1. MATTER OF RYAN H. 22CV0541

OSC Re: Name Change.

The petition seeks to change the name of a minor; the minor's mother has not joined in the petition; there is no proof of personal service of notice of the hearing or the order to show cause on the minor's mother in the court's file; and there is proof of service of the OSC Re: Name Change on the minor's paternal grandparents by mail on April 25, 2022.

Proof of publication was filed on May 23, 2022.

The petitioning parent declares: that he has sole physical and legal custody of the minor by a court order issued by the Stanislaus County Superior Court; he is unable to serve the minor's mother as he has no information as to her whereabouts and no way to contact her; the mother's phone number and address are very outdated and no longer good; the mother has no social media accounts, so he is unable to contact her through those forums; he contacted the maternal grandmother and she stated she has not had any contact with the mother for over one year and believes she is homeless; the maternal grandmother stated she has no way of contacting the mother and could not provide any assistance, and no current residence address was found for the mother and she is believed to be homeless.

"…If notice of the hearing cannot reasonably be accomplished pursuant to Section 415.10 or 415.40, the court may order that notice be given in a manner that the court determines is reasonably calculated to give actual notice to the nonconsenting parent. In that case, if the court determines that notice by publication is reasonably calculated to give actual notice to the nonconsenting parent, the court may determine that publication of the order to show cause pursuant to this subdivision is sufficient notice to the nonconsenting parent." (Code of Civil Procedure, § 1277(a)(4).)

The court finds that under the totality of the circumstances presented notice by publication is reasonably calculated to give actual notice to the nonconsenting parent and publication of the order to show cause is sufficient notice to the nonconsenting parent.

TENTATIVE RULING # 1: THE PETITION IS GRANTED.

2. PEOPLE v BUTTERFIELD 21CV0167

Petition for Forfeiture.

Claimant Butterfield filed a claim opposing forfeiture in response to a notice of administrative proceedings to determine that certain funds are forfeited. The proof of service declares that a Deputy District Attorney was served the claim opposing forfeiture by mail on November 5, 2021

The People responded by filing a petition for forfeiture. The unverified petition contends: that $4,000 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; and the property became subject to forfeiture pursuant to Health and Safety Code, § 11470(f), because that money was a thing of value furnished or intended to be furnished by a person in exchange for a controlled substance, the proceeds was traceable to such an exchange, and the money was used or intended to be used to facilitate a violation of Health and Safety Code, § 11358. The People pray for a judgment declaring that the money is forfeited to the State of California.

The proof of service declares that the petition for forfeiture was served on the claimant's counsel of record on May 6, 2022, by email.

"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).)

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

The hearing was continued from May 20, 2022, to June 17, 2022.

TENTATIVE RULING # 2: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, JUNE 17, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

3. PEOPLE v. ANDERSON PCL-20210122

Claim Opposing Forfeiture.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

At May 13, 2022, hearing, the court advised that the criminal case settled four weeks ago and the People requested a continuance to June 17, 2022. The request was granted.

The People were to give notice of the continuance. There was no proof of service of notice of the continuance of the hearing on claimant Anderson in the court's file at the time this ruling was prepared. The court can not reach the merits of the petition absent proof of notice of the continuance being served on claimant Anderson.

TENTATIVE RULING # 3: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, JUNE 17, 202 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

4. MCNELIS v. ANDERSON PC-20200548

Defendant's Motion to Quash Deposition Subpoenas for Production of Business Records.

TENTATIVE RULING # 4: UPON REQUEST OF PLAINTIFF, THIS ACTION WAS DISMISSED WITH PREJUDICE ON MAY 24, 2022, AND THIS HEARING WAS VACATED.

5. BANK OF AMERICA v. HILL 21CV0226

Plaintiff's Motion to Deem Admitted Requests for Admission.

Plaintiff's counsel declares on January 10, 2022, requests for admission were served on the defendant and the defendant failed to respond to the requests for admission propounded. Plaintiff moves to deem admitted the requests for admission. Plaintiff has not requested an award of monetary sanctions.

The proof of service in the court's file declares that on March 9, 2022, a notice of the hearing and copies of the moving papers were served by mail to the defendant. The court continued the hearing by minute orders from April 22, 2022, to May 13, 2022, and then to June 17, 2022. The minute orders continuing the hearing dates were served by mail to the defendant's address of record and the plaintiff's counsel's address of record on April 22, 2022, and May 18, 2022. There is no opposition to the motion in the court's file.

Where a party fails to timely respond to requests for admission, the court is mandated to deem such requests admitted, "…unless it finds that the party to whom the requests for admission have been directed has served, before the hearing on the motion, a proposed response to the requests for admission that is in substantial compliance with Section 2033.220. It is mandatory that the court impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) on the party or attorney, or both, whose failure to serve a timely response to requests for admission necessitated this motion." (Code of Civil Procedure, § 2033.280(c).)

Absent opposition, it appears appropriate under the circumstances to grant the motion to deem admitted the requests for admission.

TENTATIVE RULING # 5: PLAINTIFF'S MOTION TO DEEM ADMITTED REQUESTS FOR ADMISSION IS GRANTED. THE COURT ORDERS THAT REQUESTS FOR ADMISSION,

SET ONE PROPOUNDED ON DEFENDANT ARE DEEMED ADMITTED. MONETARY SANCTIONS NOT HAVING BEEN REQUESTED, THE COURT DOES NOT AWARD ANY SANCTIONS. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, JUNE 17, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

6. APONTE v. MARSHALL MEDICAL CENTER PC-20210413

Defendant's Motion Compel Responses to Interrogatories and Requests for Production and to Deem Admitted Requests for Admission.

Defendant's counsel declares on October 18, 2021, general form interrogatories, special interrogatories, requests for production, and requests for admission were served on the plaintiff; and despite having granted extensions of time to respond and requested responses and production after the expiration of the last extension of time, plaintiff failed to provide any responses to the discovery propounded. Defendant moves to compel answers and production of documents without objections and to deem admitted requests for admission. Defendant further requests an award of monetary sanctions in the amount of $1,540.50.

The proofs of service in the court's file declare that on May 10, 2022, a notice of the hearing and copies of the moving papers were served to the plaintiff by mail to the plaintiff's address of record. There was no opposition to the motion in the court's file at the time this ruling was prepared.

The party to whom interrogatories and requests for production have been served must serve responses upon the propounding party within 30 days after service or any other later date the propounding party stipulates to. (Code of Civil Procedure, §§ 2030.260, 2030.270, 2031.260, and 2031.270.) The failure to timely respond waives all objections to the interrogatories and requests and the propounding party may move to compel answers to interrogatories and production of documents. (Code of Civil Procedure, §§ 2030.290 and 2031.300.)

Where a party fails to timely respond to requests for admission, the court is mandated to deem such requests admitted, "…unless it finds that the party to whom the requests for

admission have been directed has served, before the hearing on the motion, a proposed response to the requests for admission that is in substantial compliance with Section 2033.220. It is mandatory that the court impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) on the party or attorney, or both, whose failure to serve a timely response to requests for admission necessitated this motion." (Code of Civil Procedure, § 2033.280(c).)

Absent opposition, it appears appropriate under the circumstances to grant the motion to compel answers and production without objections and to deem admitted the requests for admission.

Sanctions

Failure to respond to interrogatories, requests for production, and requests for admission is a sanctionable misuse of the discovery process. (Code of Civil Procedure, §§ 2023.010(d), 2023.030, 2030.290(c), 2031.300(c), and 2033.280(c).) The court may award sanctions under the Discovery Act in favor of the moving party even though no opposition to the motion to compel was filed, the opposition was withdrawn, or the requested discovery was provided to the moving party after the motion was filed. (Rules of Court, Rule 3.1348(a).)

It appears appropriate to award the defendant monetary sanctions in the amount of $1,540.50, payable by the plaintiff within ten days.

TENTATIVE RULING # 6: DEFENDANT'S MOTION COMPEL RESPONSES TO INTERROGATORIES AND REQUESTS FOR PRODUCTION AND TO DEEM ADMITTED REQUESTS FOR ADMISSION ARE GRANTED. PLAINTIFF IS ORDERED TO SERVE ANSWERS TO GENERAL FORM INTERROGATORIES, SET ONE WITHOUT OBJECTIONS, FORM INTERROGATORIES – EMPLOYMENT, SET ONE WITHOUT OBJECTIONS, SPECIAL INTERROGATORIES, SET ONE WITHOUT OBJECTIONS, AND PRODUCE THE DOCUMENTS AND THINGS REQUESTED IN REQUESTS FOR

PRODUCTION, SET ONE WITHOUT OBJECTIONS WITHIN TEN DAYS. THE COURT ORDERS THAT REQUESTS FOR ADMISSION, SET ONE ARE DEEMED ADMITTED. THE COURT FURTHER ORDERS PLAINTIFF TO PAY DEFENDANT $1,540.50 IN MONETARY SANCTIONS WITHIN TEN DAYS. NO HEARING ON THESE MATTERS WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON

FRIDAY, JUNE 17, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

7. FOULDS v. COLD SPRINGS MOBILE HOME PARK PC-20210033

(1) Review Hearing Re: Motion to Substitute Personal Representative or Successor in Interest for Defendant Brache.

(2) Plaintiff's Motion to Compel Discovery.

Review Hearing Re: Motion to Substitute Personal Representative or Successor in Interest for Defendant Brache.

At the hearing on the defendant's demurrer and motion to strike the 1st amended complaint on February 18, 2022, the court denied the motion and found it appropriate to order the action against defendant Brache stayed pending the appointment of a personal representative to be substituted into the case on behalf of defendant Brache's estate or a successor in interest stepping forward to be substituted for defendant Brache. The court also set this review hearing for June 17, 2022.

There is no motion to substitute a personal representative or successor in interest for defendant Brache in the court's file. Appearances are required.

Plaintiff's Motion to Compel Discovery.

Plaintiff moves to compel defendants to provide further responses to requests for production set one and for production of documents. The motion was initially set for hearing on April 8, 2022. The parties advised the court that they had settled the case and all that remained was executing the settlement documents. The hearing was continued to April 29, 2022. The court was advised that the continuance did not provide sufficient time to accomplish the required tasks and the on April 21, 2022, the parties filed a stipulation to continue the hearing on this motion to any date the court has available after June 1, 2022.

On April 18, 2022 defense counsel filed a declaration regarding and opposing the motion, which declared that the action had settled, all material terms were agreed to by the parties, and the settlement was reduced to writing; on March 18, 2022, the defendants executed the settlement and release agreement; the plaintiff has not signed the settlement and release agreement despite having professed his intent to do so; it is counsel's understanding that neither plaintiff's counsel nor defense counsel believe the pending motion to compel will require a decision because their respective clients wish to resolve the case without further law and motion or discovery and both sides wish to limit further expenditures of time and money while the case winds down and clears from the court's docket; defendants reasonably expect full and final settlement of the case will be concluded shortly; defendants do not waive and expressly reserve their right to address the merits of plaintiff's motion to compel.

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

Appearances are required at 8:30 a.m. on Friday, June 17, 2022, to advise the court concerning the status of the settlement. There is no motion to substitute a personal representative or successor in interest for defendant Brache.

TENTATIVE RULING # 7: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, JUNE 17, 2022, IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

8. CHISM v. CANDLELIGHT VILLAGE, INC. PC-20200247

(1) Defendants Candlelight Village, Inc.'s and Emigh's Application for Determination of Good Faith Settlement.

(2) Defendant Candlelight Village Estates HOA's Application for Determination of Good Faith Settlement.

(3) Defendant Candlelight Village Mutual Water Co.'s Application for Determination of Good Faith Settlement.

Defendants Candlelight Village, Inc.'s and Emigh's Application for Determination of Good Faith Settlement.

Defendants Candlelight Village Inc. and Emigh have agreed to pay $15,000 in settlement of the plaintiff's claims. Defendants Candlelight Village Inc. and Emigh filed and served an application for determination of good faith settlement pursuant to the provisions of Code of Civil Procedure, § 877.6(a)(2)

The proof of service declares that on March 7, 2022, the notice of settlement and application for determination of good faith settlement and declaration in support were served by electronic service to the email addresses listed during the COVID-19 pandemic on counsels for the plaintiff, defendant Candlelight Village Mutual Water Company, and defendant Candlelight Village, Estates HOA.

The plaintiff and remaining defendants have not filed a notice of motion to contest the good faith of the settlement.

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

"In the alternative, a settling party may give notice of settlement to all parties and to the court, together with an application for determination of good faith settlement and a proposed order. The application shall indicate the settling parties, and the basis, terms, and amount of the settlement. The notice, application, and proposed order shall be given by certified mail, return receipt requested, or by personal service. Proof of service shall be filed with the court. Within 25 days of the mailing of the notice, application, and proposed order, or within 20 days of personal service, a nonsettling party may file a notice of motion to contest the good faith of the settlement. If none of the nonsettling parties files a motion within 25 days of mailing of the notice, application, and proposed order, or within 20 days of personal service, the court may approve the settlement. The notice by a nonsettling party shall be given in the manner provided in subdivision (b) of Section 1005. However, this paragraph shall not apply to settlements in which a confidentiality agreement has been entered into regarding the case or the terms of the settlement." (Code of Civil Procedure, § 877.6(a)(2).)

There is no proof of service of the notice of settlement, application for determination of good faith settlement, and proposed order on the parties by certified mail, return receipt requested, or by personal service. The proof of service states that the interested parties were served by email to the email addresses listed during the COVID-19 pandemic. Defendants Candlelight Village Inc. and Emigh have not cited a specific court order or legislation that authorized waiver of the statutory requirement to serve by certified mail, return receipt requested, or by personal service.

The court can not rule on the application absent proof of service pursuant to the provisions of Section 877.6(a)(2).

Defendant Candlelight Village Estates HOA's Application for Determination of Good Faith Settlement.

Defendant Candlelight Village Estates HOA has agreed to pay $10,000 in settlement of the plaintiff's claims. Defendant Candlelight Village Estates HOA filed and served an application for determination of good faith settlement pursuant to the provisions of Code of Civil Procedure, § 877.6(a)(2).

The proof of service declares that on March 7, 2022, the notice of application for determination of good faith settlement, application for good faith settlement, and declaration in support were served by email pursuant to a court order or agreement of the parties to accept email and hand delivery on counsels for the plaintiff, defendant Candlelight Village Mutual Water Company, and defendants Candlelight Village, Inc. and Emigh.

The plaintiff and remaining defendants have not filed a notice of motion to contest the good faith of the settlement.

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

"In the alternative, a settling party may give notice of settlement to all parties and to the court, together with an application for determination of good faith settlement and a proposed order. The application shall indicate the settling parties, and the basis, terms, and amount of the settlement. The notice, application, and proposed order shall be given by certified mail, return receipt requested, or by personal service. Proof of service shall be filed with the court. Within 25 days of the mailing of the notice, application, and proposed order, or within 20 days of personal service, a nonsettling party may file a notice of motion to contest the good faith of the settlement. If none of the nonsettling parties files a motion within 25 days of mailing of the

notice, application, and proposed order, or within 20 days of personal service, the court may approve the settlement. The notice by a nonsettling party shall be given in the manner provided in subdivision (b) of Section 1005. However, this paragraph shall not apply to settlements in which a confidentiality agreement has been entered into regarding the case or the terms of the settlement." (Code of Civil Procedure, § 877.6(a)(2).)

With one exception, there is no proof of service of the notice of settlement, application for determination of good faith settlement, and proposed order on the parties by certified mail, return receipt requested, or by personal service. The proof of service states that the interested parties were served by email pursuant to the court order or agreement of the parties to accept the email. Defendant Candlelight Village Estates HOA has not cited a specific court order or legislation that authorized waiver of the statutory requirement to serve by certified mail, return receipt requested, or by personal service. Defendant Candlelight Village Estates HOA has not submitted an agreement of the parties to accept the email service of the application.

The only proof of personal service was filed on March 10, 2022, which declared that defendants Candlelight Village Inc.'s and Emigh's counsel was personally served on March 7, 2022. There are no proofs of personal service from the other parties.

The applicant must submit proof of service to all parties that conform to the statutory requirements.

The court can not rule on the application absent proof of service pursuant to the provisions of Section 877.6(a)(2).

Candlelight Village Mutual Water Co.'s Application for Determination of Good Faith Settlement.

Defendant Candlelight Village Mutual Water Co. has agreed to pay $13,500 in settlement of the plaintiff's claims. Defendant Candlelight Village Mutual Water Co. filed and served an

application for determination of good faith settlement pursuant to the provisions of Code of Civil Procedure, § 877.6(a)(2)

The proof of service declares that on April 18, 2022, the notice of settlement and application for determination of good faith settlement, declaration in support of the application, and proposed order were served by email to counsels for the plaintiff, defendant Candlelight Village Estates HOA, and defendants Candlelight Village, Inc. and Emigh in compliance with State and Local orders due to restrictions presently in place relating to the COVID-19 pandemic.

The plaintiff and remaining defendants have not filed a notice of motion to contest the good faith of the settlement.

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

"In the alternative, a settling party may give notice of settlement to all parties and to the court, together with an application for determination of good faith settlement and a proposed order. The application shall indicate the settling parties, and the basis, terms, and amount of the settlement. The notice, application, and proposed order shall be given by certified mail, return receipt requested, or by personal service. Proof of service shall be filed with the court. Within 25 days of the mailing of the notice, application, and proposed order, or within 20 days of personal service, a nonsettling party may file a notice of motion to contest the good faith of the settlement. If none of the nonsettling parties files a motion within 25 days of mailing of the notice, application, and proposed order, or within 20 days of personal service, the court may approve the settlement. The notice by a nonsettling party shall be given in the manner provided in subdivision (b) of Section 1005. However, this paragraph shall not apply to

settlements in which a confidentiality agreement has been entered into regarding the case or the terms of the settlement." (Code of Civil Procedure, § 877.6(a)(2).)

There is no proof of service of the notice of settlement, application for determination of good faith settlement, and proposed order on the parties by certified mail, return receipt requested, or by personal service. The proof of service states that the interested parties were served by email due to COVID-19 restrictions. Defendant Candlelight Village Mutual Water Co. has not cited to a specific court order or legislation that authorized waiver of the statutory requirement to serve by certified mail, return receipt requested, or by personal service.

The applicant must submit proof of service to all parties that conform to the statutory requirements.

The court can not rule on the application absent proof of service pursuant to the provisions of Section 877.6(a)(2).

TENTATIVE RULING # 8: DEFENDANTS CANDLELIGHT VILLAGE, INC.'S AND EMIGH'S APPLICATION FOR DETERMINATION OF GOOD FAITH SETTLEMENT IS CONTINUED TO 8:30 A.M. ON FRIDAY, JULY 22, 2022, IN DEPARTMENT NINE. DEFENDANT CANDLELIGHT VILLAGE ESTATES HOA'S APPLICATION FOR DETERMINATION OF GOOD FAITH SETTLEMENT IS CONTINUED TO 8:30 A.M. ON FRIDAY, JULY 22, 2022, IN DEPARTMENT NINE. CANDLELIGHT VILLAGE MUTUAL WATER CO.'S APPLICATION FOR DETERMINATION OF GOOD FAITH SETTLEMENT IS CONTINUED TO 8:30 A.M. ON FRIDAY, JULY 22, 2022, IN DEPARTMENT NINE. THE PARTIES ARE TO FILE PROOFS OF ADEQUATE SERVICE ON THE PARTIES. THE CLERK IS DIRECTED TO MAIL EACH PARTY IN THIS ACTION A COPY OF THE JUNE 17, 2022, MINUTE ORDER.

9. SZYPER v. MD FOODS GROUP, INC. PC-20210550

Defendants' Motion to Strike Claim for Punitive Damages from the 1st Amended Complaint.

On March 28, 2022, plaintiffs filed an amended complaint asserting causes of action against the defendant for premises liability, negligence, negligent infliction of emotional distress, and loss of consortium arising from alleged serious injuries plaintiff Russell Szyper sustained when a gust of wind caused a temporary tent for outside dining to move, slide, and fly upward and plaintiff Russell Szyper tried to protect himself, his spouse and others by grabbing a tent pole to brace it, which caused him to fall to the ground.

Defendant moves to strike the punitive damage allegations contained in paragraphs 23, 25-27, and 34 of the complaint, as well as prayer number 5 for punitive damages. Defendant argues the allegations of fact in the complaint fail to rise to the level of establishing despicable conduct or willful and conscious disregard for the rights and safety of others; allegations that the defendant erected temporary pop-up tents without anchoring the poles are ordinary negligence and does rise to the level that bodily injury is virtually certain; alleged violation of pandemic specific guidelines would only be allegations of negligence per se and negligence per se conduct does not rise to the level where punitive damages can be claimed, and alleged failure to take subsequent precautionary measures by allegedly retaining the same condition of the outside seating area after plaintiff's incident is irrelevant to any issues in the case.

Plaintiffs oppose the motion on the following grounds: punitive damages can be awarded in cases of non-intentional torts; the plaintiff has alleged sufficient facts, which if proven, would support a claim for punitive damages; the court can not reject a well-pled and factually supported punitive damages claim and determine it is not strong enough for probable success

before a jury; defendant's post-accident conduct by not engaging in subsequent remedial measures is relevant to the determination of malice at the time the subject accident occurred; and should the court grant the motion, leave to amend should be granted.

Defendant replied: this case is a plain and simple case alleging negligence; plaintiffs embellish the simple facts of the case with legal arguments and boilerplate language to color the facts; and the facts alleged are insufficient to change the basic tenor of the pleading of a simple premises negligence cause of action to a case of malicious conduct justifying a claim of punitive damages.

"The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper: ¶ (a) Strike out any irrelevant, false, or improper matter inserted in any pleading. ¶ (b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (Code of Civil Procedure, § 436.)

"The grounds for a motion to strike shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice." (Code of Civil Procedure, § 437(a).) "Where the motion to strike is based on matter of which the court may take judicial notice pursuant to Section 452 or 453 of the Evidence Code, such matter shall be specified in the notice of motion, or in the supporting points and authorities, except as the court may otherwise permit." (Code of Civil Procedure, § 437(b).)

"A motion to strike, like a demurrer, challenges the legal sufficiency of the complaint's allegations, which are assumed to be true. (See *Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255, 79 Cal.Rptr.2d 747 [an order striking punitive damages allegations is reviewed de novo].)" (Blakemore v. Superior Court (2005) 129 Cal.App.4th 36, 53.)

"In passing on the correctness of a ruling on a motion to strike, judges read allegations of a pleading subject to a motion to strike as a whole, all parts in their context, and assume their truth. (*Courtesy Ambulance Service v. Superior Court* (1992) 8 Cal.App.4th 1504, 1519, 11 Cal.Rptr.2d 161; *Dawes v. Superior Court* (1980) 111 Cal.App.3d 82, 91, 168 Cal.Rptr. 319; see California Judges Benchbook, Civil Proceedings Before Trial (1995) § 12.94, p. 611.) In ruling on a motion to strike, courts do not read allegations in isolation. (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6, 172 Cal.Rptr. 427.)" (Clauson v. Superior Court (1998) 67 Cal.App.4th 1253, 1255.)

"In determining whether a complaint states facts sufficient to sustain punitive damages, the challenged allegations must be read in context with the other facts alleged in the complaint. Further, even though certain language pleads ultimate facts or conclusions of law, such language when read in context with the facts alleged as to defendants' conduct may adequately plead the evil motive requisite to recovery of punitive damages. (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6-7, 172 Cal.Rptr. 427.)" (Monge v. Superior Court (1986) 176 Cal.App.3d 503, 510.)

"In order to survive a motion to strike an allegation of punitive damages, the ultimate facts showing an entitlement to such relief must be pled by a plaintiff. (*Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 166, 203 Cal.Rptr. 556; *Blegen v. Superior Court* (1981) 125 Cal.App.3d 959, 962–963, 178 Cal.Rptr. 470.) In passing on the correctness of a ruling on a motion to strike, judges read allegations of a pleading subject to a motion to strike as a whole, all parts in their context, and assume their truth. (*Courtesy Ambulance Service v. Superior Court* (1992) 8 Cal.App.4th 1504, 1519, 11 Cal.Rptr.2d 161; *Dawes v. Superior Court* (1980) 111 Cal.App.3d 82, 91, 168 Cal.Rptr. 319; see California Judges Benchbook, Civil Proceedings Before Trial (1995) § 12.94, p. 611.) In ruling on a motion to strike, courts do not

read allegations in isolation. (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6, 172 Cal.Rptr. 427.) We review an order striking punitive damages allegations de novo. (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1223, 44 Cal.Rptr.2d 197.)" (Clauson v. Superior Court (1998) 67 Cal.App.4th 1253, 1255.)

"In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." (Code of Civil Procedure, § 452.)

"Not only must there be circumstances of oppression, fraud or malice, but facts must be alleged in the pleading to support such a claim. (Citation omitted.)" (Grieves v. Superior Court (1984) 157 Cal.App.3d 159, 166.)

"Punitive damages are "available to a party who can plead and prove the facts and circumstances set forth in Civil Code section 3294." *Hilliard v. A.H. Robins Co.,* 148 Cal.App.3d 374, 392, 196 Cal.Rptr. 117 (1983). "To support punitive damages, the complaint ... must allege ultimate facts of the defendant's oppression, fraud, or malice." *Cyrus v. Haveson,* 65 Cal.App.3d 306, 316–317, 135 Cal.Rptr. 246 (1976). Pleading the language in section 3294 "is not objectionable when sufficient facts are alleged to support the allegation." *Perkins v. Superior Court,* 117 Cal.App.3d 1, 6–7, 172 Cal.Rptr. 427 (1981)." (Altman v. PNC Mortg. (E.D. Cal. 2012) 850 F.Supp.2d 1057, 1085.)

"In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." (Civil Code, § 3294(a).)

Inasmuch as the facts when taken as true for the purposes of a motion to strike must establish that punitive damages are recoverable to avoid an order striking the punitive

damages claim and punitive damages are only recoverable where the facts show malice, fraud, or oppression by clear and convincing evidence, the facts purportedly establishing malice, fraud or oppression must be taken as true and viewed in light of the clear and convincing burden of proof.

"California does *not* recognize punitive damages for conduct that is grossly negligent or reckless. (See *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 899–900 [157 Cal.Rptr. 693, 598 P.2d 854] [noting "ordinarily, routine negligent or even reckless disobedience of [the] laws would not justify an award of punitive damages"]; *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 828 [169 Cal.Rptr. 691, 620 P.2d 141] [noting that punitive damages should be awarded "only in the most outrageous cases" and noting that to be awarded, the "act complained of must not only be willful, in the sense of intentional, but it must be accompanied by some aggravating circumstance amounting to malice"].)" (Emphasis added.) (Colombo v. BRP US Inc. (2014) 230 Cal.App.4th 1442, 1456, fn. 8.)

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

The Third District Court of Appeal has stated: "The adjective "despicable" connotes conduct that is " '... so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people.' " (*Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 331, 5 Cal.Rptr.2d 594, quoting BAJI No. 14.72.1 (1989

rev.); *Cloud v. Casey* (1999) 76 Cal.App.4th 895, 912, 90 Cal.Rptr.2d 757.) " '[A] breach of a fiduciary duty alone without malice, fraud or oppression does not permit an award of punitive damages. [Citation.] The wrongdoer " 'must act with the intent to vex, injure, or annoy, or with a conscious disregard of the plaintiff's rights. [Citations.]' " Punitive damages are appropriate if the defendant's acts are reprehensible, fraudulent or in blatant violation of law or policy. The mere carelessness or ignorance of the defendant does not justify the imposition of punitive damages.... Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate.' " (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1287, 31 Cal.Rptr.2d 433.) ¶ The definition of malice has not always included the requirement of willful and despicable conduct. Prior to 1980, section 3294 did not define malice. It was construed to mean malice in fact, which could be proven directly or by implication (*Taylor v. Superior Court* (1979) 24 Cal.3d 890, 894, 157 Cal.Rptr. 693, 598 P.2d 854 (*Taylor*); 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1335, p. 793) and could be established by conduct that was done only with "a conscious disregard of the safety of others...." (*Taylor, supra,* at p. 895, 157 Cal.Rptr. 693, 598 P.2d 854.) Relying on the reasoning in *G.D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 122 Cal.Rptr. 218, the *Taylor* court recognized that recklessness alone is insufficient to sustain an award of punitive damages because " '[t]he central spirit of the exemplary damage statute, the demand for evil motive, is violated by an award founded upon recklessness alone.' " (24 Cal.3d at p. 895, 157 Cal.Rptr. 693, 598 P.2d 854.) The court concluded that "[i]n order to justify an award of punitive damages on this basis, the plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct, and that he willfully and deliberately failed to avoid those consequences." (*Id.* at pp. 895-896, 157 Cal.Rptr. 693, 598 P.2d 854.) Applying that test, the Supreme Court directed the

trial court to reinstate a claim for punitive damages where it was alleged the defendant was operating a motor vehicle while intoxicated, under circumstances which disclosed a conscious disregard of the probable dangerous consequences. [FN 14.] ¶ FN14. The circumstances alleged in *Taylor* were that a car driven by the defendant collided with plaintiff's car causing him serious injuries, that at the time of the collision, the defendant was drinking an alcoholic beverage and under its influence, he had been an alcoholic for a substantial period of time and was well aware of the serious nature of his alcoholism, he had a history and practice of driving a motor vehicle while under the influence of alcohol, he had previously caused a serious automobile accident while under the influence of alcohol, and had been convicted numerous times for driving under the influence of alcohol. (*Id.* at p. 893, 157 Cal.Rptr. 693, 598 P.2d 854.) ¶ In 1980, the Legislature amended section 3294 by adding the definition of malice stated in *Taylor, supra,* 24 Cal.3d 890, 157 Cal.Rptr. 693, 598 P.2d 854. (Stats.1980, ch. 1242, § 1, pp. 4217-4218; *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 713, 34 Cal.Rptr.2d 898, 882 P.2d 894.) That definition was amended in 1987. As amended, malice, based upon a conscious disregard of the plaintiff's rights, requires proof that the defendant's conduct is "despicable" and "willful." (Stats.1987, ch. 1498, § 5.) The statute's reference to "despicable conduct" represents "a new substantive limitation on punitive damage awards." (*College Hospital, Inc. v. Superior Court, supra,* 8 Cal.4th at p. 725, 34 Cal.Rptr.2d 898, 882 P.2d 894.) ¶ Additionally, the 1987 amendment increased the burden of proof. Malice or oppression must now be established "by clear and convincing evidence." (Stats.1987, ch. 1498, § 5.) That standard "requires a finding of high probability .... ' "so clear as to leave no substantial doubt"; "sufficiently strong to command the unhesitating assent of every reasonable mind." ' [Citation.]" (*In re Angelia P.* (1981) 28 Cal.3d 908, 919, 171 Cal.Rptr. 637, 623 P.2d 198, superseded by statute on other grounds as stated in *Orange County Social Services*

Agency v. Jill V. (1994) 31 Cal.App.4th 221, 229, 36 Cal.Rptr.2d 848; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 891, 93 Cal.Rptr.2d 364.)" (Emphasis added.) (Lackner v. North (2006) 135 Cal.App.4th 1188, 1211-1213.)

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

"An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (Civil Code, § 3294(b).)

"An act of oppression, fraud or malice, by an officer, director or *managing agent,* is sufficient to impose liability on a corporate employer for punitive damages, without any additional showing of ratification by the employer. (§ 3294, subd. (b); *Agarwal, supra,* 25 Cal.3d at p. 950, 160 Cal.Rptr. 141, 603 P.2d 58.)" (Kelly-Zurian v. Wohl Shoe Co. (1994) 22 Cal.App.4th 397, 420.)

Plaintiffs cite paragraphs 11-16, 19-23, and 26 as establishing the requisite malice, oppression, or fraud required to be awarded punitive damages when those allegations are taken as true for the purposes of the motion to strike.

Plaintiffs allege: El Dorado County prepared COVID-19 guidelines for restaurants and retailors related to patron safety when designing outdoor spaces, which included tents with all legs weighted to a minimum of 40 pounds with acceptable weights consisting of 5-gallon buckets full of water, sand or concrete, a four inch PVC pipe at least 36 inches long filled with concrete, large commercially available tent weights, and sand bags or salt bags weighing 40 pounds or heavier; defendants violated those requirements to create a safe environment in callous disregard of the safety of its employees and customers; defendants owned, operated, and/or maintained the premises in an unsafe condition as the temporary tents were not tied down, anchored, or affixed to the ground causing tents to move, slide or fly upward from gusting winds in violation of El Dorado County requirements for outside seating; defendants failed to maintain a safe seating area knowing patrons would be using the area and would encounter temporary tents that would slide, move, shift and fly upward while dining despite there being an El Dorado County requirement to weight down the tents; defendants knew or should have known the temporary tents needed to be tied down, anchored and/or affixed to the asphalt to prevent winds from picking up the tents causing them to be a flying hazard; El Dorado County had strict requirements for such tents that they should be weighted down with

at least 40 pounds; despite knowledge of the County requirement, defendants failed to protect the public by using sand bags or weights to anchor the tents or affix the tents to the asphalt to make the temporary seating safe for use of patrons dining outside; as a result of the unsafe condition, plaintiff Russell Szyper suffered serious bodily injury and plaintiff Sandi Szyper suffered emotional trauma and shock from seeing her husband severely injured; defendants and their corporate officers, directors, and managing agents knew of the County safety requirements for outdoor seating and knew their tents were not tied down, weighed down, or affixed to the asphalt which could cause the tents to move, shift, slide and fly upward from gusting winds, thereby causing patrons to encounter a flying tent that could cause injury; this amounted to willful and conscious disregard to the safety of defendants' patrons; defendant knew of the dangerous condition, yet failed to take any steps to protect against the serious risks of injury or death; defendants did not adequately inspect, safeguard, remedy, or otherwise operate the facility and eliminate the hazards in areas where patrons would be dining; and defendants and their corporate officers, directors, and managing agents continued to operate an unsafe seating area outside in violation of the County requirements to set up safe outdoor seating after plaintiff suffered severe injuries, as plaintiff returned to the restaurant and observed the seating area was in the same condition as it was when the accident took place and defendants did not take any remedial measures to comply with the County requirements. (Amended Complaint, paragraphs 11-16, 19-23 and 26.)

"California does *not* recognize punitive damages for conduct that is grossly negligent or reckless. (See *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 899–900 [157 Cal.Rptr. 693, 598 P.2d 854] [noting "ordinarily, routine negligent or even reckless disobedience of [the] laws would not justify an award of punitive damages"]; *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 828 [169 Cal.Rptr. 691, 620 P.2d 141] [noting that punitive damages should be

awarded "only in the most outrageous cases" and noting that to be awarded, the "act complained of must not only be willful, in the sense of intentional, but it must be accompanied by some aggravating circumstance amounting to malice"].)" (Colombo v. BRP US Inc. (2014) 230 Cal.App.4th 1442, 1456, fn. 8.)

Plaintiff's allegations of callous and willful and conscious disregard of the safety of the defendants' patrons are merely conclusions of fact or law that the court need not take as true for the purposes of this motion to strike. (Picton v. Anderson Union High School Dist. (1996) 50 Cal.App.4th 726, 732-733; and Young v. Gannon (2002) 97 Cal.App.4th 209, 220.)

The allegations of fact merely set forth a set of circumstances wherein defendants were allegedly aware of the County requirements related to safe operation with tents weighted down or otherwise secured as stated in the requirements and that failure to follow those requirements resulted in plaintiff Russell Szyper being seriously injured when a gust of wind caused a temporary tent to fly upward and plaintiff tried to protect himself, his spouse, and others.

Negligent or even reckless disregard of a law does not justify an award of punitive damages. Mere failure to take remedial steps after one alleged instance of injury is insufficient to justify a conclusion of fact or law that the first incident was the product of something more than negligence, gross negligence, or recklessness that amounts to the defendant's conduct in not following the County requirements was "despicable" and "willful and conscious disregard of the safety of defendants' patron".

The motion to strike is granted. In an abundance of caution, the court grants leave to amend.

TENTATIVE RULING # 9: DEFENDANTS' MOTION TO STRIKE THE CLAIM FOR PUNITIVE DAMAGES FROM THE 1ST AMENDED COMPLAINT IS GRANTED WITH TEN DAYS LEAVE

TO AMEND. NO HEARING ON THESE MATTERS WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, JUNE 17, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

10. SV ADVENTURES, INC. v. MOUNTAIN MIKES PIZZA, LLC 21CV0381

Defendant's Motion to Compel Arbitration and Stay Action.

The action involves a dispute between former franchisee plaintiffs and franchisor defendant. Plaintiffs contend that defendant Mountain Mikes Pizza, LLC has submitted an arbitration claim with the American Arbitration Association (AAA) in Orange County and amended the arbitration claim to include trademark infringement claims. Plaintiff sought the issuance of a preliminary injunction enjoining any further proceedings in the arbitration proceeding.

Defendant Mountain Mikes Pizza, LLC submitted an arbitration claim with the American Arbitration Association (AAA) in Orange County and amended the arbitration claim to include trademark infringement claims. Plaintiffs petitioned for a TRO and preliminary injunction staying arbitration proceedings. The court issued a tentative ruling granting the preliminary injunction. On April 15, 2022, the court heard an oral argument on the matter and took it under submission.

Prior to the hearing on the OSC Re: Preliminary injunction, on March 17, 2022, the defendant filed a motion to compel the plaintiffs to submit to arbitration. Defendant contends that the court should compel the plaintiffs to submit their claims to binding arbitration and stay this litigation pending the completion of arbitration. Defendant argues: plaintiffs agreed to be bound by the arbitration agreement attached to the Franchise Disclosure Document (FDD) when they executed the assignment of the franchise agreement and guaranty; the parties have agreed in Paragraph 17.F. of the arbitration provision that the arbitrator must decide the issue of enforceability of the arbitration agreement (Adyani Declaration in Opposition, Exhibit 2.), which is a clear delegation clause that leaves the court with no jurisdiction to decide the enforceability of the arbitration provision; the proper venue for determination of the

enforceability of the arbitration agreement is by the arbitrator in the arbitration proceeding and not the court; the plaintiffs' claims are clearly within the scope of the arbitration agreement and should be arbitrated; the unconscionability argument is primarily premised upon the claim that defendant did not provide plaintiffs with a copy of the franchise agreement, which is false, because they received a copy from the prior franchisee, therefore, plaintiffs are not likely to prevail on a claim that the franchise agreement is procedurally unconscionable; plaintiffs also obtained the information in the other franchise agreements they entered into regarding their other Mountain Mike Pizza restaurants; a "take it or leave it" arbitration provision is not per se procedurally unconscionable, therefore, the agreement must also be procedurally unconscionable in another manner in order for the court to determine the arbitration provision is procedurally unconscionable; the agreement is not substantively unconscionable as the venue provision and other provisions do not shock the conscience; there is no requirement for plaintiffs to initial the arbitration provision in order to agree to it; a class waiver is not substantively unconscionable; arbitrating the dispute near defendants offices does not shock the conscience; the arbitration agreement is mutual and there are no non-mutual provisions; the jury waiver is not substantively unconscionable; even if there are unconscionable terms, the court can sever those terms and enforce the remaining terms of the arbitration agreement; and this action should be stayed pending the outcome of arbitration.

Plaintiffs oppose the motion to compel arbitration on the following grounds: there is no delegation clause in the subject agreement requiring the arbitrator to determine the validity and scope of the arbitration clause; the reference to the AAA rules is insufficient, because a copy of the rules was not attached to the agreement and there was no specific delegation in the language of the agreement itself; the arbitration proceedings initiated by defendant includes claims that are not within the scope of arbitration, such as alleged trademark infringement

claims and claims related to alleged trademark infringement after the termination of the franchise agreement; the arbitration provision of the franchise agreement is procedurally and substantively unconscionable; the arbitration agreement is procedurally unconscionable, because it is a contract of adhesion; various provisions of the agreement are substantively unconscionable; the arbitration proceeding that was filed constitutes a pre-litigation jury waiver of matters not subject to the arbitration agreement; and the arbitration proceeding is not properly venue in Orange County.

Defendant replied: plaintiffs concede they assented to the arbitration provision when they executed the assignment and assumption of the franchise agreement and executed the guaranty; the arbitration agreement clearly and unmistakably provides that the validity and scope of the arbitration provisions must be decided by the arbitrator and not the court; the reference in the agreement to the AAA Commercial Arbitration Rules as applicable to the arbitration, which includes the rule that the arbitrator determines enforceability and scope of arbitration, clearly and unmistakably provides in the agreement that the issue will be decided by an arbitrator and not a court; plaintiff's claims are covered by the agreement and it is irrelevant if defendant has raised matters not within the scope of the arbitration agreement in the arbitration; although it is for the arbitrator to decide enforceability of the arbitration agreement, the agreement is not procedurally and substantively unconscionable; and the action should be stayed pending arbitration.

The initial hearing on the motion took place on April 29, 2022. The court heard oral argument and ordered supplemental briefing by statute. The hearing was continued to June 17, 2022.

Defendant filed a supplemental brief, a supplemental declaration, and a request for judicial notice. Defendant argues in the supplemental brief: the AAA Commercial Arbitration rules were

properly incorporated by reference into the subject arbitration agreement, thereby validly delegating to the arbitrator the authority to determine the threshold issues; the severability clause in the agreement does not create an ambiguity that leaves the court with authority to decide the threshold issues, because all the cases cited by the court in support of finding an ambiguity all involved arbitration clauses that included all claims, disputes, and controversies are subject to arbitration, while the subject arbitration agreement in this case exempted from arbitration trademark claims that arise after the termination of the agreement; and the severance clause, which provides that any provision that is held to be invalid or contrary to or in conflict with any applicable present or future law or regulation in a final, unappealable ruling issued by any court, agency or tribunal with competent jurisdiction in a proceeding to which we are a party, should be construed as being limited to trademark claims excluded from the arbitration, which will proceed either in court or before the Trial and Appeal Board before the U.S. Patent and Trademark Office.

Plaintiff argues in response to the supplemental brief: that the brief incorporation by reference of the AAA Commercial Arbitration Rules was insufficient; and other provisions of the agreement, including the severability provision of the agreement, render the agreement ambiguous as to the arbitrator's exclusive jurisdiction such that even if the arbitration rule is incorporated it is insufficient to "clearly and unmistakably" provide that arbitrators would have exclusive jurisdiction to decide their own jurisdiction.

Motion to Compel Arbitration and Stay Litigation

Except for specifically enumerated exceptions, the court must order the petitioner and respondent to arbitrate a controversy, if the court finds that a written agreement to arbitrate the controversy exists. (See Code of Civil Procedure, § 1281.2.)

"If an arbitration agreement requires that arbitration of a controversy be demanded or initiated by a party to the arbitration agreement within a period of time, the commencement of a civil action by that party based upon that controversy, within that period of time, shall toll the applicable time limitations contained in the arbitration agreement with respect to that controversy, from the date the civil action is commenced until 30 days after a final determination by the court that the party is required to arbitrate the controversy, or 30 days after the final termination of the civil action that was commenced and initiated the tolling, whichever date occurs first." (Code Civil Procedure, § 1281.12.)

"…when a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable. Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence. If the party opposing the petition raises a defense to enforcement—either fraud in the execution voiding the agreement, or a statutory defense of waiver or revocation (see § 1281.2, subds. (a), (b))—that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense. (*Strauch v. Eyring*, *supra*, 30 Cal.App.4th at p. 186.)" (Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal.4th 394, 413.)

"In California, "[g]eneral principles of contract law determine whether the parties have entered a binding agreement to arbitrate." (*Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416, 420, 100 Cal.Rptr.2d 818; see *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972–973, 64 Cal.Rptr.2d 843, 938 P.2d 903.) Generally, an arbitration agreement must be memorialized in writing. (*Fagelbaum & Heller LLP v. Smylie* (2009) 174 Cal.App.4th

1351, 1363, 95 Cal.Rptr.3d 252.) A party's acceptance of an agreement to arbitrate may be express, as where a party signs the agreement. A signed agreement is not necessary, however, and a party's acceptance may be implied in fact (e.g., *Craig,* at p. 420, 100 Cal.Rptr.2d 818 [employee's continued employment constitutes acceptance of an arbitration agreement proposed by the employer]) or be effectuated by delegated consent (e.g., *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 852–854, 114 Cal.Rptr.3d 263, 237 P.3d 584 (*Ruiz*).) An arbitration clause within a contract may be binding on a party even if the party never actually read the clause. (*24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1215, 78 Cal.Rptr.2d 533.)" (Emphasis added.) (Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC (2012) 55 Cal.4th 223, 236.)

"A written agreement to arbitrate is fundamental, because Code of Civil Procedure section 1281.2 permits a court to order the parties to arbitrate a matter only if it determines that an agreement to arbitrate exists. (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 356, 72 Cal.Rptr.2d 598; *Berman v. Renart Sportswear Corp.* (1963) 222 Cal.App.2d 385, 388-389, 35 Cal.Rptr. 218.) Indeed, when the trial court reviews a petition to compel arbitration, the threshold question is whether there is an agreement to arbitrate. (*Cheng-Canindin v. Renaissance Hotel Associates* (1996) 50 Cal.App.4th 676, 683, 57 Cal.Rptr.2d 867.)" (Villa Milano Homeowners Ass'n v. Il Davorge (2001) 84 Cal.App.4th 819, 824-825.)

"Once a court grants the petition to compel arbitration and stays the action at law, the action at law sits in the twilight zone of abatement with the trial court retaining merely a vestigial jurisdiction over matters submitted to arbitration. This vestigial jurisdiction over the action at law consists solely of making the determination, upon conclusion of the arbitration proceedings, of whether there was an award on the merits (in which case the action at law

should be dismissed because of the res judicata effects of the arbitration award *Division of Labor Standards Enforcement v. Williams* (1981) 121 Cal.App.3d 302, 309, 175 Cal.Rptr. 347; Rest.2d Judgments, § 84) or not (at which point the action at law may resume to determine the rights of the parties). (Cf. *Lord v. Garland* (1946) 27 Cal.2d 840, 851, 168 P.2d 5; *Shuffer v. Board of Trustees* (1977) 67 Cal.App.3d 208, 217, 136 Cal.Rptr. 527 [discussing effect of interlocutory judgment pursuant to § 597 abating second action at law pending resolution of first action of law].) The court also retains a separate, limited jurisdiction over the contractual arbitration which was the subject of the section 1281.2 petition: "After a petition has been filed *under this title* [i.e., "Title 9" (§§ 1280–1294.2)], the court in which such petition was filed retains jurisdiction to determine *any subsequent petition* involving the same agreement to arbitrate and the same controversy, and *any such subsequent petition* shall be filed in the same proceeding." (§ 1292.6 [emphasis added].)" (Brock v. Kaiser Foundation Hospitals (1992) 10 Cal.App.4th 1790, 1796.)

""The purpose of the statutory stay [required pursuant to section 1281.4] is to protect the jurisdiction of the arbitrator by preserving the status quo until arbitration is resolved. [Citations.] [¶] In the absence of a stay, the continuation of the proceedings in the trial court disrupts the arbitration proceedings and can render them ineffective. [Citation.]" (*Federal Ins. Co. v. Superior Court* (1998) 60 Cal.App.4th 1370, 1374–1375, 71 Cal.Rptr.2d 164 (*Federal Ins. Co.*).) ¶ In *SWAB Financial, LLC v. E*Trade Securities, LLC* (2007) 150 Cal.App.4th 1181, 1199–1200, 58 Cal.Rptr.3d 904 (*SWAB Financial*), the Court of Appeal emphasized that, after granting a petition to compel arbitration and staying a lawsuit, the scope of jurisdiction that a trial court retains is extremely narrow: ¶ "The trial court was ... authorized under Code of Civil Procedure section 1281.4 to stay pending judicial actions. But beyond that, the trial court's power to interfere in the pending arbitration was strictly limited. [Citations.].... [¶] ... Once a

petition is granted and the lawsuit is stayed, "the action at law sits in the twilight zone of abatement with the trial court retaining merely vestigial jurisdiction over matters submitted to arbitration." [Citation.] During that time, under its "vestigial" jurisdiction, a court may: appoint arbitrators if the method selected by the parties fails ([Code Civ. Proc.,] § 1281.6); grant a provisional remedy "but only upon the ground that the award to which an applicant may be entitled may be rendered ineffectual without provisional relief" ([Code Civ. Proc.,] § 1281.8, subd. (b)); and confirm, correct or vacate the arbitration award ([Code Civ. Proc.,] § 1285). Absent an agreement to withdraw the controversy from arbitration, however, no judicial act is authorized.' [Citation.]"" (MKJA, Inc. v. 123 Fit Franchising, LLC (2011) 191 Cal.App.4th 643, 658–659.)

With the above-cited legal principles in mind, the court will rule on the motion to compel arbitration and stay this litigation.

Arbitration Provision

Defense counsel declares in support of the motion: that he understood that plaintiffs received a copy of the subject agreement because on March 26, 2008, they signed a receipt acknowledging that they received the subject agreement, which is established by Defense Exhibit 3 that is attached to Steven Adjani's declaration in support of the motion to compel arbitration; on February 28, 2022 plaintiffs' counsel responded to correspondence sent by defense counsel wherein she stated that plaintiffs stand by their declarations 100%, because they never received the franchise agreement from defendant; and that correspondence also admits that plaintiffs received a large box of documents from the prior franchisee, which included the subject franchise agreement. (Court's emphasis.) (Declaration of Ryan Bykerk in Support of Motion to Compel Arbitration, paragraphs 2 and 4; and Exhibit 9 – February 28, 2022 Correspondence from Plaintiff's Counsel, page 1, second paragraph.)

Plaintiffs Salvatore Viscuso and Sandra Viscuso declare: they are shareholders of plaintiff SV Adventures, Inc., which has a principal place of business in El Dorado Hills; plaintiffs live in Placer County; on April 23, 2008 they were assigned the subject franchise by means of a six page assignment that incorporates by reference the underlying franchise agreement; a copy of the underlying franchise agreement was not attached to the assignment; the franchisor never provided plaintiffs with a copy of the underlying franchise agreement; they were told they had to take the underlying franchise agreement as it existed and no negotiations would take place as they were assuming obligations already agreed to; on August 3, 2021 plaintiff through counsel gave defendant notice that they were not renewing the franchise beyond the January 2, 2022 expiration date; after more than 60 days expired after that notice was sent, without defendant indicating an intent to purchase the franchise, plaintiffs began to rebrand the store as Viscuso's Pizza and Draft House with new signage, paint and recipes; on November 18, 2021 plaintiffs received an email from defendant stating the franchise agreement expires in January 2, 2022 and that defendant was exercising its option under Section 15.E. of the franchise agreement to purchase the subject restaurant; on December 22, 2022 [sic] the complaint was filed in this action; plaintiffs were never personally served the arbitration claim or the federal action; plaintiffs are a team owning and operating the business for 15 years and they have personal guarantees on the lease of the store and would be liable if another franchisee occupied the leased space; the food delivery and all services that support the restaurant are in their names and plaintiffs would be liable for someone else's mistakes if they were to turn over the business without having time to transfer liability, thereby causing them severe and irreparable injury; all witnesses to be called in this case are located in Northern California; and the landlord of the premises, DC Management, LLC will be a witness and is located in El Dorado County, in addition to numerous customers, which will refute the claim of

trademark infringement. (Court's emphasis.) (Declaration of Kathleen C. Lyon in Opposition to Defendant's Motion to Compel Arbitration, paragraph 6, Exhibit C – Omnibus Declaration of Plaintiffs in Support of Application, paragraphs 1, 2, 4-13, and 15-22.)

Plaintiffs admittedly received a copy of the subject agreement from the prior franchisee. Even assuming plaintiffs did not read the subject franchise agreement, that does not excuse them from a claim that the arbitration agreement in the underlying franchise agreement applies. However, that does not lead to a conclusion that the arbitration clause is enforceable as there remain issues concerning the unconscionability of the arbitration clause to consider.

The question then becomes whether the arbitrator or the court has jurisdiction to determine the validity of the arbitration provision in the agreement.

A line of cases holds that an arbitrator decides whether or not the disputes are arbitrable only where it is established by *clear and unmistakable* evidence that the parties elected to have the arbitrator, rather than the court, decide which grievances are arbitrable. (Emphasis in original.) (Hartley v. Superior Court (2011) 196 Cal.App.4th 1249, 1254-1255.)

The Third District Court of Appeal has recently held: "Arbitration agreements are construed to give effect to the intention of the parties. (*Aanderud, supra*, 13 Cal.App.5th at p. 890, 221 Cal.Rptr.3d 225.) "If contractual language is clear and explicit, it governs. [Citation.]" (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264, 10 Cal.Rptr.2d 538, 833 P.2d 545.) ¶ When a dispute arises between parties to an arbitration agreement, the parties may disagree not only about the merits of the dispute but also about "the threshold arbitrability question—that is, whether their arbitration agreement applies to the particular dispute." (*Henry Schein, Inc. v. Archer and White Sales, Inc.* (2019) ––– U.S. ––– [139 S.Ct. 524, 527, 202 L.Ed.2d 480] (*Schein*).) The high court has recognized that parties may "agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying

merits disputes." (*Ibid*.) Such threshold or "gateway" questions of arbitrability include whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. (*Id.* at p. ——— [139 S.Ct. at p. 529].) Indeed, "an 'agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the ... court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.' " (*Ibid.*) ¶ The question of who has the power to decide issues of arbitrability "turns upon what the parties agreed about *that* matter." (*First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 943, 115 S.Ct. 1920, 131 L.Ed.2d 985 (*First Options*).) If the parties agreed to submit arbitrability questions to the arbitrator, then the court reviews the arbitrator's decision under the same standard it reviews other decisions by the arbitrator. (*Ibid.*) "If, on the other hand, the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently. These two answers flow inexorably from the fact that arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes -- but only those disputes -- that the parties have agreed to submit to arbitration. [Citations.]" (*Ibid*.) ¶ Courts presume that the parties intend *courts*, not arbitrators, to decide threshold issues of arbitrability. (*Aanderud, supra*, 13 Cal.App.5th at p. 891, 221 Cal.Rptr.3d 225.) Accordingly, " '[t]here are two prerequisites for a delegation clause to be effective. First, the language of the clause must be clear and unmistakable. [Citation.] Second, the delegation must not be revocable under state contract defenses such as fraud, duress, or unconscionability.' [Citation.] The 'clear and unmistakable' test reflects a '*heightened* standard of proof' that reverses the typical presumption in favor of the arbitration of disputes. [Citation.]" (*Id.* at p. 892, 221 Cal.Rptr.3d 225.) Where the agreement is silent or ambiguous on the question of who decides threshold arbitrability questions, the court and not the arbitrator should

decide arbitrability so as not to force unwilling parties to arbitrate a matter they reasonably thought a judge, not an arbitrator, would decide. (*First Options, supra*, 514 U.S. at p. 945, 115 S.Ct. 1920.)" (Emphasis added.) (Sandoval-Ryan v. Oleander Holdings LLC (2020) 58 Cal.App.5th 217, 222–223.)

Defendant argues: that the plaintiffs received a copy of the franchise agreement from the prior franchisee from whom the plaintiffs acquired the franchise; the current agreement was also sent to them by the defendant as an exhibit to the Franchise Disclosure Document; the plaintiffs signed a receipt that acknowledged they received the agreement; plaintiffs signed the assignment and assumption agreement on April 23, 2008; and the arbitration provision of the then operative/current agreement provides in Section 17.F. that any dispute between plaintiffs and defendant, including disputes over the enforceability of the agreement itself, would be resolved by binding arbitration (Emphasis added.) (See Declaration of Steven Adyani in Support of Motion to Compel Arbitration, Exhibit 2.).

Defendant contends that the franchise agreement included in the Franchise Disclosure Document attached as Exhibit 2 to the declaration of Steven Adyani in Support of the Motion to Compel Arbitration is the operative agreement and not the franchise agreement executed by Concept Acquisitions, LLC, and the Galstyans on January 3, and 18, 2007.

The arbitration provision in Exhibit 1 of the Declaration of Steven Adyani in Support of Motion to Compel Arbitration is the only franchise agreement assigned and assumed by the plaintiff.

The arbitration provision in the franchise agreement between the predecessor franchisee and defendant, which was executed on January 3, and 18, 2007, provides: **"EXCEPT FOR CONTROVERSIES, DISPUTES OR CLAIMS RELATED TO OR BASED ON YOUR USE OF THE MARKS AFTER THE EXPIRATION OF TERMINATION OF THIS AGREEMENT, ALL**

CONTROVERSIES, DISPUTES OR CLAIMS BETWEEN US AND OUR AFFILIATES, AND OUR AFFILIATES' RESPECTIVE SHAREHOLDERS, OFFICERS, DIRECTORS, AGENTS, AND/OR EMPLOYEES AND YOU (AND YOUR OWNERS, GUARANTORS, AFFILIATES AND EMPLOYEES, IF APPLICABLE) ARISING OUT OF OR RELATED TO: ¶ * * * (3) THE VALIDITY OF THIS AGREEMENT OR ANY OTHER AGREEMENT BETWEEN YOU AND US OR ANY PROVISION OF ANY OF THOSE AGREEMENTS; ¶ * * * MUST BE SUBMITTED FOR BINDING ARBITRATION TO THE AMERICAN ARBITRATION ASSOCIATION…" **(**Emphasis in Original.) (Declaration of Steven Adyani in Support of Motion to Compel Arbitration, Exhibit 1 – Concept Acquisitions, LLC Franchise Agreement with the Galstyans, Paragraph 17.F. (Subject Franchise Agreement Assigned to Plaintiffs.))

Steven Adyani declares: that he is the vice-president of operations for the defendant and is familiar with the corporate records; the corporate records reflect that on January 3, 2007, the Galstyans entered into a franchise agreement with the defendant's predecessor, Concept Acquisitions, LLC, and a true and correct copy of that agreement is attached as Exhibit 1; the corporate records also reflect that on March 26, 2008, plaintiffs acknowledged receipt of the Franchise Disclosure Document that included the franchise agreement as Exhibit B, which is attached as Exhibit 2; and on April 23, 2008, plaintiff executed an assignment and assumption agreement thereby assuming all of the prior franchisee's obligations under the franchise agreement, which is attached as Exhibit 4. (Declaration of Steven Adyani in Support of Motion to Compel Arbitration, paragraphs 1, and 3-5.)

Exhibit 2 of the declaration of Steven Adyani in Opposition to Motion is a standard Franchise Disclosure Document, which includes a blank, unexecuted franchise agreement that purportedly is the agreement between Concept Acquisitions, LLC, and an unnamed franchise owner. The arbitration provision in that blank, unexecuted franchise agreement is materially

different from the executed January 3, 2007, Concept Acquisitions, LLC franchise agreement with the Galstyans. The agreement attached as Exhibit B to the Franchise Disclosure Document provides with respect to matters that are to be decided by the arbitration: "**(3) THE SCOPE OR VALIDITY OF THIS AGREEMENT OR ANY OTHER AGREEMENT BETWEEN YOU (OR YOUR OWNERS) AND US OR ANY PROVISION OF ANY OF THESE AGREEMENTS (INCLUDING THE VALIDITY AND SCOPE OF THE ARBITRATION OBLIGATION UNDER THIS SECTION, WHICH WE AND YOU ACKNOWLEDGE IS TO BE DETERMINED BY AN ARBITRATOR AND NOT BY A COURT)…**" (Declaration of Steven Adyani in Support of Motion to Compel Arbitration, Exhibit 2 - Franchise Disclosure Document, Exhibit B, paragraph 17.F.(3).)

The assignment and assumption agreement entered into between Concept Acquisitions, LLC, franchisees Galstyan, and plaintiffs on April 23, 2008, expressly provides: the subject assigned and assumed franchise agreement was the defendant's franchise agreement with the Galstyans dated January 3, 2007; the recitals in the agreement are incorporated into and made part of the agreement by reference; the franchisee transfers, sets over, and assigns to assignee all of the franchisee's rights to and interest in the subject franchise agreement and the restaurant and all related rights; and the assignee accepts the assignment from the franchisee and assumes the franchisee's obligations, agreements, commitments, duties, and liabilities under the subject franchise agreement. (Declaration of Steven Adyani in Support of Motion to Compel Arbitration, Exhibit 4 – Assignment and Assumption Agreement, 1st Recital, page 1, and paragraphs 1-3.)

Plaintiffs agreed to be assigned and assume the franchise agreement entered between defendant/Concept Acquisitions, LLC and the Galstyans, which was executed by Concept Acquisitions, LLC and the Galstyans on January 3, and 18, 2007, not a purported

current/operative blank, sample franchise agreement attached as an exhibit to a disclosure document. Therefore, the operative franchise agreement arbitration provision is found in defense Exhibit 1. The arbitration agreement itself does not include any specific language that provided that the validity and scope of the arbitration obligation under this arbitration section were acknowledged/agreed to be determined by an arbitrator and not by a court.

The arbitration language in January 3, 2007, franchise agreement is distinguishable from the language found in Aanderund v. Superior Court (2017) 13 Cal.App.5th 880, 892 and is not squarely on point.

"Here, the arbitration provision states that the parties "agree to arbitrate all disputes, claims and controversies arising out of or relating to ... (iv) the interpretation, validity, or enforceability of this Agreement, including the determination of the scope or applicability of this Section 5 [the "Arbitration of Disputes" section]. ..." This language delegates to the arbitrator questions of arbitrability and is clear and unmistakable evidence that the parties intended to arbitrate arbitrability. (See, e.g., *Malone v. Superior Court* (2014) 226 Cal.App.4th 1551, 1560, 173 Cal.Rptr.3d 241 [noting delegation clause that provided "[t]he arbitrator has exclusive authority to resolve any dispute relating to the interpretation, applicability, or enforceability of this binding arbitration agreement" was clear and unmistakable]; *Momot v. Mastro* (9th Cir. 2011) 652 F.3d 982, 988 [language that delegated authority to arbitrator to determine "the validity or application of any of the provisions of" the arbitration clause was a clear and unmistakable agreement to arbitrate the question of arbitrability].)" (Emphasis added.) (Aanderud v. Superior Court (2017) 13 Cal.App.5th 880, 892.)

The language in the arbitration provision at issue in Aanderund, supra, stated that the interpretation, validity, and enforceability of this agreement, including the determination of the scope or applicability of this Section 5.." were subject to arbitration as a dispute, claim and

controversy arising from the agreement. No such specific language as to the enforceability of the arbitration provision, including the scope and applicability of the provision, is determined by the arbitrator is present in the January 3, 2007, agreement. Only a general, vague reference to the validity of the agreement is present in that agreement.

Defendant also argues that merely referring to the American Arbitration Association's Commercial Arbitration Rules in the body of a lengthy arbitration clause is a clear, unmistakable, and explicit delegation of the authority of the arbitrator to decide enforceability and scope issues concerning the arbitration agreement, because a single provision in the rules provides for such a delegation.

Defendant's supplemental brief asserts the same argument and requests the court to take judicial notice of various versions of the AAA Commercial Arbitration Rules in effect over the years.

Plaintiff replied to the defendant's supplemental brief: both Gilbert Street Developers, LLC v. La Quinta Homes, LLC (2009) 174 Cal.App.4th 1185 and the most recent appellate opinion in Nelson v. Dual Diagnosis Treatment Center, Inc. (2022) 77 Cal.App.5th 643 holds that brief incorporation of arbitration rules does not limit the court's jurisdiction to decide the threshold issues regarding the enforceability of the arbitration agreement.

The arbitration provision of the January 3, 2007 franchise agreement states: "…**THE ARBITRATION PROCEEDINGS WILL BE CONDUCTED BY ONE ARBITRATOR … AND, EXCEPT AS PROVIDED IN THIS AGREEMENT, IN ACCORDANCE WITH THE THEN CURRENT COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION**…" (Declaration of Steven Adyani in Support of Motion to Compel Arbitration, Exhibit 1 – Concept Acquisitions, LLC Franchise Agreement with the Galstyans, Paragraph 17.F. (Subject Franchise Agreement Assigned to Plaintiffs.))

"Establishing the "clear and unmistakable rule" is easy. The hard part is applying it. Just how "clear and unmistakable" must the parties be if they choose to have an arbitrator decide his or her own jurisdiction? An easy case is obviously when there is explicit language in the actual signed document to that effect. For example: "We want the arbitrators selected pursuant to this contract to have the power to decide whether what is put before them is actually arbitrable under this contract." But life is rarely that easy. When lawyers have the prescience to write clauses like that, their contracts usually don't get to appellate courts. Cases that do get to the appellate courts often turn on the problem of whether an agreement to be bound by a certain body of rules e.g., American Arbitration Association or National Association of Securities Dealers rules, is *itself* sufficient to show that the parties "clearly and unmistakably agreed" that arbitrators would decide their own jurisdiction. ¶ Two California appellate cases, *Dream Theater, Inc. v. Dream Theater, supra,* 124 Cal.App.4th 547, 21 Cal.Rptr.3d 322, and *Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 39 Cal.Rptr.3d 43 7 (*Rodriquez*) have gone so far as to conclude that incorporation of American Arbitration Association rules by reference *was* sufficient to "clearly and unmistakably" provide that arbitrators would have jurisdiction to decide their own jurisdiction. However, in those cases the appellate courts operated on the premise the American Arbitration Association rule providing for arbitrators to decide their own jurisdiction *actually existed at the time the contract was signed.* In *Dream Theater* we know the contract was signed after the adoption of rule 8, since the opinion mentions that the contract had been signed in October 2001. (*Dream Theater, supra,* 124 Cal.App.4th at p. 550, 21 Cal.Rptr.3d 322; see fn. 2, *ante.*) And while the *Rodriquez* opinion does not tell the reader precisely when the arbitration contract was signed, its treatment of the issue strongly suggests that AAA rule 8 was similarly in effect at the time of signing. If it wasn't, the opinion certainly gives no hint of that fact, or of any issue raised

in that regard. [FN 10.] ¶ FN 10 Ajamian also argues that the Employment Agreement recognizes that she might bring "an action" against CantorCO2e relating to the "validity" or "efficacy" of the Employment Agreement. Appellants point out that the provision does not explicitly state that she can bring "an action" *in court.* ¶ We think that *Dream Theater* and *Rodriquez* represent the outer limits of the use of incorporation by reference of some body of rules incorporated by reference to confer upon arbitrators the power to decide their own jurisdiction. At least in those cases, the parties could go *look up* the AAA rules to which they were agreeing beforehand, and see that, yes, they were conferring on arbitrators the power to decide if a dispute was arbitrable in the first place. To go beyond the incorporation of an *existent* rule and allow for the incorporation of a rule that might not even come into existence in the future, however, contravenes the clear and unmistakable rule. We decline to take the next step beyond *Dream Theater* and *Rodriquez.* ¶ Incorporating the *possibility* of a *future* rule by reference simply doesn't even meet the basic requirements for a valid incorporation by reference under simple state contract law. ¶ Most basically, what is being incorporated must *actually exist at the time of the incorporation,* so the parties can know exactly what they are incorporating. (See *In re Plumel's Estate* (1907) 151 Cal. 77, 80, 90 P. 192 ["in order to make out a case for the application of the doctrine of incorporation by reference, the paper referred to must not only be in existence at the time of the execution of the attested or properly executed paper, but that it must be referred to in the latter as an existent paper, so as to be capable of identification"].) ¶ Put another way, to have a valid incorporation by reference, the terms of the document being incorporated must be " ' "known or easily available" ' " to the contracting parties. (See *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1331, 90 Cal.Rptr.3d 589 [" ' "For the terms of another document to be incorporated into the document executed by the parties the reference must be clear and

unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties." ' "].) ¶ "Prediction," said Niels Bohr, "is very difficult, especially about the future." A rule that does not exist at the time of incorporation by reference fails the elementary test of being known or easily available at the time of incorporation. To allude to that old medieval con game from which we get the expression "pig in a poke"—where an unsuspecting buyer would buy what he or she thought was a pig in a bag only to later discover that it was an inedible cat or rat—in both *Dream Theater* and *Rodriquez* there was at least *something* in the bag that the parties could look at. Here, by contrast, the bag was empty at the time of the transaction and *might* or might *not,* be later filled with a pig. Or a cat or rat or, for that matter, nothing." (Gilbert Street Developers, LLC v. La Quinta Homes, LLC (2009) 174 Cal.App.4th 1185, 1192–1194.)

"Sovereign nonetheless argues arbitral delegation occurred "ultimately" by reference. That is, the agreement's arbitration provision specified "binding arbitration pursuant to the Commercial Arbitration Rules of the American Arbitration Association (the 'Rules')." According to Sovereign, the applicable version of those rules provided that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim" and that "the arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part."[FN 6] ¶ FN 6. The AAA Commercial Arbitration Rules and Mediation Procedures that Sovereign includes in the record are 46 pages long, single-spaced. ¶ At oral argument, counsel for Sovereign agreed that a copy of the AAA rules was never provided to Brandon. Sovereign nonetheless argues "that incorporation of the [AAA] arbitration rules constitutes clear and unmistakable evidence that

the parties agreed to arbitrate arbitrability.' " *(Brennan, supra*, 796 F.3d at p. 1130.) *Brennan* limited its "holding to the facts of the present case, which *do* involve an arbitration agreement 'between sophisticated parties.' " *(Id* at p. 1131, italics added.) ¶ Neither *Brennan* nor Sovereign provide authority holding that incorporation binds an unsophisticated party. The two cases on which Sovereign relies in addition to *Brennan* did not consider the issue. *(Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 1123, 39 Cal.Rptr.3d 437 *(Rodriguez); Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 557, 21 Cal.Rptr.3d 322 *(Dream Theater).)*" (Emphasis added.) (Nelson v. Dual Diagnosis Treatment Center, Inc. (2022) 77 Cal.App.5th 643, 656-657.) [April 19, 2022.]

Although the Nelson opinion is not yet final, it is consistent with the Gilbert opinion that recognized that under certain circumstances appellate authorities hold that incorporation of American Arbitration Association rules by reference was sufficient to "clearly and unmistakably" provide that arbitrator would have jurisdiction to decide their own jurisdiction. However, the issue of whether unsophisticated parties may be held to short, simple incorporation of arbitration rules by reference alone remains.

The American Arbitration Association (AAA) has the AAA arbitration rules posted on its website. Rule 7(a) of the amended AAA Commercial Arbitration Rules effective October 1, 2013, provides: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim."

Defendant has requested the court take judicial notice of seven sets of the AAA Commercial Arbitration Rules effective September 1, 2000, July 1, 2002, July 1, 2003, September 15, 2005, September 1, 2007, June 1, 2009, and October 1, 2013.

Defendant submitted evidence that the rule in effect at the time the franchise agreement was executed on January 3, 2007, was the set of Commercial Arbitration Rules effective September 15, 2005, which can be incorporated by reference into the agreement as they were in existence at the time the agreement was entered. Rule R-7(a) of the AAA Commercial Arbitration Rules effective September 15, 2005, provides: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement."

Even assuming for the sake of argument it is established that the plaintiffs are sophisticated parties and the rule is incorporated into the agreement, the language of the subject rule does not provide that the arbitrator is agreed to have exclusive authority to resolve the threshold questions regarding the interpretation, validity, and enforceability of the arbitration agreement itself; and there is a severance clause in the agreement that provides for court authority to decide of the agreement's provisions are valid and enforceable. (Court's emphasis.)

- Severability Clause

The severability provision states: "… each section, paragraph, term and provision of this Agreement, and any portion thereof, will be considered severable, and if, for any reason, any provision is held to be invalid or contrary to or in conflict with any applicable present or future law or regulation in a final, unappealable ruling issued by any court, agency or tribunal with competent jurisdiction in a proceeding to which we are a party, that ruling will not impair the operation of, or have any other effect upon, the other portions of this agreement…" (Emphasis added.) (Declaration of Steven Adyani in Support of Motion to Compel Arbitration, Exhibit 1 – Concept Acquisitions, LLC Franchise Agreement with the Galstyans, Paragraph 17.A. (Subject Franchise Agreement Assigned to Plaintiffs.).)

"As a general matter, where one contractual provision indicates that the enforceability of an arbitration provision is to be decided by the arbitrator, but another provision indicates that the *court* might also find provisions in the contract unenforceable, there is no clear and unmistakable delegation of authority to the arbitrator. (*Parada v. Superior Court* (2009) 176 Cal.App.4th 1554, 1565–1566, 98 Cal.Rptr.3d 743 [fact that the contract's severability clause authorized the " 'trier of fact of competent jurisdiction' "—instead of " 'arbitration panel' " or " 'panel of three (3) arbitrators' "—to sever unenforceable contractual provisions suggests that the court could find the arbitration provision unenforceable (italics omitted)].) ¶ Even broad arbitration clauses that *expressly* delegate the enforceability decision to arbitrators may not meet the clear and unmistakable test, where other language in the agreement creates an uncertainty in that regard. (*Hartley v. Superior Court* (2011) 196 Cal.App.4th 1249, 1257–1258, 127 Cal.Rptr.3d 174 [following and applying *Parada*]); (see *Baker v. Osborne Development Corp.* (2008) 159 Cal.App.4th 884, 888–894, 71 Cal.Rptr.3d 854 [parties' agreement did not clearly and unmistakably delegate issue of enforceability to arbitration, despite agreement's provision that " '[a]ny disputes concerning the interpretation or the enforceability of this arbitration agreement, including without limitation, its revocability or voidability for any cause, [and] the scope of arbitrable issues ... shall be decided by the arbitrator,' " where another provision indicated that the court might find a provision unenforceable].)" (Emphasis added.) (Ajamian v. CantorCO2e, L.P. (2012) 203 Cal.App.4th 771, 792.)

"As in *Parada, supra,* 176 Cal.App.4th 1554, 1565, 98 Cal.Rptr.3d 743, we are not required to reach the issue because we agree that even if state and federal law agree on the point, the court's order here is erroneous because the account agreements do not clearly and unmistakably show they agreed to give the arbitrator the exclusive power to decide the gateway issue of arbitrability. Rather, the contract language conflicts on the issue of who is to

decide arbitrability and creates ambiguity. ¶ Paragraph 15.11(a) of the purchase agreement provides: "**Arbitration of Claims.** The parties agree that any and all disputes, claims or controversies arising out of or relating to any transaction between them or to the breach, termination, enforcement, interpretation or validity of this Agreement, including the *determination of the scope and applicability of this agreement to arbitrate,* shall be subject to the terms of the [FAA] and shall be submitted to final and binding arbitration before JAMS, or its successor, in Orange County, California, in accordance with the laws of the State of California for agreements made in and to be performed in California." (Italics added.) ¶ Paragraph 15.11(d) of the purchase agreement provides that arbitration "shall be conducted in accordance with the provisions of JAMS Comprehensive Arbitration Rules and Procedures in effect at the time of filing the demand for arbitration." The paragraph advises the customer that he or she can obtain a copy of JAMS' rules on its Internet Web site. ¶ Rule 11(c) of JAMS's rules stated at the relevant time: "Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, ... shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter." Ordinarily, the parties' agreement to arbitrate in accordance with such a rule "is clear and unmistakable evidence of the intent that the arbitrator will decide whether a [c]ontested [c]laim is arbitrable." (*Dream Theater, supra,* 124 Cal.App.4th at p. 557, 21 Cal.Rptr.3d 322.) ¶ Paragraph 15.11(h) of the purchase agreement, however, provides: "**No Waiver of Any Right to Provisional or Injunctive Relief.** *Nothing contained in this Agreement* shall in any way deprive a party of its right to obtain provisional, injunctive, or other *equitable relief from a court of competent jurisdiction,* pending dispute resolution and arbitration. For purposes of any proceeding for provisional, injunctive or *other equitable relief, the parties consent to the*

jurisdiction of, and venue in, the courts of the State of California and the United States District Court, located in Orange County, California." (Italics added.) Paragraph 31.8 of the parties' loan agreement contains the same provision. ¶ A claim that a contract is unenforceable on the ground of unconscionability is an equitable matter. " 'That equity does not enforce unconscionable bargains is too well established to require elaborate citation.' " (*Walnut Producers of California v. Diamond Foods, Inc.* (2010) 187 Cal.App.4th 634, 643, 114 Cal.Rptr.3d 449; 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 40, p. 333–334.) "Under both federal and California law, arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law *or in equity* for the voiding of any contract. [Citation.] Unconscionability is a recognized contract defense which can defeat an arbitration agreement." (*Arguelles–Romero v. Superior Court* (2010) 184 Cal.App.4th 825, 836, 109 Cal.Rptr.3d 289, italics added.) ¶ Further, paragraph 15.14 of the purchase agreement provides: "**Severability.** In the event that any provision of this Agreement shall be determined by a *trier of fact of competent jurisdiction* to be unenforceable in any jurisdiction, ... the remainder of this Agreement shall remain binding...." (Italics added.) ¶ In *Parada*, the court held that read together, an arbitration provision and a severability provision in Monex account agreements that were similar to the ones quoted above, created an ambiguity as to who may determine unconscionability, and the ambiguity foreclosed Monex's argument that the issue was for the arbitrator's determination. (*Parada*, *supra*, 176 Cal.App.4th at pp. 1565–1566, 98 Cal.Rptr.3d 743.) As to the severability clause, the court explained, "Use of the term 'trier of fact of competent jurisdiction' instead of 'arbitration panel' or 'panel of three (e) arbitrators' suggests the trial court also may find a provision, including the arbitration provision, unenforceable." (*Id.* at p. 1566, 98 Cal.Rptr.3d 743.) ¶ Here, likewise, the account agreements do not meet the heightened standard that must be satisfied to vary from the general rule that

the court decides the gateway issue of arbitrability. The severability clause here uses the term "trier of fact of competent jurisdiction," rather than the term "arbitrator," indicating the court has authority to decide whether an arbitration provision is unenforceable. As in *Parada,* " 'although one provision of the arbitration agreement stated that issues of enforceability or voidability were to be decided by the arbitrator, another provision indicated that the court might find a provision unenforceable.' " (*Parada, supra,* 176 Cal.App.4th at p. 1566, 98 Cal.Rptr.3d 743, citing *Baker v. Osborne Development Corp.* (2008) 159 Cal.App.4th 884, 893–894, 71 Cal.Rptr.3d 854.) Further, one paragraph of the arbitration clause here authorizes the court to decide all equitable issues, notwithstanding another paragraph that authorizes the arbitrator to decide all disputes. When an agreement is ambiguous, "the court and not the arbitrator should decide arbitrability so as not to force unwilling parties to arbitrate a matter they reasonably thought a judge, not an arbitrator, would decide." (*Dream Theater, supra,* 124 Cal.App.4th at p. 552, 21 Cal.Rptr.3d 322, citing *First Options, supra,* 514 U.S. at p. 945, 115 S.Ct. 1920.) We construe ambiguities against Monex as the drafting party. (*Hunt v. Superior Court* (2000) 81 Cal.App.4th 901, 909, 97 Cal.Rptr.2d 215.) ¶ We conclude Hartley is entitled to a judicial declaration of whether the arbitration clause is unconscionable, as requested in the complaint's twentieth count. [FN 4.] We also conclude that should the court find in favor of Monex on the issue of arbitrability, Hartley is entitled to a pre-arbitration judicial declaration of whether certain "contract disclaimers" in the account agreements are unconscionable or in violation of public policy, as requested in the complaint's nineteenth count, and to a court decision on the complaint's eleventh count for injunctive relief under the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.). Declaratory relief and injunctive relief are equitable remedies (*In re Claudia E.* (2008) 163 Cal.App.4th 627, 633, 77 Cal.Rptr.3d 722; *D.C. v. Harvard–Westlake School* (2009) 176 Cal.App.4th 836, 856, 98 Cal.Rptr.3d 300) reserved to the court under

paragraph 15.11(h) of the purchase agreement and paragraph 31.8 of the loan agreement." (Emphasis added.) (Hartley v. Superior Court (2011) 196 Cal.App.4th 1249, 1256–1258.)

"In any event, to be effective, any attempted delegation cannot be equivocal or ambiguous. Instead, the issue of arbitrability presumptively remains with the court except "where 'the parties *clearly and unmistakably* provide otherwise.' " *(Brennan* v. *Opus Bank* (9th Cir. 2015) 796 F.3d 1125, 1130 *(Brennan);* accord, *Dennison, supra*, 47 Cal.App.5th at p. 209, 260 Cal.Rptr.3d 675.) "[C]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *(First Options, supra*, 514 U.S. at p. 939, 115 S.Ct. 1920.) ¶ Sovereign argues the parties' intent to have an arbitrator determine questions of arbitrability is reflected implicitly in the broad language of their arbitration clause which states a general desire for disputes to be resolved "without litigation." Specifically, "The Parties" stated expressly in the "Dispute Resolution" section of the enrollment agreement their "desire to resolve *any* dispute, whether based on contract, tort, statute or other legal or equitable theory *arising out of or related to* this Agreement ... or the breach or termination of this Agreement ... without litigation." (Italics added.) ¶ While this language might permit an inference the parties intended that an arbitrator should resolve arbitrability questions (i.e., "any dispute"), such an intent is not clear and unmistakable. The clause does not mention arbitrability, nor is it mentioned anywhere else in the agreement. Arbitrability is a "rather arcane" subject *(First Options, supra*, 514 U.S. at p. 945, 115 S.Ct. 1920), and silence or ambiguity regarding arbitrability favors the presumption for judicial determination *(ibid.).* ¶ "Even broad arbitration clauses that expressly delegate the enforceability decision to arbitrators may not meet the clear and unmistakable test, where other language in the agreement creates an uncertainty in that regard." *(Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 792, 137 Cal.Rptr.3d 773 *(Ajamian).* Here, the agreement not only did not expressly delegate arbitrability to an

arbitrator, it expressly contemplated court review of the validity and enforceability of the agreement: "If *a court* finds that any provision of this Agreement is invalid or unenforceable ...." (Italics added.) This broad power of review for validity and enforceability expressly extended to "any provision of this Agreement ... for any reason ....." [FN 5] ¶ FN 5. In full, the "Severability" clause stated: "If any provision of this Agreement will be held to be *invalid or unenforceable for any reason*, the remaining provisions will continue to be valid and enforceable. *If a court* finds that *any provision of this Agreement* is invalid and unenforceable, but that by limiting such provision it would become valid and enforceable, then such provision will be deemed written, construed and enforced as so limited." (Italics added.)" ¶ Sovereign attempts to limit this broad authority by observing that it is conferred at the end of the agreement under a "Miscellaneous" heading. Sovereign points out that the dispute resolution section of the agreement has its own severability term under a heading entitled "Enforceability: "If any part *of this dispute resolution provision* is held to be unenforceable, it shall be severed and shall not affect either the duty to arbitrate or any other part of this provision." (Italics added.) ¶ We are not persuaded. The "Severability" provision in the "Miscellaneous" section of the agreement expressly gave the court the authority to review the validity and enforceability of the agreement as a whole. This broad judicial authority to hold "any provision" of the agreement "invalid or unenforceable for any reason" precludes any conclusion that the parties clearly and unmistakably delegated arbitrability questions to an arbitrator." (Emphasis added.) (Nelson v. Dual Diagnosis Treatment Center, Inc. (2022) 77 Cal.App.5th 643, 654–656.) [Opinion issued April 19, 2022.]

The appellate court further held: "Here, regardless of Brandon's sophistication or lack thereof, the enrollment agreement itself resolves the arbitrability question against Sovereign. The agreement's broad severability language confirms the trial court's retained authority to resolve questions concerning the validity or enforceability of the agreement. None of the cases

on which Sovereign relies for delegation-by-reference-to-arbitral-rules involved the parties' simultaneous express statement of broad judicial power to hold "any provision" of their agreement "invalid or unenforceable for any reason." ¶ At best, the dual delegation presented by the facts here-to the arbitrator by reference to AAA rules, and to the court expressly-created uncertainty. Uncertainty or ambiguity as to whether arbitrability determinations have been delegated to the arbitrator cannot overcome the presumption for judicial determination of threshold issues. *(Ajamian, supra*, 203 Cal.App.4th at pp. 790-791, 137 Cal.Rptr.3d 773.) "[W]here one contractual provision indicates that the enforceability of an arbitration provision is to be decided by the arbitrator, but another provision indicates that the *court* might also find provisions in the contract unenforceable, there is no clear and unmistakable delegation of authority to the arbitrator." *(Id* at p. 790, 137 Cal.Rptr.3d 773.) As *Ajamian* observed, mere reference to arbitral rules may "tell[ ] the reader almost nothing, since a court *also* has power to decide such issues, and nothing in the AAA rules states that the AAA arbitrator ... has *exclusive* authority to do so ...." *(Id* at p. 789, 137 Cal.Rptr.3d 773.) ¶ Under these circumstances, Sovereign has not met its burden to defeat the applicable presumption. "[I]t is not enough that ordinary rules of contract interpretation simply yield the result that arbitrators have power to decide their own jurisdiction. Rather, the result must be clear and unmistakable, because the law is solicitous of the parties actually *focusing* on the issue. Hence silence or ambiguity is not enough." *(Gilbert Street Developers, LLC v. La Quinta Homes, LLC* (2009) 174 Cal.App.4th 1185, 1191-1192, 94 Cal.Rptr.3d 918.) ¶ As *Ajamian* explained: "[W]e must be mindful of what the United States Supreme Court has emphasized unflinchingly for decades: notwithstanding the public policy favoring arbitration, arbitration can be imposed only as to issues the parties agreed to arbitrate; given the slim likelihood that the parties actually contemplated who would determine threshold enforceability issues, as well as the default

presumption that such issues would be determined by the court, those threshold issues must be decided by the court absent *clear and unmistakable* proof to the contrary." *(Ajamian, supra*, 203 Cal.App.4th at p. 789, 137 Cal.Rptr.3d 773.) That is the case here. The trial court did not err in its ruling." (Nelson v. Dual Diagnosis Treatment Center, Inc. (2022) 77 Cal.App.5th 643, 657–658.) [Opinion issued April 19, 2022.]

Although the Nelson opinion will not be final until April 19, 2022, its holding is fully consistent with the other cases cited above for the legal proposition that where there exists a severability provision that provides the court with authority to decide the issue of severability of the agreement provisions, the court is expressly authorized to decide the threshold issues of validity and enforceability of the arbitration agreement.

The arbitration agreement expressly provides that "… each section, paragraph, term and provision of this Agreement, and any portion thereof, will be considered severable, and if, for any reason, any provision is held to be invalid or contrary to or in conflict with any applicable present or future law or regulation in a final, unappealable ruling issued by any court, agency or tribunal with competent jurisdiction in a proceeding to which we are a party". This renders the agreement ambiguous concerning whether the plaintiffs and defendant agreed that the arbitrator is the sole person who is agreed to decide the threshold arbitrability questions of the validity and enforceability of the arbitration agreement and, therefore, the agreement does not clearly, unmistakably, and explicitly delegate to the arbitrator the resolution of threshold questions regarding the interpretation, validity, and enforceability of the arbitration agreement itself. (See Paragraph 17.A. of Subject Franchise Agreement Assigned to Plaintiffs.)

Defendant argues that the above-cited authorities are distinguishable because they all involved arbitration clauses that provided that all claims, disputes, and controversies are

subject to arbitration, while the subject arbitration agreement in this case exempted from arbitration claims related to trademark claims that arise after the termination of the agreement and the subject severance clause is properly construed under the laws of construction of contracts to be expressly limited to trademark claims that are excluded from the arbitration, which will proceed either in court or before the Trial and Appeal Board before the U.S. Patent and Trademark Office.

The clear language of the severance clause can not reasonably be construed to limit the authority of the courts, or any other tribunal, to only hearing Trademark claims between the parties. The parties broadly agree to any court, agency, or tribunal with competent jurisdiction in a proceeding to which the plaintiffs and defendant are parties having jurisdiction to determine whether any section, paragraph, term, and provision of the Agreement, and any portion thereof is invalid or contrary to or in conflict with any applicable present or future law or regulation in a final, unappealable ruling. The provision does not limit severance of provisions of the agreement to only provisions involving claims excluded from the arbitration agreement, leaving the agreement ambiguous on the question of who decides threshold arbitrability questions. Therefore, the court and not the arbitrator should decide arbitrability so as not to force unwilling parties to arbitrate a matter they reasonably thought a judge, not an arbitrator, would decide.

Agreement Unconscionability

"The party resisting arbitration bears the burden of proving unconscionability." (Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC (2012) 55 Cal.4th 223, 247.)

The lack of opportunity to negotiate terms of an employment/arbitration agreement and take or leave it nature of the adhesive aspect of an employment/arbitration agreement is not dispositive. (Serpa v. California Surety Investigations, Inc. (2013) 215 Cal.App.4th 695, 704.)

"When, as here, there is no other indication of oppression or surprise, "the degree of procedural unconscionability of an adhesion agreement is low, and the agreement will be enforceable unless the degree of substantive unconscionability is high." (*Ajamian v. CantorCO2e* (2012) 203 Cal.App.4th 771, 796, 137 Cal.Rptr.3d 773; accord, *Dotson v. Amgen, Inc.* (2010) 181 Cal.App.4th 975, 981-982, 104 Cal.Rptr.3d 341; see generally *Roman,* at p. 1471, fn. 2, 92 Cal.Rptr.3d 153["[w]hen bargaining power is not grossly unequal and reasonable alternatives exist, oppression typically inherent in adhesion contracts is minimal"].) [Footnote omitted.]" (Serpa v. California Surety Investigations, Inc. (2013) 215 Cal.App.4th 695, 704.)

"Even in adhesion contracts, courts will enforce provisions that are conspicuous, plain, and clear, and that do not "operate to defeat the reasonable expectations of the parties." (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 710, 131 Cal.Rptr. 882, 552 P.2d 1178.)" (Flores v. West Covina Auto Group (2013) 212 Cal.App.4th 895, 920.)

While the "take it or leave it" agreement is a contract of adhesion, there must be other factors present for a court to determine that the agreement is unenforceable due to unconscionability. "Unconscionability analysis begins with an inquiry into whether the contract is one of adhesion. (Id. at pp. 817-819, 171 Cal.Rptr. 604, 623 P.2d 165.) "The term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." (*Neal v. State Farm Ins. Cos.* (1961) 188 Cal.App.2d 690, 694, 10 Cal.Rptr. 781.) If the contract is adhesive, the court must then determine whether "other factors are present which, under established legal rules -- legislative or judicial -- operate to render it [unenforceable]." (*Scissor-Tail*, supra, at p. 820, 171 Cal.Rptr. 604, 623 P.2d 165, fn. omitted.)" (Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 113.)

"We explained the judicially created doctrine of unconscionability in *Scissor-Tail*, supra, 28 Cal.3d 807, 171 Cal.Rptr. 604, 623 P.2d 165. Unconscionability analysis begins with an inquiry into whether the contract is one of adhesion. (Id. at pp. 817-819, 171 Cal.Rptr. 604, 623 P.2d 165.) "The term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." (*Neal v. State Farm Ins. Cos.* (1961) 188 Cal.App.2d 690, 694, 10 Cal.Rptr. 781.) If the contract is adhesive, the court must then determine whether "other factors are present which, under established legal rules -- legislative or judicial -- operate to render it [unenforceable]." (*Scissor-Tail*, supra, at p. 820, 171 Cal.Rptr. 604, 623 P.2d 165, fn. omitted.) "Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or 'adhering' party will not be enforced against him. [Citations.] The second -- a principle of equity applicable to all contracts generally -- is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or 'unconscionable.' " (Ibid.) Subsequent cases have referred to both the "reasonable expectations" and the "oppressive" limitations as being aspects of unconscionability. (See *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486-487, 186 Cal.Rptr. 114 (A & M Produce Co.).) ¶ In 1979, the Legislature enacted Civil Code section 1670.5, which codified the principle that a court can refuse to enforce an unconscionable provision in a contract. (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 925, 216 Cal.Rptr. 345, 702 P.2d 503.) As section 1670.5, subdivision (a) states: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may

enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." Because unconscionability is a reason for refusing to enforce contracts generally, it is also a valid reason for refusing to enforce an arbitration agreement under Code of Civil Procedure section 1281, which, as noted, provides that arbitration agreements are "valid, enforceable and irrevocable, save upon such grounds as exist [at law or in equity] for the revocation of any contract." The United States Supreme Court, in interpreting the same language found in section 2 of the FAA (19 U.S.C. § 2), recognized that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements...." (*Doctor's Associates, Inc. v. Casarotto*, supra, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902, italics added.) ¶ As explained in *A & M Produce Co.*, supra, 135 Cal.App.3d 473, 186 Cal.Rptr. 114, "unconscionability has both a 'procedural' and a 'substantive' element," the former focusing on "oppression" or "surprise" due to unequal bargaining power, the latter on "overly harsh" or "one-sided" results. (Id. at pp. 486-487, 186 Cal.Rptr. 114.) "The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability." (*Stirlen v. Supercuts, Inc.*, supra, 51 Cal.App.4th at p. 1533, 60 Cal.Rptr.2d 138 (Stirlen).) But they need not be present to the same degree. "Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves." (15 Williston on Contracts (3d ed. 1972) § 1763A, pp. 226-227; see also A & M Produce Co., supra, 135 Cal.App.3d at p. 487, 186 Cal.Rptr. 114.) In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the

term is unenforceable, and vice versa." (Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 113-114.)

"'The procedural element focuses on two factors: "oppression" and "surprise." [Citations.] "Oppression" arises from an inequality of bargaining power which results in no real negotiation and "an absence of meaningful choice." [Citations.] "Surprise" involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms. [Citations.]' [Footnote omitted.] The substantive prong of unconscionability encompasses '"overly harsh" or "one-sided" results.' [Footnote omitted.] Stated another way, '[t]he substantive component of unconscionability looks to whether the contract allocates the risks of the bargain in an objectively unreasonable or unexpected manner.' [Footnote omitted.] Both procedural and substantive unconscionability must be present to deny enforcement to the contract, but there may be an inverse relation between the two components, 'such that the greater the unfair surprise or inequality of bargaining power, the less unreasonable the risk reallocation which will be tolerated.' [Footnote omitted.]" (Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal.App.4th 708, 722-723.)

With the above-cited principles in mind, the court will determine whether there exists procedural and substantive unconscionability such that the agreement to arbitrate is unenforceable, or is a valid, enforceable agreement.

- Procedural Unconscionability

Defendant argues there is no procedural unconscionability because plaintiffs did receive a copy of the franchise agreement with the arbitration provision; and a "take it or leave it" arbitration provision is not per se procedurally unconscionable; therefore, the agreement must

also be procedurally unconscionable in another manner for the court to determine the arbitration provision is procedurally unconscionable.

The evidence presented in opposition to the motion to compel arbitration establishes that the franchise agreement is adhesive in nature as it was offered on a take it or leave it basis with no negotiations allowed and that there is some procedural unconscionability in the agreement.

The California Supreme Court has held that there is no obligation to highlight the arbitration clause of its contract or to specifically call that clause to the weaker party's attention. "…Valencia was under no obligation to highlight the arbitration clause of its contract, nor was it required to specifically call that clause to Sanchez's attention. Any state law imposing such an obligation would be preempted by the FAA. (See *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 684, 687–688, 116 S.Ct. 1652, 134 L.Ed.2d 902 [holding state statute requiring arbitration clause to be in underlined capital letters on the first page of a contract is preempted]; but cf. *Concepcion, supra,* 563 U.S. at pp. ——, fn. 6, 131 S.Ct. at p. 1750, fn. 6 ["States remain free to take steps addressing the concerns that attend contracts of adhesion-for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted."].) Furthermore, we have held that even when a customer is assured it is not necessary to read a standard form contract with an arbitration clause, "it is generally unreasonable, in reliance on such assurances, to neglect to read a written contract before signing it." (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 424, 58 Cal.Rptr.2d 875, 926 P.2d 1061.) ¶ Here the adhesive nature of the contract is sufficient to establish some degree of procedural unconscionability. Yet "a finding of procedural unconscionability does not mean that a contract will not be enforced, but rather that courts will scrutinize the substantive terms of the contract to ensure they are not manifestly unfair or one-

sided." (*Gentry, supra,* 42 Cal.4th at p. 469, 64 Cal.Rptr.3d 773, 165 P.3d 556.)" (Emphasis added.) (Sanchez v. Valencia Holding Co., LLC (2015) 61 Cal.4th 899, 914-915.)

The plaintiffs can hardly claim they were surprised that there was an arbitration provision in the franchise agreement they assumed as they admittedly received a copy of the subject agreement directly from the predecessor franchisee, the Galstyans.

Therefore, the only procedural unconscionability is that this is a contract of adhesion. Such procedural unconscionability by itself will be sufficient to support a finding of unconscionability where both the substantive unconscionably and the procedural unconscionability together establish that the arbitration clause is unenforceable.

- Substantive Unconscionability

Defendant argues that the agreement is not substantively unconscionable as the venue provision and other provisions do not shock the conscience; a class waiver is not substantively unconscionable; arbitrating the dispute near the defendant's offices does not shock the conscience; the arbitration agreement is mutual and there are no non-mutual provisions, and the jury waiver is not substantively unconscionable.

Plaintiffs argue the arbitration provision is substantively unconscionable for the following reasons: the contract gives the franchisor defendant access to a judicial forum to litigate intellectual property claims, while the provision requires that all claims brought by a franchisee be arbitrated resulting in the arbitration provision lacking mutuality; the arbitral forum is designated in the arbitration provision to be expressly limited to a location within ten miles of the franchisor's principal place of business in Florida, which is considerably more advantageous to the franchisor such that the imbalance favors a finding of substantive unconscionability; Section 17.K. of the agreement limits the statute of limitation for claims of the franchisee to one year, while franchisor claims for payments are not so limited resulting in

the arbitration provision lacking mutuality; Section 17.I results in more imbalance and lack of mutuality in that it provides that the franchisor's remedies are unlimited, including punitive damages recoverable against the franchisee, while franchisee damages are strictly limited to actual damages and equitable relief thereby sheltering the stronger party from liability for certain damages; and paragraph 17.I includes an unlawful provision that constitutes a pre-litigation waiver of the right to jury trial in trademark and disclosure of confidential information actions the franchisor brings against the franchisee, which is not subject to arbitration.

""A provision is substantively unconscionable if it 'involves contract terms that are so one-sided as to "shock the conscience," or that impose harsh or oppressive terms.' " (*Morris, supra,* 128 Cal.App.4th at p. 1322, 27 Cal.Rptr.3d 797.) Substantive unconscionability may be shown if the disputed contract provision falls outside the nondrafting party's reasonable expectations. (*Gutierrez, supra,* 114 Cal.App.4th at p. 88, 7 Cal.Rptr.3d 267.)" (Parada v. Superior Court (2009) 176 Cal.App.4th 1554, 1573.)

"Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. (*Armendariz,* at p. 114, 99 Cal.Rptr.2d 745, 6 P.3d 669; *Mission Viejo Emergency Medical Associates v. Beta Healthcare Group* (2011) 197 Cal.App.4th 1146, 1159, 128 Cal.Rptr.3d 330.) A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be "so one-sided as to 'shock the conscience.' " (*24 Hour Fitness, Inc. v. Superior Court, supra,* 66 Cal.App.4th at p. 1213, 78 Cal.Rptr.2d 533.)" (Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC (2012) 55 Cal.4th 223, 246.)

"Where a party with superior bargaining power has imposed contractual terms on another, courts must carefully assess claims that one or more of these provisions are one-sided and unreasonable." (Gutierrez v. Autowest, Inc. (2003) 114 Cal.App.4th 77, 88.)

One form of substantive unconscionability is an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party. (Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 119.)

""Substantively unconscionable terms may 'generally be described as unfairly one-sided.' [Citation.] For example, an agreement may lack 'a modicum of bilaterality' and therefore be unconscionable if the agreement requires 'arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party.' " (*Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 713, 13 Cal.Rptr.3d 88, quoting *Armendariz, supra,* 24 Cal.4th at p. 119, 99 Cal.Rptr.2d 745, 6 P.3d 669.)" (Higgins v. Superior Court (2006) 140 Cal.App.4th 1238, 1253.)

Paragraph 17.D. of the agreement provides: "You agree that you will not withhold payment of any amounts owed to us on the grounds our alleged nonperformance of any of our obligations under this Agreement. You agree that all claims will, if not otherwise resolved, be submitted to arbitration as provided in Paragraph F of this Section." (Declaration of Steven Adyani in Support of Motion to Compel Arbitration, Exhibit 1 – Concept Acquisitions, LLC Franchise Agreement with the Galstyans, Paragraph 17.D. (Subject Franchise Agreement Assigned to Plaintiffs.))

The arbitration clause is found in paragraph 17.F. of the franchise agreement. It provides: **"EXCEPT FOR CONTROVERSIES, DISPUTES OR CLAIMS RELATED TO OR BASED ON YOUR USE OF THE MARKS AFTER THE EXPIRATION OR TERMINATION OF THIS AGREEMENT, ALL CONTROVERSIES, DISPUTES OR CLAIMS BETWEEN US AND OUR AFFILIATES, AND OUR AFFILIATES' RESPECTIVE SHAREHOLDERS, OFFICERS, DIRECTORS, AGENTS, AND/OR EMPLOYEES AND YOU (AND YOUR OWNERS, GUARANTORS, AFFILIATES AND EMPLOYEES, IF APPLICABLE) ARISING OUT OF OR RELATED TO: ¶ (1) THIS AGREEMENT OR ANY OTHER AGREEMENT BETWEEN YOU**

AND US OR ANY PROVISION OF ANY OF THESE AGREEMENTS; ¶ (2) OUR RELATIONSHIP WITH YOU; ¶ (3) THE VALIDITY OF THIS AGREEMENT OR ANY OTHER AGREEMENT BETWEEN YOU AND US OR ANY PROVISION OF ANY OF THOSE AGREEMENTS; OR ¶ (4) ANY SYSTEM STANDARD RELATING TO THE ESTABLISHMENT OR OPERATION OF THE RESTAURANT; ¶ MUST BE SUBMITTED FOR BINDING ARBITRATION TO THE AMERICAN ARBITRATION ASSOCIATION. THE ARBITRATION PROCEEDINGS WILL BE CONDUCTED BY ONE ARBITRATOR AT A SUITABLE LOCATION CHOSEN BY THE ARBITRATOR THAT IS WITHIN TEN (10) MILES OF OUR THEN CURRENT PRINCIPAL BUSINESS ADDRESS IN FLORIDA…" (Emphasis in Original.) (Declaration of Steven Adyani in Support of Motion to Compel Arbitration, Exhibit 1 – Concept Acquisitions, LLC Franchise Agreement with the Galstyans, Paragraph 17.F. (Subject Franchise Agreement Assigned to Plaintiffs.))

The arbitration provision further states: "…**THE ARBITRATOR WILL NOT HAVE THE RIGHT TO DECLARE ANY MARK GENERIC OR OTHERWISE INVALID OR, EXCEPT AS PROVIDED IN PARAGRAPH I OF THIS SECTION, TO AWARD EXEMPLARY OR PUNITIVE DAMAGES**…"(Emphasis In Original.) (Declaration of Steven Adyani in Support of Motion to Compel Arbitration, Exhibit 1 – Concept Acquisitions, LLC Franchise Agreement with the Galstyans, Paragraph 17.F. (Subject Franchise Agreement Assigned to Plaintiffs.))

Paragraph 17.I of the underlying franchise agreement provides in part: "**EXCEPT FOR YOUR OBLIGATION TO INDEMNIFY US UNDER SECTION 16.D AND CLAIMS WE BRING AGAINST YOU FOR YOUR UNAUTHORIZED USE OF THE MARKS OR UNAUTHORIZED USE OR DISCLOSURE OF ANY CONFIDENTIAL INFORMATION, WE AND YOU AND YOUR RESPECTIVE OWNERS WAIVE TO THE FULLEST EXTENT PERMITTED BY LAW ANY RIGHT TO OR CLAIM FOR ANY CLAIM FOR PUNITIVE OR EXEMPLARY DAMAGES**

AGAINST THE OTHER AND AGREE THAT, IN THE EVENT OF A DISPUTE BETWEEN US, THE PARTY MAKING THE CLAIM WILL BE LIMITED TO EQUITABLE RELIEF AND TO RECOVERY OF ANY ACTUAL DAMAGES IT SUSTAINS." (Declaration of Steven Adyani in Support of Motion to Compel Arbitration, Exhibit 1 – Concept Acquisitions, LLC Franchise Agreement with the Galstyans, Paragraph 17.I. (Subject Franchise Agreement Assigned to Plaintiffs.))

The franchisor defendant has access to a judicial forum to litigate intellectual property claims concerning trademarks and trademark use after the expiration of the franchise, while the arbitration provision requires that all claims brought by a franchisee be arbitrated. This is a lack of mutuality that favors the stronger party defendant.

In addition, there is a lack of mutuality of remedies concerning the availability of claims for punitive damages. The previously cited provisions allow the stronger party defendant, to recover punitive damages against the weaker party plaintiffs for claims of indemnity against the plaintiff franchisees and claims against the plaintiff franchisees for their alleged unauthorized use of the marks or alleged unauthorized use or disclosure of any confidential information, while the plaintiffs have no right to claim and be awarded punitive damages under any circumstances.

"Where the party with stronger bargaining power has restricted the weaker party to the arbitral forum, but reserved for itself the ability to seek redress in either an arbitral or judicial forum, California courts have found a lack of mutuality supporting substantive unconscionability. As the California Supreme Court held in *Armendariz,* substantive unconscionability may manifest itself in the form of "an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party." 24 Cal.4th at 119, 99 Cal.Rptr.2d 745, 6 P.3d 669; *see also Martinez,* 118 Cal.App.4th at 115, 12

Cal.Rptr.3d 663 (holding that an arbitration agreement requiring employees to arbitrate all claims, but reserving the right of employer to obtain injunctive or other equitable relief in a judicial forum for certain causes of action, lacks mutuality). ¶ In *O'Hare v. Municipal Resource Consultants,* 107 Cal.App.4th 267, 277, 132 Cal.Rptr.2d 116 (2003), the California Court of Appeal was called upon to analyze the unconscionability of an arbitration clause in an employment contract that required the employee to arbitrate all claims against the employer, but expressly permitted the employer to file a lawsuit seeking injunctive and equitable relief against the employee and remained silent as to the employer's obligation to arbitrate claims. The Court of Appeal there recognized that "unconscionability turns not only on a one-sided result, but also on an absence of justification for it." *Id.* at 273, 132 Cal.Rptr.2d 116 (internal quotation marks omitted). Therefore, the Court of Appeal rejected the employer's contention that it had a legitimate business justification in the "highly confidential and proprietary nature" of its auditing and consulting work for allowing it, but not the employee, to seek injunctive relief in court. *Id.* at 277, 132 Cal.Rptr.2d 116. Citing the California Supreme Court's *Armendariz* opinion, the Court of Appeal noted that to constitute a reasonable business justification, the justification must be " 'something other than the employer's desire to maximize its advantage based on the perceived superiority of the judicial forum.' " *Id.* at 277, 132 Cal.Rptr.2d 116 (quoting *Armendariz,* 24 Cal.4th at 120, 99 Cal.Rptr.2d 745, 6 P.3d 669). Reasoning that the arbitration rules themselves permit such relief, the Court of Appeal held that there was no justification for the one-sided provision. *Id.* at 278, 132 Cal.Rptr.2d 116. Because the one-sided clause permeated the entire arbitration provision, the Court of Appeal refused to enforce it on grounds of unconscionability. *Id.* at 277–78, 132 Cal.Rptr.2d 116; *see also Flores,* 93 Cal.App.4th at 854, 113 Cal.Rptr.2d 376 (finding lack of mutuality of remedies where a debtor was forced to arbitrate any controversy arising out of a loan, but the lender

could "proceed by judicial or non-judicial foreclosure, by self-help remedies such as setoff, and by injunctive relief to obtain appointment of a receiver"); *Stirlen,* 51 Cal.App.4th at 1539–42, 60 Cal.Rptr.2d 138 (finding an arbitration provision unconscionable where employment disputes were required to be submitted to arbitration, but breach of noncompete or confidentiality clause claims could be brought in court). ¶ The MailCoups arbitration provision lacks mutuality. Like the contract in *O'Hare,* it requires that Nagrampa submit to arbitration any controversy related to the franchise agreement, "or any breach thereof, including without limitation, any claim that this Agreement or any portion thereof is invalid, illegal or otherwise voidable or void," while reserving MailCoups's right to obtain any provisional remedy "including, without limitation, injunctive relief from any court of competent jurisdiction, as may be necessary in MailCoups's sole subjective judgment to protect its Service Marks and proprietary information." This language, read plainly, means that MailCoups could go to court to obtain "any provisional remedy," even if it related to a claim for breach of contract, as long as the claim also implicated MailCoups's Service Marks or proprietary information. Moreover, it is far more likely that Nagrampa—and not MailCoups—would assert claims related to the invalidity or unenforceability of the non-negotiable contract written by MailCoups. Thus, this provision is clearly one-sided, effectively giving MailCoups the right to choose a judicial forum and eliminating such a forum for Nagrampa. California courts consistently have found such arbitration provisions unconscionable. *See Martinez,* 118 Cal.App.4th at 115, 12 Cal.Rptr.3d 663; *Mercuro,* 96 Cal.App.4th at 176, 116 Cal.Rptr.2d 671; *Stirlen,* 51 Cal.App.4th at 1541–42, 60 Cal.Rptr.2d 138." (Emphasis added.) (Nagrampa v. MailCoups, Inc. (9th Cir. 2006) 469 F.3d 1257, 1285–1287.)

Paragraph 17.K. provides: "Except for claims arising from your non-payment or underpayment of amounts you owe us under this agreement, any and all claims arising out of

or relating to this Agreement or our relationship with you will be barred unless a judicial or arbitration proceeding is commenced within one (1) year from the date on which the party asserting the claim knew or should have known of the facts giving rise to the claims." (Declaration of Steven Adyani in Support of Motion to Compel Arbitration, Exhibit 1 – Concept Acquisitions, LLC Franchise Agreement with the Galstyans, Paragraph 17.K. (Subject Franchise Agreement Assigned to Plaintiffs.))

This is a provision that unfairly bars plaintiffs from asserting any claims arising from the agreement unless arbitration is commenced within one year and then allows the stronger defendant to assert claims arising under the agreement that plaintiffs failed to make payments under the contract to the defendant franchisor or made underpayments to the defendant franchisor within the much longer four-year statute of limitation for breach of contract. This is an unfair, one-sided provision.

The arbitral forum is expressly limited to a location within ten miles of the franchisor's principal place of business in Florida. It does not state that arbitration shall take place within ten miles of the current principal place of the defendant's business. (Declaration of Steven Adyani in Support of Motion to Compel Arbitration, Exhibit 1 – Concept Acquisitions, LLC Franchise Agreement with the Galstyans, Paragraph 17.F. (Subject Franchise Agreement Assigned to Plaintiffs.))

"…if the "place and manner" restrictions of a forum selection provision are "unduly oppressive," *see Bolter v. Superior Court,* 87 Cal.App.4th 900, 909–10, 104 Cal.Rptr.2d 888 (2001), or have the effect of shielding the stronger party from liability, *see Comb v. PayPal, Inc.,* 218 F.Supp.2d 1165, 1177 (N.D.Cal.2002), then the forum selection provision is unconscionable. To that end, a "party may attempt to make a showing that would warrant setting aside the forum-selection clause—that the agreement was affected by fraud, undue

influence, or overweening bargaining power; that enforcement would be unreasonable and unjust; or that proceedings in the contractual forum will be so gravely difficult and inconvenient that the resisting party will for all practical purposes be deprived of his day in court." *Mitsubishi Motors Corp.,* 473 U.S. at 632, 105 S.Ct. 3346 (citations and alterations omitted); *see also Hayes Children Leasing Co. v. NCR Corp.,* 37 Cal.App.4th 775, 787 n. 5, 43 Cal.Rptr.2d 650 (1995). Similarly, "California favors contractual forum selection clauses so long as they are entered into freely and voluntarily, and their enforcement would not be unreasonable." *Am. Online, Inc. v. Superior Court,* 90 Cal.App.4th 1, 11, 108 Cal.Rptr.2d 699 (2001). The Court of Appeal discussed the rationale for this favorable treatment in *Wimsatt v. Beverly Hills Weight Loss Clinic Int'l, Inc.,* 32 Cal.App.4th 1511, 1523, 38 Cal.Rptr.2d 612 (1995), a case involving weight-loss center franchises. The Court of Appeal there stated that "[f]orum selection clauses *are* important in facilitating national and international commerce, and as a general rule should be welcomed." *Id.* However, this favorable treatment of forum selection clauses is conditioned on their free and voluntary procurement, "with the place chosen having some logical nexus to one of the parties or the dispute, and so long as California consumers will not find their substantial legal rights significantly impaired by their enforcement." *Am. Online,* 90 Cal.App.4th at 12, 108 Cal.Rptr.2d 699. Therefore, to be enforceable, the selected jurisdiction must be " 'suitable,' 'available,' and able to 'accomplish substantial justice.' " *Id.* (citing *Bremen v. Zapata Off–Shore Co.,* 407 U.S. 1, 17, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972)). ¶ To assess the reasonableness of the "place and manner" provisions in the arbitration clause, we must take into account the "respective circumstances of the parties." *Bolter,* 87 Cal.App.4th at 909, 104 Cal.Rptr.2d 888. In *Bolter,* the Court of Appeal held that place and manner restrictions were unconscionable where small "Mom and Pop" franchisees located in California were required to travel to Utah to arbitrate their claims against an international carpet-cleaning

franchisor. *Id.* The Court of Appeal found a forum selection provision unreasonable and "unduly oppressive" because the remote forum would work severe hardship upon the franchisees and would unfairly benefit the franchisor by effectively precluding the franchisees from asserting any claims against it. *Id.; see also Comb,* 218 F.Supp.2d at 1177 ("Limiting venue to PayPal's backyard appears to be yet one more means by which the arbitration clause serves to shield PayPal from liability instead of providing a neutral forum in which to arbitrate disputes."); *Armendariz,* 24 Cal.4th at 118, 99 Cal.Rptr.2d 745, 6 P.3d 669 (holding that structuring an arbitration provision to effectively preclude the other party from pursuing its claims would be unconscionable, because "[a]rbitration was not intended for this purpose")." (Nagrampa v. MailCoups, Inc. (9th Cir. 2006) 469 F.3d 1257, 1287–1288.)

While the arbitration has been filed far to the South in Orange County, California, the arbitration agreement itself contains an even more harsh and oppressive term that this "Mom and Pop" plaintiff restaurant operation in El Dorado Hills must arbitrate across the nation in Florida. While plaintiffs operate several restaurants, they are not a large corporate entity and can be considered a "Mom and Pop" operation when compared to defendant.

As stated earlier, plaintiffs argue that paragraph 17.I includes an unlawful provision that constitutes a pre-litigation waiver of the right to jury trial in trademark and disclosure of confidential information actions the franchisor brings against the franchisee, which is not subject to arbitration.

"When parties elect a judicial forum in which to resolve their civil disputes, article I, section 16 of the California Constitution accords them the right to trial by jury (with limited exceptions not relevant in the present case). [Footnote omitted.] Our Constitution treats the historical right to a jury resolution of disputes that have been brought to a judicial forum as fundamental, providing that in "a civil cause," any waiver of the inviolate right to a jury determination must

occur by the consent of the parties to the cause *as provided by statute.* (Cal. Const., art. I, § 16.) [Footnote omitted.] ¶ The statute implementing this constitutional provision is section 631. It holds inviolate the right to trial by jury, and prescribes that a jury may be waived in civil cases *only* as provided in subdivision (d) of its provisions. (§ 631, subd. (a).) Subdivision (d) describes six means by which the right to jury trial may be forfeited or waived, including failure to appear at trial, failure to demand jury trial within a specified period after the case is set for trial, failure to pay required fees in advance or during trial, oral consent in open court, or written consent filed with the clerk or the court." (Grafton Partners v. Superior Court (2005) 36 Cal.4th 944, 951.) The California Supreme Court held that Code of Civil Procedure, § 631 does not authorize predispute waiver of the right to a jury trial in a California court (See Grafton Partners v. Superior Court (2005) 36 Cal.4th 944, 956–961.); and discussed the statutory provision allowing the predispute waiver of the right to a jury trial where the parties agree to arbitrate, which the California Supreme Court also distinguished from a pre-dispute waiver of a jury trial in court proceedings as arbitration agreements represent an agreement to avoid the judicial forum altogether. (Grafton Partners v. Superior Court (2005) 36 Cal.4th 944, 955.)

Paragraph 17.I of the underlying franchise agreement provides in part: "**WE AND YOU IRREVOCABLE WAIVE TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM, WHETHER AT LAW OR IN EQUITY, BROUGHT BY EITHER OF US.**" (Emphasis in Original.) (Declaration of Steven Adyani in Support of Motion to Compel Arbitration, Exhibit 1 – Concept Acquisitions, LLC Franchise Agreement with the Galstyans, Paragraph 17.I. (Subject Franchise Agreement Assigned to Plaintiffs.))

While the pre-dispute waiver of trial by jury in court actions involving trademark actions the franchisor brings against the franchisee that is not the subject of arbitration appears to be void as it violates the constitutional right to a jury trial in court, the potentially void provision does not

establish a lack of mutuality in the arbitration agreement. Instead, the lack of mutuality involves the stronger defendant carving out claims that can be asserted only by the defendant franchisor as triable in court proceedings, materially reducing the statute of limitations for claims brought by plaintiffs against defendant, choice of an arbitration venue that is inconvenient to plaintiffs, and disparate treatment regarding remedies, as stated earlier this ruling.

The court finds that the totality of the circumstances establishes that there are numerous instances of substantive unconscionability in the arbitration agreement leading to a very strong level of substantive unconscionability. The totality of the substantively unconscionable provisions leads the court to find that they are so one-sided as to shock the conscience.

Both procedural and substantive unconscionability is present in the subject arbitration agreement and together they have a degree of unconscionability such that plaintiffs have established that the arbitration provision is unenforceable and that these claims should be determined in the instant civil case and not by compelled arbitration.

Severance of Unconscionable Provisions in Order to Allow Arbitration

As an alternative to finding an arbitration clause unenforceable as unconscionable, the court has the discretion to sever the offending provision and enforce the remainder of the agreement, provided the central purpose of the contract is not tainted with unconscionability, the arbitration clause is not permeated with unconscionability, and the circumstances do not establish the unconscionable provision of the arbitration agreement was drafted in bad faith. (Gutierrez v. Autowest, Inc. (2003) 114 Cal.App.4th 77, 92-93.)

"California law grants courts the discretion either "to sever an unconscionable provision or refuse to enforce the contract in its entirety." *Adams III,* 279 F.3d at 895; Cal. Civ.Code § 1670.5(a). In exercising this discretion, courts look to whether the "central purpose of the

contract is tainted with illegality" or "the illegality is collateral to [its] main purpose." *Adams III,* 279 F.3d at 895 (quoting *Armendariz,* 24 Cal.4th at 124, 99 Cal.Rptr.2d 745, 6 P.3d at 696–97). Even though the 1998 arbitration agreement is a revised version of the agreement we held unconscionable in *Adams III,* it is nonetheless permeated with objectionable provisions. While many of the terms of Circuit City's arbitration agreement appear facially neutral, the effect of these provisions is to obstruct its employees' ability to substantiate claims against Circuit City. *See Ferguson,* 298 F.3d at 787("While many of its arbitration provisions appear 'equally applicable to both parties, [these provisions] work to curtail the employee's ability to substantiate any claim against [the employer].' ") (quoting *Kinney,* 70 Cal.App.4th at 1332, 83 Cal.Rptr.2d 348). ¶ Circuit City correctly argues that the FAA articulates a strong public policy in favor of arbitration agreements. 9 U.S.C. § 2 (2002); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (holding that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration"). Nevertheless, this "policy is manifestly undermined by provisions in arbitration clauses [that] seek to make the arbitration process itself an offensive weapon in one party's arsenal." *Kinney,* 70 Cal.App.4th at 1332, 83 Cal.Rptr.2d 348. ¶ While it is within this court's discretion to sever unconscionable provisions, because an "insidious pattern" [FN 24.] exists in Circuit City's arbitration agreement "that functions as a thumb on Circuit City's side of the scale should an employment dispute ever arise between the company and one of its employees," we conclude that the agreement is wholly unenforceable. *Adams III,* 279 F.3d at 892. The adhesive nature of the contract and the provisions with respect to coverage of claims, the statute of limitations, class claims, the filing fee, cost-splitting, remedies, and Circuit City's unilateral power to terminate or modify the agreement combine to stack the deck unconscionably in favor of Circuit City. Any earnest attempt to ameliorate the unconscionable

aspects of Circuit City's arbitration agreement would require this court to assume the role of contract author rather than interpreter. Because that would extend far beyond the province of this court we are compelled to find the entire contract unenforceable. [FN 25.] *See Ferguson,* 298 F.3d at 787–88; *Adams III,* 279 F.3d at 895–96; *Armendariz,* 24 Cal.4th at 124–27, 99 Cal.Rptr.2d 745, 6 P.3d at 697–98. ¶ FN24. *Ferguson,* 298 F.3d at 787. ¶ FN25. Because we find that numerous provisions in Circuit City's arbitration agreement are substantively unconscionable, we decline to sever particular terms from the agreement, as the Sixth Circuit did in *Morrison.*" (Emphasis added.) (Ingle v. Circuit City Stores, Inc. (9th Cir. 2003) 328 F.3d 1165, 1180.)

There are numerous provisions in the arbitration agreement that are unconscionable thereby tainting and permeating the agreement with unconscionability and under such circumstances, the court declines to sever the offensive terms of the agreement.

Defendant's Motion to Compel Arbitration and Stay Action is denied.

TENTATIVE RULING # 10: DEFENDANT'S MOTION TO COMPEL ARBITRATION AND STAY ACTION IS DENIED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M.

LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, JUNE 17, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

11. PEOPLE v. CANALES PCL-20190258

Trial Setting Conference.

At the hearing on May 20, 2022, the court was advised that the criminal case was set for a trial readiness conference on June 3, 2022, and a jury trial was set to commence on June 22, 2022. The court continued the trial setting conference to June 17, 2022.

TENTATIVE RULING # 11: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, JUNE 17, 2022, IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

12. GEORGETOWN DIVIDE RECREATION DISTRICT v. BYRD PC-20200294

Cross-Defendant Georgetown Divide Recreation District's Special Anti-SLAPP Motion to Strike Cross-Complainants' Cause of Action for Malicious Prosecution.

On August 31, 2021, plaintiff Georgetown Divide Recreation District (Georgetown) filed a 1st Amended Complaint asserting causes of action for quiet title, declaratory relief, trespass to land, trespass to chattel, and nuisance. On September 3, 2021, the court denied the defendants' motion to expunge lis pendens. On September 30, 2021, the defendants filed demurrers to the 1st and 2nd causes of action for quiet title and declaratory relief of the 1st amended complaint concerning the subject easement. The 1st amended demurrer to the 1st amended complaint was filed by defendants Byrd, Rodarte, Wilson, and Saunders on October 13, 2021.

On February 18, 2022, the court overruled the demurrers.

Defendants filed a cross-complaint against plaintiff Georgetown, which included a cause of action for alleged malicious prosecution of the instant action, Georgetown Divide Recreation District v. Byrd, Case Number PC-20200294

Cross-Defendant Georgetown moves to strike the malicious prosecution cause of action of the cross-complaint under the Anti-SLAPP statutes asserting the following grounds: the filing of the underlying lawsuit was a protected right to free speech or petition; and the defendants/cross-complainants cannot demonstrate a probability of success on the merits of the malicious prosecution action, because there is no termination of the 1st amended complaint filed against them in this action in their favor. Cross-Defendant Georgetown requests an award of $19,162.50 in attorney fees and costs payable by cross-complainants.

Cross-Complainants oppose the motion on the following grounds: cross-defendants must first establish that cross-complainants' cause of action arose from cross-defendant's acts in

furtherance of its right to petition or free speech under the U.S. or California Constitution; cross-complainants have established they have a probability of prevailing on the malicious prosecution cause of action; cross-complainants' demurrer to the first amended complaint was filed in order to obtain an order specifying the rights and obligations of the cross-defendant concerning the Highway 49 easement identified in the 1977 and 1990 deeds; on February 18, 2022 the court issued its order on the demurrer stating that cross-defendant had all rights and obligations related to those easements reflected in those deeds and that El Dorado County only had a reversionary interest, which is an order that terminated the dispute about the easement in defendants'/cross-complainants' favor; the evidence establishes a probability of cross-defendants prevailing on the issue of lack of probable cause to bring this action against them; the evidence establishes a probability of cross-defendants prevailing on the issue of cross-defendant bringing this action against cross-complainants with malice; and cross-defendant's request for attorney fees should be denied as cross-defendant will not be successful in this motion proceeding and if successful, the fees requested are excessive and should be drastically reduced.

Cross-Defendant Georgetown replied to the opposition and asserted objections to the evidence submitted in opposition.

Cross-Defendant Georgetown's Request for Judicial Notice in Support of Anti-SLAPP Motion to Strike

Cross-Defendant Georgetown requests the court to take judicial notice of specific pleadings, moving papers, and the court's order issuing a preliminary injunction on July 29, 2021.

Cross-Complainants' Requests for Judicial Notice in Opposition

Cross-Complainants request the court to take judicial notice of the court's order overruling defendants/cross-complainants' demurrer to the 1st amended complaint in this action, recorded grant deeds, and a recorded parcel map.

Cross-Defendant Georgetown's Objections to Cross-Defendants' Evidence in Opposition

Cross-Defendant's objection numbers 1 and 2 are overruled.

Cross-Defendant's objection numbers 3-16 are sustained

Anti-SLAPP Motion to Strike Malicious Prosecution Cause of Action

The Cross-Complaint asserted against cross-defendant Georgetown alleges: the cross-defendant brought the instant action to extort cross-defendant in an attempt to force them to abandon the subject Highway 49 easement and to instead develop the Rattlesnake Bar easement; cross-defendant has maintained this action and not informed the court about gate construction violations; no reasonable person would have reasonably believed that there were reasonable grounds to bring the Georgetown Divide Recreation District v. Byrd action against them, particularly since cross-complainants provided cross-defendant with maps showing the easement that cross-defendant refuses to approve and the court stated in the ruling overruling the cross-complainants' demurrers to the 1st amended complaint that cross-defendant was granted its property subject to the easement described in the grant deeds; and as a result, cross-complainants have been harmed. (Cross-Complaint, paragraphs 96-99.)

There are no allegations of fact in the cross-complaint that establish the critical element of a malicious prosecution cause of action that the instant action brought against defendants/cross-complainants has resulted in a legal termination of the action in the cross-complainants' favor

"A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim…" (Code of Civil Procedure, § 425.16(b)(1).) "As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code of Civil Procedure, § 425.16(e).) "…[T]his section shall be construed broadly." (Code of Civil Procedure, § 425.16(a).)

"In 1992, the Legislature enacted section 425.16 in an effort to curtail lawsuits brought primarily 'to chill the valid exercise of ... freedom of speech and petition for redress of grievances' and 'to encourage continued participation in matters of public significance.' (§ 425.16, subd. (a).) The section authorizes a special motion to strike '[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue ....' (§ 425.16, subd. (b)(1).) The goal is to eliminate meritless or retaliatory litigation at an early stage of the proceedings. (*Liu v. Moore* (1999) 69 Cal.App.4th 745, 750, 81 Cal.Rptr.2d 807;

Macias v. Hartwell (1997) 55 Cal.App.4th 669, 672, 64 Cal.Rptr.2d 222.) The statute directs the trial court to grant the special motion to strike 'unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.' (§ 425.16, subd. (b)(1).) ¶ The statutory language establishes a two-part test. First, we determine whether plaintiff's causes of action arose from acts by defendants in furtherance of defendants' rights of petition or free speech in connection with a **[*807]** public issue. (*Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 721, 77 Cal.Rptr.2d 1, disapproved on another ground in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123, fn. 10, 81 Cal.Rptr.2d 471, 969 P.2d 564.) Assuming this threshold condition is satisfied, we then determine whether plaintiff has established a reasonable probability that she will prevail on her claims at trial. We must reverse the order denying the motion if plaintiff failed to make a prima facie showing in the trial court of facts, which, if proved at trial, would support a judgment in her favor. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 646, 653, 49 Cal.Rptr.2d 620.)" (Seelig v. Infinity Broadcasting Corp. (2002) 97 Cal.App.4th 798, 806-807.)

"Only a cause of action that satisfies both prongs of the anti-SLAPP statute--i.e., that arises from protected speech or petitioning and lacks even minimal merit--is a SLAPP, subject to being stricken under the statute." (Navellier v. Sletten (2002) 29 Cal.4th 82, 89.)

"In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (Code of Civil Procedure, § 425.16(b)(2).)

- Act by Cross-Defendant In Furtherance of Cross-Defendants' Right of Petition

"It is well established that filing a lawsuit is an exercise of a party's constitutional right of petition. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115, 81

Cal.Rptr.2d 471, 969 P.2d 564 (*Briggs*); see *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 19, 43 Cal.Rptr.2d 350; *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 647-648, 49 Cal.Rptr.2d 620.) " ' "The constitutional right to petition ... includes the basic act of filing litigation or otherwise seeking administrative action." ' " (*Briggs*, supra, 19 Cal.4th at p. 1115, 81 Cal.Rptr.2d 471, 969 P.2d 564; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784, 54 Cal.Rptr.2d 830; *Ludwig v. Superior Court*, supra, 37 Cal.App.4th at p. 19, 43 Cal.Rptr.2d 350.) Further, the filing of a judicial complaint satisfies the "in connection with a public issue" component of section 425.16, subdivision (b)(1) because it pertains to an official proceeding. (*Briggs*, supra, 19 Cal.4th at p. 1109, 81 Cal.Rptr.2d 471, 969 P.2d 564; see *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 566-567, 92 Cal.Rptr.2d 755 (DuPont Merck).) ¶ Under these accepted principles, a cause of action arising from a defendant's alleged improper filing of a lawsuit may appropriately be the subject of a section 425.16 motion to strike. (See *Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 151, 106 Cal.Rptr.2d 843.) The essence of the Chavezes' malicious prosecution claim is that the plaintiff in the underlying action (Mendoza) filed litigation that was improper because it was allegedly filed with a malicious motive and without probable cause. This claim "aris[es] from" the defendant's constitutionally protected petitioning activity, and therefore is subject to the anti-SLAPP statute. (§ 425.16, subd. (b)(1).)" (Chavez v. Mendoza (2001) 94 Cal.App.4th 1083, 1087-1088.)

Cross-Defendant is being sued for malicious prosecution arising from its filing the instant lawsuit against defendants/cross-complainants, therefore, cross-defendant established the first step in an anti-SLAPP motion to show that its complaint of conduct was an act in furtherance of cross-defendant's right of petition.

The court now moves to the issue of whether cross-complainants have proven there is a reasonable probability they will prevail on the malicious prosecution cause of action.

- Probability of Prevailing on Malicious Prosecution Cause of Action

"To establish a probability of prevailing, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548 [46 Cal.Rptr.2d 880]; accord, *Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 274, 105 Cal.Rptr.2d 674.) For purposes of this inquiry, "the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." (*Wilson v. Parker, Covert & Chidester, supra,* 28 Cal.4th at p. 821, 123 Cal.Rptr.2d 19, 50 P.3d 733.) In making this assessment it is "the court's responsibility ... to accept as true the evidence favorable to the plaintiff...." (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212, 12 Cal.Rptr.3d 786.) The plaintiff need only establish that his or her claim has "minimal merit" (*Navellier v. Sletten, supra,* 29 Cal.4th at p. 89, 124 Cal.Rptr.2d 530, 52 P.3d 703) to avoid being stricken as a SLAPP. (*Jarrow Formulas, Inc. v. LaMarche, supra,* 31 Cal.4th at p. 738, 3 Cal.Rptr.3d 636, 74 P.3d 737 ["the anti-SLAPP statute requires only 'a minimum level of legal sufficiency and triability' [citation]."], quoting *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 438, fn. 5, 97 Cal.Rptr.2d 179, 2 P.3d 27.) [Footnote omitted.]" (Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal.4th 260, 291.)

"To prevail on a malicious prosecution claim, the plaintiff must demonstrate the following: the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in the plaintiff's favor; (2) was brought without probable cause; and (3) was initiated with malice. (Id. at p. 871, 254 Cal.Rptr. 336, 765 P.2d 498.)" (Vanzant v. DaimlerChrysler Corp. (2002) 96 Cal.App.4th 1283, 1288-1289.) "A necessary element of a cause of action for malicious prosecution is that the underlying proceeding have been terminated favorably to the malicious prosecution plaintiff. The requirement of favorable termination confirms the plaintiff's innocence, serves to forestall unfounded claims and prevent inconsistent judgments, and facilitates proof of other elements of the tort. (*Babb v. Superior Court* (1971) 3 Cal.3d 841, 845-847, 92 Cal.Rptr. 179, 479 P.2d 379.) The cause of action does not accrue until such favorable termination has occurred. (Id. at p. 846, 92 Cal.Rptr. 179, 479 P.2d 379.)" (Ray v. First Federal Bank (1998) 61 Cal.App.4th 315, 318.)

"In order for the termination of a lawsuit to be considered favorable to the malicious prosecution plaintiff, the termination must reflect the merits of the action and the plaintiff's innocence of the misconduct alleged in the lawsuit. (*Lackner v. LaCroix* (1979) 25 Cal.3d 747, 750, 159 Cal.Rptr. 693, 602 P.2d 393.) " 'The theory underlying the requirement of favorable termination is that it tends to indicate the innocence of the accused, and coupled with the other elements of lack of probable cause and malice, establishes the tort [of malicious prosecution].' " (Ibid., quoting *Jaffe v. Stone* (1941) 18 Cal.2d 146, 150, 114 P.2d 335.) Where a proceeding is terminated other than on the merits, the reasons underlying the termination must be examined to see if the termination reflects the opinion of either the court or the prosecuting party that the action would not succeed. (*Stanley v. Superior Court* (1982) 130 Cal.App.3d 460, 464-465, 181 Cal.Rptr. 878." (Emphasis added.) (Pender v. Radin (1994) 23 Cal.App.4th 1807, 1814.)

The court takes judicial notice of the fact that on April 18, 2022, after the oral argument the court overruled defendants Byrd's, Rodarte's, Wilson's, and Saunders' demurrers to the 1st and 2nd causes of action of the 1st Amended Complaint in consolidated case Georgetown Divide v. Byrd (PC-20210234).

Overruling demurrers to a pleading are not and can never be a determination on the merits of a case. When the court overrules a demurrer the court has decided that the allegations of fact in the pleading when taken as true for the purposes of the demurrers are sufficient to state causes of action.

"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].)" (Emphasis added.) (Picton v. Anderson Union High School Dist. (1996) 50 Cal.App.4th 726, 732-733.)

A demurrer is not a procedural device for a party to obtain a final adjudication of the existence, rights, and obligations related to a dispute over a claimed easement. Defendants/Cross-Defendants did not file a motion for summary judgment or summary adjudication of causes of action or obtain a final judgment in their favor on the easement claim.

The cross-defendants assertion that a ruling that their demurrers are overruled is a final determination in their favor on the dispute related to the Highway 49 easement is entirely and completely without merit.

Cross-Defendants have failed to establish a reasonable probability that they will prevail on their malicious prosecution claim at trial as there was no litigation commenced by or at the direction of the cross-defendant that was pursued to a legal termination in the cross-complainant's favor, which is a critical element of a malicious prosecution cause of action.

The motion to strike the malicious prosecution cause of action is granted without leave to amend.

Attorney Fees

"Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." (Emphasis added.) (Code of Civil Procedure, § 425.16(c)(1).)

"[T]he award of attorney fees to a defendant who successfully brings a special motion to strike is not discretionary but mandatory. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131, 104 Cal.Rptr.2d 377, 17 P.3d 735.)" (Pfeiffer Venice Properties v. Bernard (2002) 101 Cal.App.4th 211, 215.) "The reasonableness of attorney fees is within the discretion of the trial court, to be determined from a consideration of such factors as the nature of the litigation, the complexity of the issues, the experience and expertise of counsel and the amount of time involved. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 659, 49 Cal.Rptr.2d 620.)" (Wilkerson v. Sullivan (2002) 99 Cal.App.4th 443, 448.)

Cross-Complainants contend that charging $225 for work on the anti-SLAPP motion by a law school graduate awaiting bar results is excessive as the person is not a licensed attorney, and cross-defendants' counsel's claim of 25.5 hours of legal work on this simple Anti-SLAPP motion to strike is excessive.

Cross-Defendant replied: the law school graduate is now licensed to practice in California, has been licensed to practice in Virginia since 2018, served as a Legislative Counsel in Nevada, and clerked for judges at the state and federal levels, which justifies his $225 hourly rate; the 10.5 hours that cross-defendant's counsel Scholar stated as incurred related to the moving papers and estimate of 15 hours to prepare the reply is reasonable; the actual time spent on the reply has been adjusted in Mr. Scholar's reply declaration, wherein he declares he spent 13.9 hours working on the reply in addition to the 10.5 hours he worked on the moving papers; and the new total amount of attorney fees sought is $18,612.50.

The court finds that under the totality of circumstances presented, it is appropriate to award cross-defendant attorney fees in the amount of $18,612.50 payable by cross-complainants.

TENTATIVE RULING # 12: CROSS-DEFENDANT GEORGETOWN DIVIDE RECREATION DISTRICT'S ANTI-SLAPP MOTION TO STRIKE THE MALICIOUS PROSECUTION CAUSE OF ACTION OF THE CROSS-COMPLAINT IS GRANTED WITHOUT LEAVE TO AMEND. CROSS-DEFENDANT GEORGETOWN DIVIDE RECREATION DISTRICT IS AWARDED $18,612.50 IN ATTORNEY FEES PAYABLE BY THE DEFENDANTS. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR

MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, JUNE 17, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.