a request must be made either in a writing signed by the parties or orally before the court. (*Wackeen v.*

Malis (2002) 97 Cal.App.4th 429, 439–440, 118 Cal.Rptr.2d 502.)" (Hines v. Lukes (2008) 167 Cal.App.4th 1174, 1182.)

Plaintiff's counsel declares: defendant was sued for a delinquent credit card debt in the amount of $5,779.09; plaintiff and defendant thereafter entered into a stipulation for entry of judgment and installment payments with dismissal of the action and consent for the court to retain jurisdiction pursuant to Code of Civil Procedure, § 664.6; pursuant to the terms of the stipulation defendant was to pay a total amount of $5,799.09 by installment payments of $100 on or before the 8th of each month commencing September 8, 2021 continuing through May 8, 2026, with the final payment of $99,09; as of the date of the motion defendant has made payments totaling $180.04 and has failed to remit any further payments making defendant in default of the agreement; defendant has not cured the default despite having sent correspondence to defendant on February 4, 2022 informing defendant of the default and providing seven days for defendant to cure the default by paying the past due amount; pursuant to the stipulation plaintiff is entitled to entry of judgment against defendant in the amount of $5,799.09, plus costs and minus a credit for payments made; plaintiffs have incurred $290 in costs consisting of $225 as a filing fee and $65 for service of process; and plaintiff seeks entry of judgment in the amount of $5,909.05

It appears appropriate under the circumstances presented to grant the motion, vacate the dismissal, and enter judgment in favor of plaintiff and against defendant in the amount of $5,909.05.

TENTATIVE RULING # 17: PLAINTIFF'S MOTION TO VACATE DISMISSAL AND ENTER JUDGMENT IS GRANTED. THE COURT ORDERS THE DISMISSAL VACATED AND JUDGMENT ENTERED IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT IN THE AMOUNT OF $5,909.05. 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 BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED. 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 18, 2022 EITHER IN PERSON OR BY ZOOM APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

18. GOLDMAN SACHS BANK USA v. SPECK 21CV0052

Motion for Summary Judgment.

On October 27, 2021 plaintiff filed an action for common counts of open book account, money lent by plaintiff to defendant at defendant's request, and for money paid, laid out, and expended to defendant or for the defendant at the defendant's special instance and request related to a loan. Plaintiff alleges: that defendant owes a principal balance in the amount of $4,136.80; and despite demand defendant has failed to pay plaintiff as agreed. Defendant answered the complaint by general denial with no affirmative defenses.

Plaintiff moves for entry of summary judgment against defendant in the principal amount of $3,190.80 as the evidence submitted establishes as a matter of law that such amount is due and payable by defendant on an open book account with plaintiff.

The proof of service declares that on July 27, 2022 the notice and moving papers were served by mail to defendant's address of record. There was no opposition to the motion in the court's file at the time this ruling was prepared.

"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.)

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

Open Book Account Cause of Action

"The term "book account" means a detailed statement which constitutes the principal record of one or more transactions between a debtor and a creditor arising out of a contract or some fiduciary relation, and shows the debits and credits in connection therewith, and against whom and in favor of whom entries are made, is entered in the regular course of business as conducted by such creditor or fiduciary, and is kept in a reasonably permanent form and manner and is (1) in a bound book, or (2) on a sheet or sheets fastened in a book or to backing but detachable therefrom, or (3) on a card or cards of a permanent character, or is kept in any other reasonably permanent form and manner." (Code of Civil Procedure, § 337a.)

"A "book account" is defined as a " 'detailed statement, kept in a book, [[FN4]] in the nature of debit and credit, arising out of contract or some fiduciary relation.' It is, of course, necessary for the book to show against whom the charges are made. .... It must also be made to appear in whose favor the charges run." (*Joslin v. Gertz* (1957) 155 Cal.App.2d 62, 65, 317 P.2d 155, quoting *Wright v. Loaiza* (1918) 177 Cal. 605, 606-607, 171 P. 311.) A book account may furnish the basis for an action on a common count " '... when it contains a statement of the debits and credits of the transactions involved completely enough to supply evidence from which it can be reasonably determined what amount is due to the claimant.' " (*Tillson v. Peters* (1940) 41 Cal.App.2d 671, 678, 107 P.2d 434, quoted in *Robin v. Smith* (1955) 132 Cal.App.2d 288, 291, 282 P.2d 135.) A book account is described as "open" when the debtor has made some payment on the account, leaving a balance due. (For more on book accounts see generally, 1 Cal.Jur.3d (1972) Accounts and Accounting, § 3, pp. 214-217.) ¶ FN4. In this age of computer accounting, it is unlikely that a court would require that a book account actually be kept in a book; certainly computer memory is a reasonable substitute for the pages of a book, given that the data stored therein can always be reduced (or, more precisely, enlarged) to writing. ¶ For present purposes, the most important characteristic of a suit brought to recover a sum owing on a book account is that the amount owed is determined by computing all of the credits and debits entered in the book account. Accordingly, when a complaint alleges a common count to recover for a sum due on a book account, and, as occurred here, the complaint is answered by a general denial, this places in issue every entry in the book account. The defendant is therefore entitled to attack each of the entries "to show that the plaintiff has no right to recover or to recover to the extent that he claims." (*Aetna Carpet Co. v. Penzner*, supra, 102 Cal.App.2d at p. 860, 228 P.2d 347; see also, *Bridges v. Paige*, supra, 13 Cal. at p.

641.)" (Emphasis added.) (Interstate Group Administrators, Inc. v. Cravens, Dargan & Co. (1985) 174 Cal.App.3d 700, 708.)

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

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

Plaintiff's legal operations analyst declares: in her capacity as legal operations analyst, she has knowledge regarding and access to the plaintiff's records, the records are maintained in the ordinary course of business, and the records are updated with information on events by individuals with personal knowledge of the events, or by automated processes that track such events at or near the time the events occur; the record system also generates periodic statements to borrowers and stores copies of the periodic statements; the record keeping system contains information about which version of plaintiff's terms and conditions has been communicated to the borrower and accepted by the borrower at the time the loan was funded; she has personally inspected the defendant's loan records; the records reflect defendant established a loan with plaintiff and the funds were disbursed to defendant as requested by defendant; defendant's loan is governed by the loan agreement, disclosure statement, and

terms and conditions; a true ad correct copy of those documents are attached as Exhibit A; the records reflect defendant is in default due to failure to pay the amounts due and owing on the loan and due to the default the entire balance of the loan is presently due and owing; a true and correct record of an account statement provided to plaintiff is attached as Exhibit B; a true and correct loan history is attached as Exhibit C, which shows the current balance due and owing on the loan; and the principal amount due and owing is $4,136.80. (Declaration of Bonnie Rucker in Support of Motion, paragraphs 1 and 4-9; and Exhibits A-C.)

The memorandum of points and authorities in support of the motion concedes that defendant has paid $946 on the balance owed on the account, leaving a balance due of $3,190.80. (Plaintiff's Memorandum of Points and Authorities in Support of Motion, page 2, lines 20-22.)

Strictly construing the moving party's evidence, liberally construing the evidence submitted in opposition to the motion, resolving doubts as to the propriety of granting the motion in favor of the party resisting the motion, and considering all of the evidence and all of the inferences reasonably drawn therefrom in the light most favorable to the opposing party (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843; and Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal.App.4th 1509, 1524.), the court finds the above-cited evidence is sufficient to meet plaintiff's initial burden of proof.

Plaintiff having met its initial burden of proof, the burden shifted to defendant to raise a triable issue of material fact with admissible evidence. Defendant not having opposed the motion, the defendant failed to meet that burden of proof. It is appropriate to grant the motion for summary judgment.

TENTATIVE RULING # 18: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IS GRANTED. JUDGMENT IS ENTERED IN THE PRINCIPAL AMOUNT OF $3,190.80 AND

COSTS IN AN AMOUNT TO BE DETERMINED BY THE MEMORANDUM OF COSTS PROCEDURE. 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 BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED. 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 18, 2022 EITHER IN PERSON OR BY ZOOM APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

19. HADLOCK v. MARSHALL MEDICAL CENTER PC-20200122

(1) Defendant Los Rios Community College District's Motion for Summary Judgment.

(2) Defendant Marshall Medical Center's Motion for Summary Judgment.

Defendant Los Rios Community College District's Motion for Summary Judgment.

Defendant Los Rios Community College District's motion for summary judgment is continued to 8:30 a.m. on Friday, February 3, 2023 in Department Nine.

Defendant Marshall Medical Center's Motion for Summary Judgment.

Plaintiff filed a complaint against defendants Marshall Medical Center and Los Rios Community College District for medical malpractice/professional negligence, general negligence, negligent hiring and battery. Upon request of plaintiff, on April 1, 2020 the negligent hiring and battery causes of action were dismissed with prejudice.

. Defendant Marshall Medical Center moves for entry of summary judgment asserting the following grounds: Marshall Medical Center met the standard of care at all times; the cause of action for general negligence merely duplicates the cause of action for professional negligence; and the plaintiff can not establish any alleged action or inaction by Marshall Medical Center caused plaintiff's injury.

Plaintiff opposes the motion for summary judgment on the following grounds: the evidence raises triable issues of material fact as to whether defendant Marshall Medical Center followed the applicable standard of care regarding the use of a four-point restraint on plaintiff and nursing care during the period of time that plaintiff was restrained to his emergency department bed; and the evidence raises triable issues of material fact as to whether defendant Marshall Medical Center's restraint of plaintiff and nursing care during the period of restraint actually and proximately caused plaintiff's injuries.

Defendant Marshall Medical Center replied to the opposition.

Plaintiff's Objections to Declaration of Dr. Simon in Support of the Motion

Plaintiff essentially objects to Dr. Simon's declaration in support of the motion in the Plaintiff's Separate Statement in Opposition to Defendant's Separate Statement of Undisputed Material Fact and plaintiff's opposition at page 9, lines 4-5. There is no separate statement of objections to the evidence submitted in support of the motion in the court's file.

"Unless otherwise excused by the court on a showing of good cause, all written objections to evidence in support of or in opposition to a motion for summary judgment or summary adjudication must be served and filed at the same time as the objecting party's opposition or reply papers are served and filed." (Rules of Court, Rule 3.1354(a).)

"All written objections to evidence must be served and filed separately from the other papers in support of or in opposition to the motion. Objections on specific evidence may be referenced by the objection number in the right column of a separate statement in opposition or reply to a motion, but the objections must not be restated or reargued in the separate statement. Each written objection must be numbered consecutively and must: ¶ (1) Identify the name of the document in which the specific material objected to is located; ¶ (2) State the exhibit, title, page, and line number of the material objected to; ¶ Quote or set forth the objectionable statement or material; and ¶ State the grounds for each objection to that statement or material…" (Rules of Court, Rule 3.1354(b).)

The court does not abuse its discretion when it refuses to consider evidentiary objections that violate the requirements of Rule 3.1354. "To ensure we consider all of the admissible evidence, we first address Hodjat's complaint that the trial court erred when it refused to rule upon his evidentiary objections because they failed to comply with California Rules of Court, rule 3.1354. Rule 3.1354(b) dictates the format in which evidentiary objections must be

submitted: "All written objections to evidence must be served and filed separately from the other papers in support of or in opposition to the motion. Objections on specific evidence may be referenced by the objection number in the right column of a separate statement in opposition or reply to a motion, but the objections must not be restated or reargued in the separate statement." ¶ Below, the trial court ruled on the objections made in a document entitled "Objections of Plaintiffs to Declaration of Hervey 'Skip' Davidson," but refused to rule on any other of Hodjat's evidentiary objections because they were not also filed separately as required under rule 3.1354. Instead, the objections were included in Hodjat's separate statement, in violation of rule 3.1354's requirement that the objections not be stated or argued in the separate statement. Hodjat contends that the trial court should properly have overlooked the deficiency or permitted him the opportunity to reformat his opposing papers. We find the trial court did not abuse its discretion. (See *Collins v. Hertz Corp.* (2006) 144 Cal.App.4th 64, 74, 50 Cal.Rptr.3d 149 (*Collins*) and *Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co.* (2005) 133 Cal.App.4th 1197, 1211, 35 Cal.Rptr.3d 411 (*Parkview Villas*).) ¶ Hodjat cites to *Collins* and *Parkview Villas* to support his contention. Both cases address whether a trial court abuses its discretion when it grants summary judgment on the ground the opposing party filed a deficiently formatted separate statement of material fact. While neither case precisely addresses the issue at hand,—whether a trial court is obligated to give a party a second chance at properly formatting its evidentiary objections under rule 3.1354—the analysis in *Collins* provides some insight as to why Hodjat did not deserve another opportunity to reformat his objections. ¶ The *Collins* court explained: " 'The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]' [Citation.] To that end, the rules dictating the content and format for separate statements

submitted by moving and responding parties 'permit trial courts to expeditiously review complex motions for ... summary judgment to determine quickly and efficiently whether material facts are disputed.' [Citations.] That goal is defeated where, as here, the trial court is forced to wade through stacks of documents, the bulk of which fail to comply with the substantive requirements of [Code Civil Procedure] section 437c, subdivision (b)(3), or the formatting requirements of [California Rules of Court,] rule 342,[FN 2.] in an effort to cull through the arguments and determine what evidence is admitted and what remains at issue. The realization of this goal is so important that the Legislature has determined '[f]ailure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion.' (§ 437c, subd. (b)(3).)" (*Collins, supra,* 144 Cal.App.4th at pp. 72–73, 50 Cal.Rptr.3d 149.) ¶ FN 2. California Rules of Court, former rule 342 (renumbered to rule 3.350) provided the formatting requirements for separate statements of fact. ¶ The same reasoning can be applied in this case. The rules requiring evidentiary objections to be filed separately and not repeated in the separate statement are to allow the trial court to consider each piece of evidence and all of the objections applicable to that piece of evidence separately. Thus, the trial court correctly ruled on the separate objections to Davidson's declaration. Just as it was explained in *Collins,* interposing objections into the separate statement defeats the goal of allowing the trial court to quickly and efficiently determine what particular piece of evidence is admitted and what is not. This is because the separate statement is focused on individual facts, which may be supported by the same or different pieces of evidence. A trial court would be forced to wade through all of the facts in order to rule on a particular piece of evidence. ¶ In this case, Hodjat was well aware of the formatting requirements contained in rule 3.1354 since he separately objected to Davidson's declaration. There is no authority to support Hodjat's argument that the trial court was required

to give him a second chance at filing properly formatted papers under these circumstances. The trial court did not abuse its discretion." (Emphasis added.) (Hodjat v. State Farm Mut. Auto. Ins. Co. (2012) 211 Cal.App.4th 1, 7–9.)

Plaintiff violated the requirements of Rule 3.1354 and, therefore, the court exercises its discretion to refuse to consider those evidentiary objections.

Defendant Marshall Medical Center's Objections to Declaration of Registered Nurse Fisk in Opposition to Motion

Defendant Marshall Medical Center objects to Registered Nurse Fisk's declaration in opposition to the motion in defendant's reply to the opposition at page 5. There is no separate statement of objections to the evidence submitted in opposition to the motion in the court's file.

Defendant Marshall Medical Center violated the requirements of Rule 3.1354 and, pursuant to the previously-cited legal authorities, the court exercises its discretion to refuse to consider those evidentiary objections.

Defendant Marshall Medical Center's Objections to Declaration of Dr. Schlatterer in Opposition to Motion

Defendant Marshall Medical Center objects to Dr. Schaltterer's declaration in opposition to the motion in defendant's reply to the opposition at pages 5 and 6. There is no separate statement of objections to the evidence submitted in opposition to the motion in the court's file.

Defendant Marshall Medical Center violated the requirements of Rule 3.1354 and, pursuant to the previously-cited legal authorities, the court exercises its discretion to refuse to consider those evidentiary objections.

Motion for Summary Judgment General Principles

"For purposes of motions for summary judgment and summary adjudication: ¶ * * * (2) A defendant or cross-defendant has met his or her burden of showing that a cause of action has

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

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

"In ruling on the motion, the court must "consider all of the evidence" and "all" of the "inferences" reasonably drawn therefrom (id., § 437c, subd. (c)), and must view such evidence (e.g., *Molko v. Holy Spirit Assn.*, supra, 46 Cal.3d at p. 1107, 252 Cal.Rptr. 122, 762 P.2d 46; *Stationers Corp. v. Dun & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 417, 42 Cal.Rptr. 449, 398 P.2d 785) and such inferences (see, e.g., *Crouse v. Brobeck, Phleger & Harrison* (1998) 67

Cal.App.4th 1509, 1520, 80 Cal.Rptr.2d 94 [review on appeal]; *Ales-Peratis Foods Internat., Inc. v. American Can Co.* (1985) 164 Cal.App.3d 277, 280, 209 Cal.Rptr. 917, fn. * [same]), in the light most favorable to the opposing party." (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843.)

"A defendant has met its burden of showing a cause of action has no merit if it 'has shown that one or more elements of the cause of action ... cannot be established, or that there is a complete defense to that cause of action. Once the defendant ... has met that burden, the burden shifts to the plaintiff ... to show ... a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff ... may not rely upon the mere allegations or denials of its pleading to show ... a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists ....' (*Id.*, subd. (o)(2); *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 464 & fn. 4 [63 Cal.Rptr.2d 291, 936 P.2d 70].)" (Scheiding v. Dinwiddie Constr. Co. (1999) 69 Cal.App.4th 64, 69.)

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

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

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

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

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

Medical Malpractice and General Negligence Causes of Action

"The elements of a cause of action for negligence are: duty; breach of duty; legal cause; and damages. (*Paz v. State of California* (2000) 22 Cal.4th 550, 559, 93 Cal.Rptr.2d 703, 994 P.2d 975; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1188, 91 Cal.Rptr.2d 35, 989 P.2d 121, disapproved on another point in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853, fn. 19, 107 Cal.Rptr.2d 841, 24 P.3d 493; *Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604,

614, 76 Cal.Rptr.2d 479, 957 P.2d 1313.)" (Friedman v. Merck & Co. (2003) 107 Cal.App.4th 454, 463.)

"'[I]n any medical malpractice action, the plaintiff must establish: "(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200, 98 Cal.Rptr. 849, 491 P.2d 433[ ].)' (*Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 877, 22 Cal.Rptr.2d 819.)".)" (Hanson v. Grode (1999) 76 Cal.App.4th 601, 606.)

Defendant Marshall Medical Center's motion for summary judgment is premised upon a contention that it has established as a matter of law that the physicians and nursing staff treating plaintiff in the emergency room adhered to the standard of care when plaintiff was placed in four-point restraints, which requires that summary judgment be entered in favor of defendant Marshall Medical Center on the remaining causes of action for general negligence and professional negligence/medical malpractice.

Plaintiff argues in opposition: the evidence raises triable issues of material fact concerning whether defendant Marshall Medical Center met the standard of care and whether a breach of the duty of due care actually and proximately caused plaintiff's claimed injuries.

- Duty of Due Care of Doctors and Nurses

" ' " 'The standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony [citations]....' [Citations.]" [Citations.]' (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001, 35 Cal.Rptr.2d 685, 884 P.2d 142.) ' "California courts have incorporated the expert evidence requirement into their

standard for summary judgment in medical malpractice cases. When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence." [Citations.]' (*Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 984-985, 263 Cal.Rptr. 878.) '[E]xpert opinions ... are worth no more than the reasons and factual data upon which they are based.' (*Griffith v. County of Los Angeles* (1968) 267 Cal.App.2d 837, 847, 73 Cal.Rptr. 773.)" (Hanson v. Grode (1999) 76 Cal.App.4th 601, 606-607.)

"…standard of care, is the key issue in a malpractice action and can only be proved by expert testimony, unless the circumstances are such that the required conduct is within the layperson's common knowledge. [FN 3] (*Landeros v. Flood* (1976) 17 Cal.3d 399, 410, 131 Cal.Rptr. 69, 551 P.2d 389; *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001, 35 Cal.Rptr.2d 685, 884 P.2d 142.) In those cases where a medical specialist is alleged to have acted negligently, the "specialist must possess and use the learning, care and skill normally possessed and exercised by practitioners of that specialty under the same or similar circumstances." (*Carmichael v. Reitz* (1971) 17 Cal.App.3d 958, 976, 95 Cal.Rptr. 381.)" (Lattimore v. Dickey (2015) 239 Cal.App.4th 959, 968.)

Expert testimony concerning the standard of care of nurses must be provided by other nurses. "…"[i]t is also established that a nurse's conduct must not be measured by the standard of care required of a physician or surgeon, but by that of other nurses in the same or similar locality and under similar circumstances." (*Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 215, 6 Cal.Rptr.2d 900.) Just as with physicians and surgeons, however, "expert opinion testimony is required to prove that a defendant nurse did not meet the standard of care and therefore was negligent, 'except in cases where the negligence is obvious to

[laypersons].' " (*Massey v. Mercy Medical Center Redding* (2009) 180 Cal.App.4th 690, 694–695, 103 Cal.Rptr.3d 209, quoting *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 523, 78 Cal.Rptr.2d 122.)" (Lattimore v. Dickey (2015) 239 Cal.App.4th 959, 969.)

"(c) In any action for damages involving a claim of negligence against a physician and surgeon providing emergency medical coverage for a general acute care hospital emergency department, the court shall admit expert medical testimony only from physicians and surgeons who have had substantial professional experience within the last five years while assigned to provide emergency medical coverage in a general acute care hospital emergency department. For purposes of this section, "substantial professional experience" shall be determined by the custom and practice of the manner in which emergency medical coverage is provided in general acute care hospital emergency departments in the same or similar localities where the alleged negligence occurred." (Health and Safety Code, § 1799.110(c).)

"…a proposed expert witness satisfies the standard of subdivision (c) of section 1799.110 if he or she is a physician who has had "substantial professional experience," within the five years preceding the trial, while employed or otherwise engaged by a general acute care hospital to provide treatment in its emergency room as an "emergency room physician." (See *Sigala v. Goldfarb, supra,* 222 Cal.App.3d at p. 1455, 266 Cal.Rptr. 96.) ¶ According to section 1799.110, subdivision (c), whether the proposed expert has the required " 'substantial professional experience' shall be determined by the custom and practice of the manner in which emergency medical coverage is provided in general acute care hospital emergency departments in the same or similar localities where the alleged negligence occurred." This command is obviously intended to ensure that the performance of an emergency room physician sued for alleged malpractice in rendering emergency room treatment is evaluated under a standard of care essentially equivalent to that prevailing in emergency rooms at the

time in the locality where the alleged negligence took place. The professional expertise required by the express statutory language is therefore skill and knowledge acquired "on the job" as an emergency room physician in a locality where hospital emergency care is provided in a manner substantially the same as such care is given in the locale where and when the alleged malpractice occurred. In other words, academic credentials, or experience acquired while serving as an "on-call" specialist, or emergency room experience gained solely in hospitals or other facilities which do not deliver emergency care in essentially the same manner as it is delivered in the locale where the cause of action arose, are not enough, singly or together, to meet the demands of subdivision (c) of section 1799.110. [Footnote omitted.]" (Miranda v. National Emergency Services, Inc. (1995) 35 Cal.App.4th 894, 905-906.)

"…when the expert qualification clause of section 1799.110, subdivision (c) is considered within the context of the whole statute and in light of its legislative history, the Legislature's purpose in imposing a professional experience requirement is clear: to ensure emergency room doctors are held to a practical *standard of care* by restricting expert medical testimony to physicians and surgeons who have recently experienced the unique challenges and demands of an emergency room. Because those considerations have no bearing on the assessment of whether negligent conduct *caused* a plaintiff's alleged injuries or what *damages* are reasonable to compensate a plaintiff for such injuries, there is no logical reason to require the same experience of an expert offering medical testimony on matters other than the standard of care. Indeed, as this case demonstrates, imposing such a requirement on causation or damages experts in cases where medical testimony is needed to establish facts outside the specialized experience and expertise of an emergency room doctor is certain to generate needless conflicts with Evidence Code section 720 and to produce absurd outcomes the Legislature could not have possibly intended." (Stokes v. Baker (2019) 35 Cal.App.5th 946, 958–959.)

"…section 1799.110 applies only to evidence regarding the standard of care required of an emergency room physician. This was the express understanding and intent of the Legislature that passed the measure and of the Governor who permitted it to become law." (Stokes v. Baker (2019) 35 Cal.App.5th 946, 966.)

The appellate court then went on to hold that the Section 1799.110 emergency room experience requirement did not apply to exert declarations as to causation of injury. The appellate court stated: "Finally, we consider the practical consequences of adopting either a literal construction of section 1799.110 or one limiting the expert qualification clause to standard of care testimony. We conclude the latter construction is the only reasonable interpretation, as it satisfies the statute's apparent legislative purpose, while avoiding needless conflicts with Evidence Code section 720 and absurd consequences that the Legislature could not have intended. (See *Younger, supra*, 21 Cal.3d at p. 113, 145 Cal.Rptr. 674, 577 P.2d 1014.)" (Stokes v. Baker (2019) 35 Cal.App.5th 946, 966.)

The following facts are undisputed: on April 16, 2019 plaintiff was transported by ambulance for convulsions/seizure at 0418; plaintiff was diagnosed with a seizure in the Marshall Medical Center Emergency Department; plaintiff was discharged home on April 16, 2019 at 0624; plaintiff was transported back to the Marshall Medical Center by ambulance on April 16, 2019 at 0909 for recurrent seizure; plaintiff was again diagnosed with a seizure; and plaintiff was discharged on April 16, 2019 at 1511 to follow up with Veteran's Affairs as an outpatient. (Plaintiff's Response to Defendant Marshall Medical Center's Separate Statement of Undisputed Material Fact in Support of Motion for Summary Judgment, Fact Numbers 1, 3-5, 7, and 10.)

Dr. Simon declares in support of the motion for summary judgment: he is a medical doctor licensed to practice in California and Board Certified in Emergency Medicine; he is familiar with

the standard of care for physicians, nurses and other individuals who may assist in the emergency department; he has evaluated and cared for persons with comparable presentations to plaintiff; he reviewed plaintiff's medical records for his two emergency department encounters at Marshall Medical Center on April 16, 2019, his ambulance records, and portions of his medical records of the Veteran's Administration and U.C. Davis Medical Center; he reviewed plaintiff's wife's notes made related to the two encounters; the emergency medical provider ordered the application of restraints; the four-point restraints remained in place during the period of 0947 through 1328; plaintiff remained agitated throughout the morning and repeatedly attempted to get out of bed; two or more staff members were present at all times to ensure he remained in bed; he was described asleep by 1314 and more cooperative and following commands by 1335; once plaintiff was alert, oriented, and more calm, the restraints were removed and he was later discharged home by 1510; it is his opinion that to a reasonable degree of medical probability, all care provided to plaintiff in the two emergency department encounters on April 16, 2019 were within the standard of care during the second encounter while plaintiff was very confused, combative, agitated, and attempted to run away from emergency medical services providers and they had to physically restrain him in order to transport him back to the emergency department; plaintiff was physically fit and strong and remained combative and agitated despite the application of the four-point restraints and medication; he also needed to be restrained by two persons to the bed; there is an indication that two EMT students from the Los Rios Community College were tasked to try to ensure plaintiff's trunk and upper body remained on the bed; it is completely acceptable and standard practice to use non-medically trained persons to restrain a patient where the four-point restraints and sedatives may not be adequate to protect the patient from themselves and to protect staff while the patient remains agitated and combative; he understands that plaintiff's

wife was distressed to see students applying downward pressure on plaintiff's trunk and shoulder attempting to keep him physically restrained onto the bed while bucking his restraints, however, this is a common situation on an emergency department; and even if the plaintiff's claimed right shoulder cuff injury where tendons were torn off the bone was due to plaintiff's restraint at the emergency department, that is a known risk of caring for a highly combative, agitated patient and does not fall below the standard of care. (Declaration of Dr. Barry Simon in Support of Motion, paragraphs 1-3, 7, 9-14, and 17.)

Registered Nurse Rachel Fisk declares in opposition: she is a licensed Advanced Practice Registered Nurse in the State of Virginia; she holds both an MSN and BSN; her current field of practice and focus is on continuing education Emergency Department Medicine; her summary review and opinions in the declaration are based solely on her review of the documentation provided to her, which was a 146 page .pdf that included motions, plaintiff's medical record, and a handwritten statement from plaintiff's wife; Marshall Medical Center failed to follow the standard of care when plaintiff was placed in four-point restraints in April 2019; California law provides that restraints shall be used in a manner that will not cause physical injury to the patient and insure the least possible discomfort to the patient; the reason documented for the restraints was cognitive impairment at risk of harm; the patient was in a four-point restraint and continuously monitored; plaintiff was limited in his ability to harm himself or the staff; RN Anji noted that the plaintiff attempted to climb out of his bed despite the restraints; pulling the patient back onto the bed is excessive and medically unnecessary; while RN Anji references staff members being present in the room, RN Anji did not specify who they were; according to plaintiff's wife's handwritten statement, the person pulling plaintiff's right shoulder where the injury occurred was Theresa, an EMT student; and an EMT student does not have the

professional training necessary to safely handle patients, especially in an acute situation as plaintiff's. (Declaration of Registered Nurse Rachel Fisk in Opposition to Motion, pages 1-2.)

Dr. David Schlatterer declares in opposition to the motion: he is a Board Certified orthopedic trauma surgeon; he performed a medical records review of plaintiff; the records provided and reviewed were from the office visit with Dr. Marder at U.C. Davis on January 14, 2020, which was one page, and the medical records submitted in support of the motion for summary judgment consisting of 146 pages; after reviewing the records, he understands that plaintiff was restrained at Marshall Medical Center on or about April 2019; and it is his medical opinion that it is more likely than not that plaintiff sustained a shoulder injury which now requires surgical repair due to the restraints donned at Marshal Medical Center. (Declaration of Dr. David Schlatterer, page 1, line 22 to page 2, line 7.)

There is evidence from a board certified emergency medicine physician that non-medical personnel fall within the standard of care in the emergency department when holding down the shoulder and truck of an agitated and combative patient in four point restraints tied to the bed when the patient is bucking the restraints to prevent injury of the patient and health care providers even where the conduct results in significant injury to the patient's rotor cuff by tearing the tendons off the bone.

The incident apparently occurred while providing nursing care after the restraints were applied presumably upon the emergency department physician's order.

On the other hand, there is evidence from a licensed Advanced Practice Registered Nurse whose practice is focused on continuing education in Emergency Department Medicine that Marshall Medical Center failed to following the standard of care when plaintiff was placed in four-point restraints in April 2019; pulling a restrained patient back onto the bed is excessive

and medically unnecessary; and EMT students do not have the professional training necessary to safely handle patients, especially in an acute situation as plaintiff's.

There is also evidence from a Board Certified orthopedic trauma surgeon that it is his medical opinion that it is more likely than not that plaintiff sustained a shoulder injury which now requires surgical repair due to the restraints donned at Marshal Medical Center.

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 triable issues of material facts as to whether defendant Marshall Medical Center breached its duty of due care during plaintiff's treatment in the emergency department, which caused his shoulder injuries.

Defendant Marshall Medical Center's motion for summary judgment is denied.

TENTATIVE RULING # 19: DEFENDANT LOS RIOS COMMUNITY COLLEGE DISTRICT'S MOTION FOR SUMMARY JUDGMENT IS CONTINUED TO 8:30 A.M. ON FRIDAY, FEBRUARY 3, 2023 IN DEPARTMENT NINE. DEFENDANT MARSHALL MEDICAL CENTER'S MOTION FOR SUMMARY JUDGMENT IS DENIED. NO HEARING ON DEFENDANT MARSHALL MEDICAL CENTER'S MOTION FOR SUMMARY JUDGMENT 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 BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED. 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 18, 2022 EITHER IN PERSON OR BY ZOOM APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.