1. PEOPLE v. $115,720 U.S. CURRENCY PC-20200401

Hearing Re: Claim Opposing Forfeiture.

On August 3, 2020, claimant Judkins filed a Judicial Council Form MC-200 claim opposing forfeiture in response to a notice of administrative proceedings.

On August 17, 2020, the People filed a petition for forfeiture of cash in the amount of $115,720, gold valued at $21,673, silver valued at $5,538, platinum valued at $785, and collectable U.S. Currency valued at $5,925 that was seized by the El Dorado County Sheriff's Department. The petition states: the funds and other property are currently in the hands of the El Dorado County District Attorney's Office; and the property became subject to forfeiture pursuant to Health and Safety Code, § 11470(f), because that money was a thing of value furnished or intended to be furnished by a person in exchange for a controlled substance, the proceeds was traceable to such an exchange, and the money was used or intended to be used to facilitate a violation of various provisions of the Health and Safety Code. The People pray for judgment declaring that the money is forfeited to the State of California.

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

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

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

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

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

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

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

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

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

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

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

described in subdivision (f) of Section 11470." (Emphasis added.) (Health and Safety Code, § 11488.4(i)(2).)

"(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).)

The court was previously advised that there was a criminal proceeding pending.

At the hearing on June 16, 2021, claimant requested a continuance to retain counsel. The People did not object. The hearing was continued to August 13, 2021. At the hearing on August 13, 2021, the claimant/respondent confirmed that he has retained an attorney. Counsel has advised the People that while he helped claimant prepare the claim, he does not represent claimant in this matter

At the last hearing on March 4, 2022, the People advised the court the parties were working to resolve the matter. The hearing was continued to March 18, 2022.

TENTATIVE RULING # 1: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, MARCH 18, 2022, IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

2. PEOPLE v. BERGEY PC-20080213

Report Review.

Upon ex parte written request of the Public Defender on February 2, 2022, the court placed this matter on calendar for the purpose of obtaining a confidential report. The confidential report was submitted to the court.

TENTATIVE RULING # 2: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, MARCH 18, 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. FRANKLIN v. NORCAL GOLD, INC. PC-20200246

Defendants' Motion to Quash Subpoena Plaintiff Issued and Served on Wells Fargo Bank.

Plaintiff filed an action against defendants asserting causes of action for fraud, intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, breach of fiduciary duties, civil conspiracy, and constructive trust allegedly arising from plaintiff's unsuccessful attempt to purchase certain real property, which was allegedly purchased later by defendant Crusha for $45,000 less than plaintiff offered. One issue raised by the complaint relates to plaintiff's offer of proof of funds for the down payment. (See Complaint, paragraphs 2 and 23.)

There is evidence that plaintiff served a subpoena for production of business records on Wells Fargo Bank seeking all bank records concerning a single bank account in defendant Crusha's name.

Defendants move to quash that subpoena on following grounds: the bank records sought are constitutionally protected from disclosure as they fall within defendant Crusha's right to privacy; and the subpoena is overbroad as to time, seeks irrelevant information, has no limiting language as to scope, and requests information that will not have any relevance to prove or disprove plaintiff's causes of action, thereby rendering the subpoena invalid.

Plaintiff opposes the motion on the following grounds: this action concerns an alleged conspiracy to side-line plaintiff's offer to purchase the subject real property; the defendant property listing agent worked together with defendant Crusha, a real estate agent working in the same office of the listing agent defendant, to ensure defendant Crusha's offer was accepted by the listing agent allegedly never presenting the offer to the seller due to plaintiff's

purported sufficient evidence of proof of funds; and Crusha's cash offer with a proof of funds letter and a bank statement for the subject Wells Fargo Bank was accepted, thereby rendering the Wells Fargo Bank records discoverable as such evidence goes to the heart of the case; defendants raised the proof of funds issue directly in plaintiff's deposition by asking plaintiff about what he had submitted as proof of funds for the transaction; defendant waived all claims of privacy to his bank records by defense counsel not objecting to the seller's production of a single proof of funds bank statement at the seller's deposition, not objecting to plaintiff's counsel's introduction of that statement during the seller's deposition, and asking the seller about the statement; the motion should be denied as the subpoena for financial records is justified by the issues raised in the case; and the court can require that the records be subject to a protective order and the court can limit the records sought to those times that defendant Crusha was in contract to purchase the property.

"When a subpoena requires the attendance of a witness or the production of books, documents or other things before a court, or at the trial of an issue therein, or at the taking of a deposition, the court, upon motion reasonably made by the party, the witness, any consumer described in Section 1985.3, or any employee described in Section 1985.6, or upon the court's own motion after giving counsel notice and an opportunity to be heard, may make an order quashing the subpoena entirely, modifying it, or directing compliance with it upon such terms or conditions as the court shall declare, including protective orders. In addition, the court may make any other order as may be appropriate to protect the parties, the witness, the consumer, or the employee from unreasonable or oppressive demands, including unreasonable violations of the right of privacy of the witness, consumer, or employee. Nothing herein shall require any person to move to quash, modify, or condition any subpoena duces tecum of personal records of any consumer served under paragraph (1) of subdivision (b) of Section 1985.3 or

employment records of any employee served under paragraph (1) of subdivision (b) of Section 1985.6." (Code of Civil Procedure, § 1987.1)

There is a right to privacy in a party's financial information. (See Cobb v. Superior Court (1979) 99 Cal.App.3d 543, 549-550.) "'Personal financial information comes within the zone of privacy protected by article I, section 1 of the California Constitution.' *Moskowitz v. Superior Court*, supra, 137 Cal.App.3d at p. 315, 187 Cal.Rptr. 4 (fn. omitted.) Nevertheless, one's constitutional right of privacy is not absolute and, upon a showing of some compelling public interest, the right of privacy must give way. (*Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516, 525, 174 Cal.Rptr. 160; *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 131, 164 Cal.Rptr. 539, 610 P.2d 436.)" (Harris v. Superior Court (1992) 3 Cal.App.4th 661, 664.)

It is also recognized that that there is a privacy interest in precluding the dissemination or misuse of sensitive and confidential information ("informational privacy"). (Estate of Gallio (1995) 33 Cal. App.4th 592, 597.)

"Article I, section 1 of the California Constitution provides that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safe keeping, happiness and privacy." Our Supreme Court has held that the "[l]egally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information ('informational privacy'); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ('autonomy privacy')." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 35, 26 Cal.Rptr.2d 834, 865 P.2d 633.) ¶ The "informational privacy" protection is qualified and requires that a court balance the right of privacy against the need for discovery.

(*Harris v. Superior Court* (1992) 3 Cal.App.4th 661, 665, 4 Cal.Rptr.2d 564.) “There must be a compelling and opposing state interest justifying the discovery. [Citation.] Even when discovery of private information is found directly relevant to the issues of ongoing litigation, it will not be automatically allowed; there must be a careful balancing of the compelling public need for discovery against the fundamental right of privacy. [Citation.]” (*Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1014, 9 Cal.Rptr.2d 331.)” (Estate of Gallio (1995) 33 Cal.App.4th 592, 597.)

“A discovery proponent may demonstrate compelling need by establishing the discovery sought is directly relevant and essential to the fair resolution of the underlying lawsuit. (*Planned Parenthood Golden Gate v. Superior Court, supra,* 83 Cal.App.4th at p. 367, 99 Cal.Rptr.2d 627; *Johnson v. Superior Court* (2000) 80 Cal.App.4th 1050, 1071, 95 Cal.Rptr.2d 864.)” (Digital Music News LLC v. Superior Court (2014) 226 Cal.App.4th 216, 229.)

“There must be a compelling and opposing state interest justifying the discovery. (*Britt v. Superior Court*, supra, 20 Cal.3d at p. 855, 143 Cal.Rptr. 695, 574 P.2d 766.) Even when discovery of private information is found directly relevant to the issues of ongoing litigation, it will not be automatically allowed; there must then be a careful balancing of the compelling public need for discovery against the fundamental right of privacy. (*Binder v. Superior Court* (1987) 196 Cal.App.3d 893, 900, 242 Cal.Rptr. 231.) The scope of any disclosure must be narrowly circumscribed, drawn with narrow specificity, and must proceed by the least intrusive manner. (Id. at pp. 900-901, 242 Cal.Rptr. 231.)” (Davis v. Superior Court (1992) 7 Cal.App.4th 1008, 1014.)

Defense Counsel declares that on September 24, 2021, plaintiff served a deposition subpoena on Wells Fargo Bank seeking defendant Crusha’s financial records. Attached to counsel’s declaration is a verified copy of that subpoena.

The subject subpoena demands production of all bank records concerning a specific bank account of defendant Crusha apparently without any limitation as to time. Attachment 3 of the subpoena states: "Dates Requested: Records for all dates requested".

- Waiver of Privacy Right

Plaintiff argues in opposition that defendant Crusha's right to financial privacy concerning all information concerning a specific Wells Fargo Bank Account was waived by the following: defense counsel's production of a single bank account statement related to defendant Crusha's proof of funds available to purchase the subject real property; defense counsel asking one defendant seller during her deposition about defendant Crusha's proof of funds; plaintiff's counsel's introduction of that bank statement at the deposition of Lisa Bartolo without defense counsel objecting to the single bank statement as protected by the constitutional right to privacy; and defense counsel not objecting to plaintiff's questioning of Lisa Bartolo during her deposition concerning the Wells Fargo Bank Account statement as violating defendant Crusha's right to privacy.

"(a) The protection of information from discovery on the ground that it is privileged or that it is a protected work product under Chapter 4 (commencing with Section 2018.010) is waived unless a specific objection to its disclosure is timely made during the deposition." (Code of Civil Procedure, § 2025.460(a).)

While the information in the single Wells Fargo Bank Statement produced, introduced, and discussed in the seller's deposition is not subject to a claim of being protected by defendant Crusha's constitutional right to privacy as defense counsel failed to object to the production of the document, failed to object to the introduction of that statement during deposition, and failed to object to questions about that specific statement during a deposition, the waiver related to a single bank statement does not throw open access to all of defendant Crusha's bank records

related to that account. The waiver is strictly limited to the information sought by the questions posed during deposition and a single bank account statement. The subpoena goes far beyond the scope of the waiver.

- <u>Whether Plaintiff has Established a Compelling Public Need for Discovery Outweighs the Defendant's Fundamental Right of Privacy</u>

Plaintiff asserts in opposition: the Wells Fargo Bank records are discoverable as such evidence goes to the heart of the case related to the proof of funds issue; defendants raised the proof of funds issue directly in plaintiff's deposition by asking plaintiff about what he had submitted as proof of funds for the transaction; and the motion should be denied as the subpoena for financial records is justified by the issues raised in the case.

Plaintiff has not demonstrated a compelling need in that plaintiff has not established discovery of all bank records concerning a bank account without limit as to time is directly relevant and essential to the fair resolution of the underlying lawsuit. At best, it appears that plaintiff is only entitled to discovery of the single bank statement submitted to the seller as proof of defendant Crusha's funds for offer and nothing more, which was already produced by the sellers in response to defendant's notice of deposition of the sellers (See Declaration of Plaintiff's Counsel, Kevin James in Opposition to Motion, paragraph 3.) and, therefore, already in plaintiff's possession.

In short, plaintiff has not established entitlement to discovery of the financial documents that are protected by the defendant's constitutional right to privacy. The motion to quash the subpoena is granted.

TENTATIVE RULING # 3: DEFENDANTS' MOTION TO QUASH SUBPOENA PLAINTIFF ISSUED AND SERVED ON WELLS FARGO BANK IS GRANTED. NO HEARING ON THIS MATTER WILL BE HELD (<u>LEWIS V. SUPERIOR COURT</u> (1999) 19 CAL.4TH 1232, 1247.),

UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE 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, MARCH 18, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

4. SCHAMP v. FRESNO SSYAP, LLC PC-20200045

Motion for Preliminary Approval of Joint Stipulation of Settlement.

Plaintiffs filed a class and representative action against defendant allegedly on behalf of defendant's employees for alleged unfair and unlawful business practices, alleged wage and hour violations, including alleged improper calculation and payment of overtime, failure to furnish meal breaks, failure to furnish rest breaks, failure to pay minimum wage, failure to pay sick leave, failure to indemnify employees for business expenses to discharge their duties, failure to pay all wages due and owing at end of employment, and wage statement violations. Having reached a settlement, plaintiffs move for the court's preliminary approval of the class and PAGA action settlement.

The proof of service declares that notice of the hearing and the moving papers were served by email on defense counsel on January 26, 2022. There is no opposition to the motion in the court's file.

"A class action shall not be dismissed, settled, or compromised without the approval of the court, and notice of the proposed dismissal, settlement, or compromise shall be given in such manner as the court directs to each member who was given notice pursuant to subdivision (d) and did not request exclusion." (Civil Code, § 1781(f).)

""Approval under 23(e) involves a two-step process in which the Court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.,* 221 F.R.D. 523, 525 (C.D.Cal.2004). At the final approval stage, the primary inquiry is whether the proposed settlement "is fundamentally fair, adequate, and reasonable." *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1026 (9th Cir.1998). Having already

completed a preliminary examination of the agreement, the court reviews it again, mindful that the law favors the compromise and settlement of class action suits. *See, e.g., Churchill Village, LLC. v. Gen. Elec.,* 361 F.3d 566, 576 (9th Cir.2004); *Class Plaintiffs v. City of Seattle,* 955 F.2d 1268, 1276 (9th Cir.1992); *Officers for Justice v. Civil Serv. Comm'n,* 688 F.2d 615, 625 (9th Cir.1982). Ultimately, "the decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is exposed to the litigants and their strategies, positions, and proof." *Hanlon,* 150 F.3d at 1026. ¶ An objector to a proposed settlement agreement bears the burden of proving any assertions they raise challenging the reasonableness of a class action settlement. *United States v. State of Oregon,* 913 F.2d 576, 581 (9th Cir.1990). The court iterates that the proper standard for approval of the proposed settlement is whether it is fair, reasonable, adequate, and free from collusion—not whether the class members could have received a better deal in exchange for the release of their claims. *See Hanlon,* 150 F.3d at 1027 ("Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion.")." (Noll v. eBay, Inc. (N.D. Cal. 2015) 309 F.R.D. 593, 602.)

"A settlement or compromise of an entire class action, or of a cause of action in a class action, or as to a party, requires the approval of the court after hearing." (Rules of Court, Rule 3.769(a).)

Any agreement, express or implied, that has been entered into with respect to the payment of attorney's fees or the submission of an application for the approval of attorney's fees must be set forth in full in any application for approval of the dismissal or settlement of an action that has been certified as a class action." (Rules of Court, Rule 3.769(b).)

"Any party to a settlement agreement may serve and file a written notice of motion for preliminary approval of the settlement. The settlement agreement and proposed notice to class members must be filed with the motion, and the proposed order must be lodged with the motion." (Rules of Court, Rule 3.769(c).)

"California law controls in this case. While we are not bound to follow the certification requirements of Rule 23, we note that California courts have recognized that "class action settlements should be scrutinized more carefully if there has been no adversary certification." (*Dunk, supra,* 48 Cal.App.4th at p. 1803, fn. 9, 56 Cal.Rptr.2d 483.) This reflects concerns that the absent class members, whose rights may not have been considered by the negotiating parties, be adequately protected against fraud and collusion. (*Id.* at pp. 1801, 1807, fn. 19, 56 Cal.Rptr.2d 483; *Officers for Justice v. Civil Service Com'n., etc.* (9th Cir.1982) 688 F.2d 615, 624.) However, these concerns are satisfied by a careful fairness review of the settlement by the trial court. Even in the federal cases cited by Doherty, pre-certification settlements are routinely approved if found to be fair and reasonable. (See *In re Baldwin–United Corp.* (S.D.N.Y.1984) 105 F.R.D. 475, 478; *Mars Steel Corp. v. Continental Illinois Nat. Bank* (7th Cir.1987) 834 F.2d 677, 681; *In re Beef Industry Antitrust Litigation* (5th Cir.1979) 607 F.2d 167, 174; *Hanlon v. Chrysler Corp., supra,* 150 F.3d at pp. 1019, 1030.) The possibility of abuse in such cases is "held in check by the requirement that the judge determine the fairness of the settlement before he can approve it." (*Mars Steel Corp. v. Continental Illinois Nat. Bank, supra,* 834 F.2d at p. 681.) As we discuss more fully below, among the factors considered by the court in evaluating fairness is whether the settlement is the result of an arm's length negotiating process and whether class members have reacted favorably or unfavorably to the proposed settlement. In addition, in this case it is clear from the record that the court carefully considered the remedies provided by the settlement to each subclass of class members in

determining fairness. We conclude that even bearing in mind the heightened need for class protection in pre-certification settlements, the court did not abuse its discretion here." (Emphasis added.) (Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 240.)

Counsel for plaintiffs declares: on September 6, 2019 notice was provided to the Department of Labor and Workplace Development Agency (LWDA) regarding the alleged Labor Code violations; on October 18, 2019 supplemental written notice was provided to the LWDA; plaintiffs propounded discovery on defendant consisting of form interrogatories, 30 special interrogatories, 24 requests for admission, and 32 requests for production; after the court granted in part and denied in part a motion to compel further responses to the discovery, the parties agreed to defendant providing further responses on May 14, 2021 and agreed to provide additional data and documents sufficient to allow the parties to participate in a meaningful and informed mediation; between August 2019 and July 2021 as part of the formal and informal discovery process and settlement negotiations, defendant provided hundreds of pages of documents relating to its policies, practices and procedures, as well as 10,000 lines of data constituting the time and payroll records for an agreed upon sampling of the class for the period of May 2016 through June 2021; class counsel retained an expert to analyze the data produced by defendant and separately completed its own analysis of the data, including calculating the damages of a number of the individual class members to confirm the accuracy of their expert's calculations; after a full day of mediation on July 9, 2021 the parties were unable to agree to settle the matter; at the conclusion of the mediation, the mediator issued a mediator's proposal to try to help bring about a resolution; the mediator's proposal was accepted on July 20, 2021; after several months of negotiations regarding the terms of the settlement with further assistance of the mediator, the parties executed the memorandum of understanding setting forth the terms of the settlement on October 1, 2021; on December 17,

2021 after further negotiations, the parties executed the Joint Stipulation of Settlement; the settlement represents a compromise of highly disputed claims; the class action and settlement will result in substantial benefits to all class members; with the help of an expert and after completing its own analysis of the data, class counsel developed a damages model illustrating both defendant's maximum exposure and realistic potential for recovery for the alleged violations; under that model defendant faced up to a maximum of $2,482 in underpaid minimum wages, overtime and sick pay, $35,632 in unpaid minimum wages, overtime and double-time, plus $24,232.70 in liquidated damages, $111,993 in premiums for missed, late, or short meal breaks, $114,377 for missed meal breaks, $517,432.80 in waiting time penalties, $202,100 in statutory penalties, and $51,131 in pre-judgment interest for a maximum potential damages to the class amounting to $1,059,380.50; because 100% success in litigation is unrealistic, class counsel determined an aggressive, more realistic estimate for the potential recovery is $531,380.95; the maximum settlement amount of $350,000 allocates $340,000 to class claims, which is 63.98% of the realistic recovery and the expected net recovery of $198,500 is more than 37% of the realistic recovery; the net class recovery will be just under $1,000 each; while maximum PAGA penalties could range between $328,650-$859,400, penalties are discretionary and often reduced significantly by the courts; the settlement allocates $10,000 to PAGA civil penalties; $115,000 of the $198,500 of the net class settlement will be distributed proportionally amongst participating current employee class members based upon the number of work weeks each worked during the class period for an average of $563.72; the remaining $83,500 will be shared equally amongst the estimated 167 participating former employee subclass members for an average of $500 each; the parties estimate that the average payment to each of the 204 class members will be approximately $907.04; every PAGA group member employee will also receive an average payment of

approximately $12.25 to resolve the PAGA claim; defendant asserted numerous defenses and planned a multipronged attack to circumscribe the scope of the class and available damages; defendant also intended to file a motion for summary judgment seeking to wipe out the ability of large segments of the class to participate in the class action and/or to receive under the settlement; based upon class counsel's experience and knowledge of the facts and circumstances of the case, it is counsel's opinion that the proposed settlement reflects a reasoned compromise that not only takes into consideration the inherent risks of such litigation, but the various issues unique to this case that have the potential to substantially reduce recovery by the class, if not wipe it out entirely; counsel also believes that the proposed settlement is fair, reasonable, and adequate, preferable to continued litigation, and in the best interests of the class; the maximum settlement amount for PAGA claims in the amount of $10,000 will be distributed in the amounts of $7,500 to the LWDA and $2,500 to the PAGA aggrieve employees; the settlement agreement has been transmitted to the LWDA; and the two plaintiff class representatives will each receive $3,500.

The settlement agreement provides that the class members are all current and former non-exempt employees of defendant's iPull-uPull Self Service Auto Parts Facility in Fresno, California at any time during the period of January 8, 2016, through July 1, 2021. The agreement also provides for payment of attorney fees to class counsel in the amount of $122,500, representing 35% of the maximum settlement amount, and $7,500 for declared costs.

It appears appropriate under the circumstances presented to grant preliminary approval and set a final approval hearing.

"If the court grants preliminary approval, its order must include the time, date, and place of the final approval hearing; the notice to be given to the class; and any other matters deemed necessary for the proper conduct of a settlement hearing." (Rules of Court, Rule 3.769(e).)

The proposed notice of settlement and hearing for final approval to be sent to class and PAGA members are attached as an Exhibit to the joint stipulation of settlement.

Plaintiffs request that the final approval hearing be set not less than 75 days after the mailing of the class notice.

A proposed order setting forth procedural deadlines, notice to class members, and the date and time for the final approval hearing must be submitted. (Rules of Court, Rule 3.769(c).)

TENTATIVE RULING # 4: ABSENT OPPOSITION, THE MOTION IS GRANTED. THE PLAINTIFFS MUST APPEAR AT 8:30 A.M. ON FRIDAY, MARCH 18, 2022, IN DEPARTMENT NINE AND SUBMIT A PROPOSED ORDER SETTING FORTH PROCEDURAL DEADLINES, NOTICE TO CLASS MEMBERS AND DATE AND TIME FOR THE FINAL APPROVAL 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.

5. AUGER v. PACIFIC COACHWORKS PC-202100031

Defendant RF Motorsports Motion to Compel Further Responses to Form Interrogatories, Requests for Production, and Requests for Admission.

TENTATIVE RULING # 5: THIS MATTER IS CONTINUED TO 8:30 A.M. ON FRIDAY, APRIL 1, 2022, IN DEPARTMENT NINE.

6. SHURTZ v. BOARD OF FORESTRY AND FIRE PROTECTION 21CV0076

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

Petitioner filed a petition for Writ of Administrative Mandamus challenging a decision of an administrative law judge imposing a civil penalty against petitioner in the amount of $10,300 for violations of the Public Resources Code, which was adopted by respondent Board of Forestry and Fire Protection.

The court issued an ex parte minute order on November 1, 2021, setting a hearing re: status of service, response, lodging of the administrative record, and setting of the briefing schedule.

Petitioner and respondent appeared by their respective counsels at the status hearing on December 17, 2021.

Upon request of respondent's counsel, the court continued the hearing to March 18, 2022. There is no response to the petition in the court's file, the administrative record has not been lodged, and a briefing schedule has not been set.

TENTATIVE RULING # 6: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, MARCH 18, 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.

7. BANK OF AMERICA v. BEATTY PCL-20210625

Plaintiff's Motion for Judgment on the Pleadings.

On August 16, 2021, plaintiff filed an action for common counts Plaintiff alleges that defendant owes a principal balance in the amount of $2,851.08; and that the amount remains due and unpaid despite demand for payment.

Plaintiff moves for entry of judgment on the pleadings on the grounds that the complaint states a cause of action against defendant to collect the alleged debt, that defendant's answer does not raise a material issue of fact, and that it does not state a defense to the complaint.

The motion was filed on November 8, 2021. The proof of service declares that notice of the hearing and the moving papers were served on plaintiff on November 2, 2021.

The court notes that on October 1, 2021, the court rejected defendant's answer on the ground that it was unsigned. The notice of the rejection was emailed on October 1, 2021, and the email stated the documents are in Will-Call for pick up. It does not appear from the court record that an executed answer was submitted for filing. Plaintiff submitted a request for entry of default and a clerk's judgment, which was filed on November 29, 2021. The proof of service of the request for entry of default and clerk's judgment declares that on November 11, 2021, the request was served by mail to the defendant at address where she was served the summons and complaint on September 5, 2021. On November 29, 2021, the court entered default against defendant as requested by plaintiff.

"(c)(1) The motion provided for in this section may only be made on one of the following grounds: ¶ (A) If the moving party is a plaintiff, that the complaint states facts sufficient to constitute a cause or causes of action against the defendant <u>and the answer does not state</u>

facts sufficient to constitute a defense to the complaint…." (Emphasis added.) (Code of Civil Procedure, § 438(c)(1)(A).)

A motion for judgment on the pleadings can only be considered when both the complaint and an answer has been filed.

The motion is denied as no answer was filed. Plaintiff needs to request a prove-up hearing on the default.

TENTATIVE RULING # 7: PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS IS DENIED. THERE IS NO ANSWER FILED AND DUE TO THE ENTRY OF DEFENDANT'S DEFAULT ON NOVEMBER 29, 2021. PLAINTIFF NEEDS TO REQUEST A PROVE-UP HEARING ON THE DEFAULT. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR

TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.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, MARCH 18, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

8. BURNLEY v. ERB PC-20200069

Motion for Leave to File 4th Amended Complaint.

Plaintiffs move for leave to file a 4th amended complaint, which adds as plaintiffs who have moved into the community who are allegedly suffering loss as a direct result of defendant's alleged conduct and to change the remedies sought in the action to reduce the overall amount of damages sought.

The proof of service in the court's file executed on November 30, 2021, declares that notice of the hearing and copies of the moving papers were served by email on defendants' counsels. There is no opposition to the motion in the court's file.

No papers opposing the motion having been filed with the court at least nine court days before the hearing (Code of Civil Procedure, § 1005(b).), the court is justified in exercising its discretion to treat the defendants' failure to file an opposition as an admission that the motion is meritorious and is an independent reason to grant the motion**.** (See Local Rule 7.10.02C.)

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

There is a general policy in this state of great liberality in allowing amendment of pleadings at any stage of the litigation to allow cases to be decided on their merits. (Kittredge Sports Co. v. Superior Court (1989) 213 Cal.App.3d 1045, 1047.) "…it is a rare case in which 'a court will

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

With the above-cited principles in mind, the court will rule on plaintiffs' motion for leave to file a 4th amended complaint

Under the circumstances presented in the declaration in support of the motion and the moving papers, it is appropriate to grant the motion.

TENTATIVE RULING # 8: THE MOTION FOR LEAVE TO FILE A 4TH AMENDED COMPLAINT IS GRANTED. PLAINTIFFS ARE TO FILE AN ORIGINAL, EXECUTED 4TH AMENDED COMPLAINT AS PROPOSED AND SERVE A COPY OF THE EXECUTED 4TH AMENDED COMPLAINT ON 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, MARCH 18, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

9. MCDERMOTT v. TRINITY FINANCIAL SERVICES PC-20210522

Motion to Consolidate Civil Case with Unlawful Detainer Case.

On September 22, 2021, plaintiffs filed an action against defendants asserting causes of action for violation of Civil Code, § 2923.5; violation of Civil Code, § 2924(a)(1); violation of the truth in lending act; violation of the Rosenthal Fair Debt Collection Practices Act; negligence; wrongful foreclosure; unfair business practices; and cancellation of written instruments.

On October 15, 2021 Trinity Financial Services, LLC filed an unlawful detainer action against the McDermotts asserting: plaintiff owns the subject real property; defendants were the former owners of the property who defaulted on loan secured by a deed of trust; plaintiff obtained ownership of the property at a trustee's sale on August 24, 2021 that was held pursuant to Civil Code, § 2924 under the power of sale in a deed of trust executed by the former owner; plaintiff's title under the trustee's sale was duly perfected; and from August 24, 2021 to the present defendants have continue in possession of the property without plaintiff's permission. (Unlawful Detainer Complaint, paragraphs 2 and 6-9.)

On December 7, 2021, plaintiffs McDermott filed this motion to consolidate the civil action (Case Number PC-20210522.) with the unlawful detainer action (Case Number 21UD0003.).

On December 17, 2021 the court ruled on the defendant's demurrers to all causes of action on the complaint as follows: defendant Trinity Financial Services, LLC'S demurrers to the truth in lending act and unfair business practices causes of action causes of action were overruled; defendant Trinity Financial Services, LLC'S demurrer to the Rosenthal Fair Debt Collection Practices Act was sustained with ten days leave to amend; and defendant Trinity Financial Services, LLC'S demurrers to the violation of Civil Code, § 2923.5, violation of Civil Code, §

2924(a)(1), negligence, wrongful foreclosure, and cancellation of written instruments causes of action were sustained without leave to amend.

On December 30, 2021, the 1st amended complaint was filed in the civil action, which only asserts causes of action for violation of the truth in lending act; violation of the Rosenthal Fair Debt Collection Practices Act; and unfair business practices. The 1st amended complaint seeks an award for compensatory, special, and general damages; restitution and disgorgement of profits; actual damages; rescission of the loan; $1,000 for each of the defendants for violation of the Rosenthal Act; punitive damages for wrongful foreclosure; and recompense for damages and arrears.

As stated earlier, the demurrer to the wrongful foreclosure cause of action was sustained without leave to amend and, therefore, the prayer for punitive damages for wrongful foreclosure is either a clerical error or improperly pled as there is no wrongful foreclosure cause of action remaining in the civil action.

Plaintiff moves to consolidate the two cases and stay the unlawful detainer proceeding asserting the following grounds: the two actions involve common issues of law and fact as the civil case involves causes of action that ultimately led to the wrongful sale and the complex issues of title must be tried in the civil case and not by summary proceedings in the unlawful detainer case; consolidation is appropriate as the unlawful detainer proceeding precludes plaintiff from obtaining discovery that is normally available to civil litigants in civil actions concerning claims of title; numerous case opinions hold that unlawful detainer procedures are only constitutionally acceptable when applied to straightforward issues of possession and incidental damages; and the amount in controversy exceeds the jurisdictional limits of a limited civil action as the amount in controversy, the value of the subject property, is around $200,000 in addition to damages for civil violations.

Plaintiffs McDermott requests that should consolidation be denied the court order the issue of title severed and the issues of title and wrongful foreclosure separately tried in the unlimited civil action.

. Defendant Trinity Financial Services, LLC opposes the motion on the following grounds: plaintiffs McDermott's argument that title is at issue in both the civil action and unlawful detainer action is fatally defective in that the issue of title is no longer an issue in the civil case as the court sustained demurrers without leave to amend to all causes of action in the civil complaint that attempted to reverse the foreclosure; the remaining causes of action of the 1st amended complaint in the civil action do not provide for any remedy of rescinding/cancelling defendant Trinity Financial Services, LLC's title to the subject property; and there is no commonality between the civil action and unlawful detainer action which justifies consolidation under the Code of Civil Procedure.

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

"When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." (Code of Civil Procedure, § 1048(a).) "…Consolidation under section 1048 is permissive, and the trial court granting consolidation must determine whether the consolidation will be for all purposes or will be limited. (*General Motors Corp. v. Superior Court* (1966) 65 Cal.2d 88, 92, 52 Cal.Rptr. 460, 416 P.2d 492.)" (Committee for Responsible Planning v. City of Indian Wells (1990) 225 Cal.App.3d 191, 196, fn.5.)

It has long been held that complex issues of title are not appropriately litigated in summary proceedings in unlawful detainer. The Supreme Court held: "The trial court properly held that in

the summary proceeding in unlawful detainer the right to possession along was involved, and the broad question of title could not be raised and litigated by cross-complaint or affirmative defense. See *Arnold v. Krigbaum*, 169 Cal. 143, 146 P. 423, Ann.Cas.1916D, 370; *Bekins v. Trull*, 69 Cal.App. 40, 230 P. 24. It is true that where the purchaser at a trustee's sale proceeds under section 1161a of the Code of Civil Procedure he must prove his acquisition of title by purchase at the sale; but it is only to this limited extent, as provided by the statute, that the title may be litigated in such a proceeding. *Hewitt v. Justice' Court*, 131 Cal.App. 439, 21 P.(2d) 641; *Nineteenth Realty Co. v. Diggs*, 134 Cal.App. 278, 25 P.(2d) 522; *Berkeley Guarantee Building & Loan Ass'n v. Cunnyngham*, 218 Cal. 714, 24 P.(2d) 782. ¶ * * * In our opinion, the plaintiff need only prove a sale in compliance with the statute and deed of trust, followed by purchase at such sale, and the defendant may raise objections only on that phase of the issue of title. Matters affecting the validity of the trust deed or primary obligation itself, or other basic defects in the plaintiff's title, are neither properly raised in this summary proceeding for possession, nor are they concluded by the judgment." (Emphasis added.) (Cheney v. Trauzettel (1937) 9 Cal.2d 158, 159-160.)

Malkoskie v. Option One Mortg. Corp. (2010) 188 Cal.App.4th 968 is consistent with the Supreme Court's opinion in Cheney, supra, in that the appellate court found that where the plaintiff in an unlawful detainer action premises his or her claim of right to possession on the validity of a foreclosure sale, the issue of the validity of the sale is at issue in the case, particularly where the defendant generally denied the complaint and asserted as affirmative defenses that the foreclosure proceedings contained irregularities and were invalid due to lack of notice. The appellate court held that the judgment in the unlawful detainer action under such circumstances barred further litigation of the validity of the foreclosure sale itself due to the principle of res judicata. (Emphasis the court's) (Malkoskie v. Option One Mortg. Corp. (2010)

188 Cal.App.4th 968, 973-976.) Therefore, unlawful detainer actions are strictly limited to litigation of the validity of the foreclosure with respect to title and not unlimited claims as to the state of title in general, such as claims related to the underlying deed of trust and the loan transaction leading to execution of that deed of trust, and the judgment in unlawful detainer is not res judicata as to such general title issues.

"An unlawful detainer action is a summary proceeding, the primary purpose of which is to obtain the possession of real property in the situations specified by statute. (*Childs v. Eltinge*, 29 Cal.App.3d 843, 852-853, 105 Cal.Rptr. 864; *Union Oil Co. v. Chandler*, 4 Cal.App.3d 716, 721, 84 Cal.Rptr. 756.) The statutory procedure must be strictly followed. (*Greene v. Municipal Court*, 51 Cal.App.3d 446, 450, 124 Cal.Rptr. 139.) The sole issue before the court is the right to possession; accordingly, a defendant is not permitted to file a cross-complaint or counterclaim and, 'a defense normally permitted because it 'arises out of the subject matter' of the original suit is generally excluded . . . if such defense is extrinsic to the narrow issue of possession. . . .' (*Green v. Superior Court*, 10 Cal.3d 616, 632-633, 111 Cal.Rptr. 704, 715, 517 P.2d 1168, 1179.) Nor may an unlawful detainer action be tried in conjunction with other causes or claims, except perhaps by mutual consent of the parties. (*Childs v. Eltinge*, supra, 29 Cal.App.3d at pp. 852 853, 105 Cal.Rptr. 864.) Importantly, the defendant has only five days to respond to an unlawful detainer complaint instead of the usual thirty days. (Code Civ.Proc., s 1167.) [FN 1.] The denial of certain procedural rights which are enjoyed by litigants in ordinary actions is deemed necessary in order to prevent frustration of the summary proceedings by the introduction of delays and extraneous issues. (*Markham v. Fralick*, 2 Cal.2d 221, 227, 39 P.2d 804; *Union Oil Co. v. Chandler*, supra, 4 Cal.App.3d at p. 721, 84 Cal.Rptr. 756.) ¶ FN1. An unlawful detainer summons calling for a response in 5 days is inappropriate for determining issues outside the scope of the unlawful detainer action and does

not confer jurisdiction over the parties on those issues. (See *Greene v. Municipal Court*, supra, 51 Cal.App.3d at page 451, 124 Cal.Rptr. 139.)" (Emphasis added.) (Vasey v. California Dance Co. (1977) 70 Cal.App.3d 742, 746-747.)

In reversing the trial court's dismissal of an unlawful detainer action due to the lessee's previous filing of a civil action for declaratory relief concerning the amount of monthly rent payable pursuant to the provisions of the lease, the appellate court in Childs v. Eltinge (1973) 29 Cal.App.3d 843 determined that, among other things, a lessee cannot prevent a lessor from employing the summary and expeditious procedures prescribed by the unlawful detainer statutes by filing and serving upon the lessor an action for declaratory relief. The appellate court stated: "Although it is not, it might be argued that lessors could litigate their right to possession of the property and forfeiture of the lease in the Los Angeles declaratory relief action by way of a cross-complaint or by filing in the Los Angeles Superior Court a separate action for unlawful detainer and having it consolidated with the declaratory relief action. * * * [E]xcept perhaps by mutual consent of the parties, an unlawful detainer action may not generally be tried together with other causes. (Cf. *Schubert v. Lowe*, 193 Cal. 291, 294-295, 223 P. 550; *Arnold v. Krigbaum*, 169 Cal. 143, 145-147, 146 P. 423; *Lakeside Park Assn. v. Keithly*, 43 Cal.App.2d 418, 422, 110 P.2d 1055.)" (Childs v. Eltinge (1973) 29 Cal.App.3d 843, 852.) The appellate court further stated that joinder or consolidation of other civil actions with the unlawful detainer proceeding would entirely frustrate the purposes of the statutory, summary procedure. "Moreover, the reason for the rule that unlawful detainer actions are not to be tried in conjunction with other causes or claims is that, otherwise, the very purpose of this statutory, summary procedure, to afford an expeditious and adequate remedy for obtaining possession of premises wrongfully withheld by tenants, would be entirely frustrated. (*Arnold v. Krigbaum*, Supra, 169 Cal. at p. 146, 146 P. 423; *Union Oil Co. v. Chandler*, 4 Cal.App.3d 716,

721, 84 Cal.Rptr. 756; *Lakeside Park Assn v. Keithly*, Supra, 43 Cal.App.2d at p. 422, 110 P.2d 1055.)" (Childs v. Eltinge (1973) 29 Cal.App.3d 843, 853.)

The appellate court in Asuncion v. Superior Court (1980) 108 Cal.App.3d 141 determined that where a separate fraud action amounts to a direct challenge to the manner in which the unlawful detainer plaintiff obtained title to the property, due process requires that the fraud action be tried prior to eviction of the unlawful detainer defendant and after the unlawful detainer action is transferred to the superior court, one possible procedural device to facilitate accommodating the eviction action with the fraud action which the borrower separately filed is to stay the eviction proceedings until trial of the fraud action, based on the authority of Code of Civil Procedure, § 526 which permits a preliminary injunction to preserve the status quo. (See Asuncion v. Superior Court (1980) 108 Cal.App.3d 141, 146.)

The appellate court stated: "We note, however, the court in *Vella* was not directly faced with the issue of accommodating summary procedures and affirmative defenses, for there the issue was the res judicata effect of an eviction already consummated, in a later action based on fraud. *Vargas*, however, directly faced the issue in the context of a retaliatory eviction for protected exercise of collective bargaining rights, and that court's language applies here as well. We are prepared to hold homeowners cannot be evicted, consistent with due process guaranties, without being permitted to raise the affirmative defenses which if proved would maintain their possession and ownership. Such a procedure would be as unfair as the situation forbidden in *Vargas*. Accordingly, title to the property is inevitably in issue in this unlawful detainer action, and the action is not within the jurisdiction of the municipal court. ¶ As we see it, after the eviction is transferred to the superior court, a number of procedural devices exist to facilitate accommodating the eviction action with the fraud action which the Asuncions separately filed. A possibility, which we understand is frequently utilized in other counties, is for

the superior court to stay the eviction proceedings until trial of the fraud action, based on the authority of Code of Civil Procedure section 526 which permits a preliminary injunction to preserve the status quo on such grounds as irreparable injury, multiplicity of legal actions, or unconscionable relative hardship. [FN 1.] (See, e. g., *Continental Baking Co. v. Katz*, 68 Cal.2d 512, 528, 67 Cal.Rptr. 761, 439 P.2d 889 and see gen. discussion of subject in 2 Witkin, Cal. Procedure (2d ed. 1970) Provisional Remedies, s 47, p. 1496; s 73, pp. 1511-1512.) Bond would be required to obtain such an injunction (Code Civ.Proc., s 529), which could be waived for an indigent litigant (*Conover v. Hall*, 11 Cal.3d 842, 851, 853, 114 Cal.Rptr. 642, 523 P.2d 682). It has been held where foreclosure of a trust deed would moot a claim of right under a deed, and the deed is attacked as a fraudulent conveyance, a preliminary injunction is permitted to prevent foreclosure pending trial (*Weingand v. Atlantic Sav. & Loan Assn.*, 1 Cal.3d 806, 83 Cal.Rptr. 650, 464 P.2d 106). Staying the eviction here is analogous. ¶ FN1. But see, *Mobil Oil Corp. v. Superior Court*, 79 Cal.App.3d 486, 145 Cal.Rptr. 17. There a service station lessee filed a Los Angeles Superior Court action seeking declaratory relief and affirmative remedies for wrongful termination of franchise. The gist of the relief sought was to maintain the lessee in possession. Then in a different district of that same court, Mobil Oil filed unlawful detainer against the lessee. The lessee obtained from the superior court a stay of the unlawful detainer, which the appellate court vacated on writ of mandate. The court stated the stay was an abuse of discretion because there were no facts presented to the trial court which would justify the granting of a stay. (Id. at p. 495, 145 Cal.Rptr. 17.) It is unclear why the court reached this conclusion, but it appears to have relied on a combination of preserving the summary nature of unlawful detainer, and the fact the lessee did not seek a preliminary injunction in his lawsuit against Mobil. (Id. at p. 495, 145 Cal.Rptr. 17.) The court also noted the lessee was bringing a lengthy and complex representative action, imposing a heavy burden on

the evicting franchisor by delaying his action. ¶ Although it would be premature for us to determine the effect of this case on the Asuncions' right to a stay, we note *Mobil Oil Corp*. involves a commercial, rather than a residential, eviction. Insofar as the preliminary injunction question is concerned, the Asuncions have not yet had the opportunity to present facts in the trial court warranting either such an injunction or a stay, whereas in Mobil Oil Corp., supra, the stay had already been issued on a record the appellate court perceived as inadequate. ¶ An alternate possibility might be consolidation of the actions. ¶ Since this court is not a suitable forum to determine the need for a preliminary injunction nor its terms and conditions, we leave such matters for determination in the trial court. We hold only, the Asuncions are entitled to defend this eviction action based on the claims of fraud and related causes which they have asserted, and accordingly the action necessarily exceeds the jurisdiction of the municipal court and cannot be tried there. ¶ Let a writ of mandate issue, directing the superior court to vacate its order transferring this action to the municipal court, and to retain jurisdiction over the matter so long as substantive issues of ownership remain to be litigated. Petitioners shall have costs in this proceeding. Attorneys' fees incurred in this proceeding may form part of the Asuncions' damages if they prevail in their claim of fraud. (See Civ.Code, s 3333; Walters v. Marler, 83 Cal.App.3d 1, 30, 147 Cal.Rptr. 655.)" (Asuncion v. Superior Court (1980) 108 Cal.App.3d 141, 146-147.)

The appellate court in Old National Financial Services, Inc. v. Seibert (1987) 194 Cal.App.3d 460 distinguished Asuncion, supra on the following grounds: "the case of *Asuncion v. Superior Court (1980) 108 Cal.App.3d 141, 166 Cal.Rptr. 306*, has no application to the case at bench. In that opinion, the Court of Appeal held that, consistent with due process guarantees, homeowners cannot be evicted without being permitted to raise affirmative defenses which, if proved, would maintain their possession and ownership. The court

concluded that title to the property was in issue and that the unlawful detainer action exceeded the municipal court's jurisdiction. The Court of Appeal stated that there are situations where it may be appropriate to stay the eviction proceedings until after the trial of the fraud action or, in the alternative, to consolidate the actions. ¶ However, the separate fraud action in *Asuncion,* like *Mehr,* was a direct challenge to the manner in which the unlawful detainer plaintiff had obtained title to the property. The Asuncions alleged that, in making a short term loan to them for the purpose of curing their default on other obligations, the unlawful detainer plaintiff had fraudulently secured title to their property when they unknowingly signed a grant deed conveying title to their home to the plaintiff. Again, the separate fraud complaint in *Asuncion* is not the type of indirect challenge to title with which we are concerned in the instant case. Seibert was not denied due process by the trial court's denial of the stay as neither his affirmative defenses nor his separate fraud complaint raised claims which, if proved, would have maintained his possession and ownership." (Emphasis added.) (Old National Financial Services, Inc. v. Seibert (1987) 194 Cal.App.3d 460, 466-467.) Therefore, where there is no direct attack on title in the causes of action asserted in the civil action, the unlawful detainer action is not stayed or consolidated.

"In unlawful detainer proceedings, ordinarily the only triable issue is the right to possession of the disputed premises, along with incidental damages resulting from the unlawful detention. (*Larson v. City and County of San Francisco* (2011) 192 Cal.App.4th 1263, 1297, [123 Cal.Rptr.3d 40]; Friedman et al., Cal. Practice Guide: Landlord–Tenant (The Rutter Group 2012) ¶ 8:4, p. 8–1 (rev. # 1 2011)). Ordinarily, issues respecting the title to the property cannot be adjudicated in an unlawful detainer action. (*Drybread v. Chipain Chiropractic Corp.* (2007) 151 Cal.App.4th 1063, 1072, 60 Cal.Rptr.3d 580; Friedman, *supra,* ¶7:267, p. 7–58.15. (rev. # 1, 2012)) The denial of certain procedural rights enjoyed by litigants in ordinary

actions is deemed necessary in order to prevent frustration of the summary proceedings by the introduction of delays and extraneous issues. (*Markham v. Fralick* (1934) 2 Cal.2d 221, 227, [39 P.2d 804]; *Vasey v. California Dance Co*. (1977) 70 Cal.App.3d 742, 747, [139 Cal.Rptr. 72].) ¶ However, the trial court has the power to consolidate an unlawful detainer proceeding with a simultaneously pending action in which title to the property is in issue. That is because a successful claim of title by the tenant would defeat the landlord's right to possession. (Friedman et al., Cal. Practice Guide: Landlord–Tenant, *supra,* ¶¶ 8:5:1, 8:409.1, pp. 8–2, 8–142. (rev. # 1, 2011, 2006).) When an unlawful detainer proceeding and an unlimited action concerning title to the property are simultaneously pending, the trial court in which the unlimited action is pending may stay the unlawful detainer action until the issue of title is resolved in the unlimited action, or it may consolidate the actions. (*Id*., ¶7:268, p. 7–58.15 (rev # 1, 2012).) If it does neither and instead tries the issue of title under the summary procedures that constrain unlawful detainer proceedings, the parties' right to a full trial of the issue of title may be unfairly expedited and limited. If complex issues of title are tried in the unlawful detainer proceeding, the proceeding loses its summary character; defects in the plaintiff's title "are neither properly raised in this summary proceeding for possession, nor are they concluded by the judgment." (*Cheney v. Trauzettel* (1937) 9 Cal.2d 158, 160, [69 P.2d 832]; see *Wood v. Herson* (1974) 39 Cal.App.3d 737, 745, [114 Cal.Rptr. 365]; *Gonzales v. Gem Properties, Inc*. (1974) 37 Cal.App.3d 1029, 1033–1035, [112 Cal.Rptr. 884].)" (Emphasis added.) (Martin-Bragg v. Moore (2013) 219 Cal.App.4th 367, 385.)

The issue before this court in this action is whether the 1st amended complaint asserts causes of action affecting title to the subject real property that if proven would maintain plaintiffs McDermott's possession and ownership of the subject real property, which would

justify consolidation of the civil action with the unlawful detainer action and stay of the unlawful detainer action pending litigation of the civil action.

The operative pleading in this action has no causes of action litigating title to the subject real property. The 1st amended complaint only seeks monetary damages for alleged conduct plaintiffs McDermott contend violated the truth in lending act, violated the Rosenthal Fair Debt Collection Practices Act, and conduct that violated statutes and a regulation that constitute unfair business practices. Title and possession of the subject real property is no longer at issue in the civil action. Therefore, there are no common issues or facts in the two cases that must be tried in the civil action prior to the trial in the summary unlawful detainer proceeding. Plaintiffs McDermott's motion to consolidate cases is denied.

TENTATIVE RULING # 9: PLAINTIFFS MCDERMOTT'S MOTION TO CONSOLIDATE CIVIL CASE WITH UNLAWFUL DETAINER CASE 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, MARCH 18, 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

Hearing Re: Preliminary Injunction.

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 seeks issuance of a preliminary injunction enjoining any further proceedings in the arbitration proceeding.

At the February 18, 2022, hearing on the plaintiff's ex parte application for a TRO and to set a hearing for a preliminary injunction preventing an arbitration, the court denied the request for a TRO and set the hearing on the preliminary injunction for 8:30 a.m. on Friday, March 18, 2022, in Department Nine.

Plaintiffs argue that the preliminary injunction should be issued for the following reasons: the arbitration provision of the franchise agreement is procedurally and substantively unconscionable; the arbitration proceeding that was filed constitutes a pre-litigation jury waiver of matters not subject to the arbitration agreement; the arbitration proceeding is not properly venued in Orange County; and plaintiffs will be irreparably damaged if they are forced to litigate their claims by arbitration in Orange County.

The proofs of service filed on March 3, 2022, declare that on February 24, 2022, defendant's agent for proof of service was personally served the notice of motion and motion re: why arbitration should be enjoined and the moving papers; and on February 24, 2022, the same documents were served by email to defense counsel.

At the time this ruling was prepared there was no opposition in the courts file.

Preliminary Injunction Principles

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

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

A preliminary injunction may be granted upon a verified complaint or upon affidavits which show that sufficient grounds exist for the issuance of such an injunction. (Code of Civil Procedure, § 527(a).) In deciding whether to issue a preliminary injunction, two factors must be weighed: the likelihood of the moving party ultimately prevailing on the merits and the relative interim harm to the parties from the issuance of a preliminary injunction. (Butt v. State of California (1992) 4 Cal.4th 668, 677-678.) "The latter factor involves consideration of such things as the inadequacy of other remedies, the degree of irreparable harm, and the necessity of preserving the status quo. The determination whether to grant a preliminary injunction

generally rests in the sound discretion of the trial court. (Citation omitted.)" (Abrams v. St. John's Hospital & Health Center (1994) 25 Cal.App.4th 628, 636.)

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

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

"The trial court considers two interrelated factors when deciding whether to issue preliminary injunctions: the interim harm the applicant is likely to sustain if the injunction is denied as compared to the harm to the defendant if it issues, and the likelihood the applicant will prevail on the merits at trial. (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286, 219 Cal.Rptr. 467, 707 P.2d 840; *IT Corp. v. County of Imperial, supra,* 35 Cal.3d at pp. 69–70, 196 Cal.Rptr. 715, 672 P.2d 121.) However, before the trial court can exercise its discretion the applicant must make a prima facie showing of entitlement to injunctive relief. The applicant must demonstrate a real threat of immediate and irreparable injury (6 Witkin, Cal.Procedure (3d ed. 1985) Provisional Remedies, § 254; *E.H. Renzel Co. v. Warehousemen's Union* (1940) 16 Cal.2d 369, 373, 106 P.2d 1) due to the inadequacy of legal remedies. (6 Witkin, *op. cit.*

supra, § 253.)" (<u>Triple A Machine Shop, Inc. v. State of California</u> (1989) 213 Cal.App.3d 131, 138.)

""To obtain a preliminary injunction, a plaintiff ordinarily is required to present evidence of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending an adjudication of the merits." (*White v. Davis, supra,* 30 Cal.4th at p. 554, 133 Cal.Rptr.2d 648, 68 P.3d 74; see generally Code Civ. Proc. § 526, subd. (a)(2) [preliminary injunction may issue when it appears the plaintiff would suffer great or irreparable injury from the commission or continuance of some act during the litigation].) While the mere possibility of harm to the plaintiffs is insufficient to justify a preliminary injunction, <u>the plaintiff are "not required to wait until they have suffered *actual harm* before they apply for an injunction, but may seek injunctive relief against the *threatened infringement* of their rights</u>." (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1292, 240 Cal.Rptr. 872, 743 P.2d 932, italics added; accord, *City of Torrance v. Transitional Living Centers for Los Angeles, Inc.* (1982) 30 Cal.3d 516, 526, 179 Cal.Rptr. 907, 638 P.2d 1304 [injunctive relief is available where the injury sought to be avoided is " 'actual or threatened' "]; *7978 Corporation v. Pitchess* (1974) 41 Cal.App.3d 42, 46, 115 Cal.Rptr. 746 [same].) ¶ If the threshold requirement of irreparable injury is established, then we must examine two interrelated factors to determine whether the trial court's decision to issue a preliminary injunction should be upheld: "(1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction." (*Butt v. State of California* (1992) 4 Cal.4th 668, 677–678, 15 Cal.Rptr.2d 480, 842 P.2d 1240.) Appellate review is generally limited to whether the trial court's decision constituted an abuse of discretion. (*Ibid.*). (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1463, 47 Cal.Rptr.3d 147.) However, [t]o the extent that the trial court's assessment of likelihood of success on the merits depends on legal rather than factual

questions, [such as when the meaning of a contract or a statute are at issue,] our review is de novo.' " (*City of Lake Forest v. Evergreen Holistic Collective* (2012) 203 Cal.App.4th 1413, 1428, 138 Cal.Rptr.3d 332; *Garamendi v. Executive Life Ins. Co.* (1993) 17 Cal.App.4th 504, 512, 21 Cal.Rptr.2d 578.)" (Emphasis added.) (Costa Mesa City Employees' Assn. v. City of Costa Mesa (2012) 209 Cal.App.4th 298, 305–306.)

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

With the above-cite principles in mind, the court will rule on the application for preliminary injunction.

Preliminary Injunction Available

The 1st Amended Complaint for declaratory relief, reformation of contract, unfair competition, and preliminary and permanent injunction filed in this action concerns a dispute over whether defendant can force plaintiffs to assign to defendant their lease of the premises/restaurant where the franchise was operated until the franchise terminated at the conclusion of the franchise term. Attached to the complaint as Exhibit A is the alleged franchise agreement that was assigned to plaintiffs on April 23, 2008, which allegedly expired on January 2, 2022. (1st Amended Complaint, paragraphs 6, 7 and 10.)

Plaintiff declares: plaintiff's counsel sent a courtesy copy of the complaint by email to defense counsel on January 10, 2022 and the amended complaint was served on February 8, 2022; on the same day that the complaint was set for filing in the superior court, defendant filed an action in the Eastern District of California and brought an ex parte motion for an order to occupy the premises, which was denied; counsel did not receive the claim in arbitration until

after the court action was filed; to counsel's knowledge, plaintiffs were not personally served with the arbitration claim or federal action; two days later counsel received the claim in arbitration filed by defendant in Orange County, California; the claim was amended on February 4, 2022; and counsel sent a written objection to the American Arbitration Association (AAA) with objections to and denial of arbitration, which AAA rejected. (Declaration of Kathleen C. Lyon in Support of Application, paragraphs 6-10.)

It appears that preliminary injunctive relief may be requested pursuant to the provisions of Code of Civil Procedure, §§ 526(a)(2) and (3) as defendant has engaged in conduct to injure plaintiffs purportedly irreparably by allegedly wrongfully depriving them of their right to litigate this action respecting the subject of the action, which would render any civil judgment ineffectual if an arbitration award is issued.

Arbitration Provision

"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.)

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. (Omnibus Declaration of Plaintiffs in Support of Application, paragraphs 1, 2, 4-13, and 15-22.)

Although plaintiffs not having read the underlying franchise agreement does not excuse them from a claim that the arbitration agreement in the underlying franchise agreement applies, that does not lead to a conclusion that the arbitration clause is enforceable as there remain issues concerning 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 hold that an arbitrator decides whether 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.)

The subject arbitration provision states: **"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.) (Omnibus Declaration in Support of Application, Exhibit D – Concept Acquisitions, LLC Franchise Agreement, Paragraph 17.F.(Subject Franchise Agreement Assigned to Plaintiffs.))

The arbitration provision does not clearly, unmistakably, and explicitly delegate to the arbitrator the resolution of threshold questions regarding the validity of the arbitration agreement itself. The provision vaguely refers to this agreement and other agreements between them and their provisions. At best the provision is 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 in 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 arbitration is unenforceable, or is a valid, enforceable agreement.

- Procedural Unconscionability

The evidence presented in support of the motion indicates a likelihood that plaintiffs will prevail on a claim 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.)" (Sanchez v. Valencia Holding Co., LLC (2015) 61 Cal.4th 899, 914-915.)

"'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.]" (Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal.App.4th 708, 722.)

""Procedural surprise focuses on whether the challenged term is hidden in a prolix printed form or is otherwise beyond the reasonable expectation of the weaker party." (Morris*, supra,* 128 Cal.App.4th at p. 1321, 27 Cal.Rptr.3d 797.)" (Parada v. Superior Court (2009) 176 Cal.App.4th 1554, 1571.)

There is evidence that defendant's withholding a copy of the underlying franchise agreement from plaintiffs prevented plaintiffs from being on notice that the underlying franchise agreement included a binding arbitration agreement.

Although the party with superior bargaining power is under no obligation to highlight the arbitration clause of its contract, nor was it required to specifically call that clause to the weaker party's attention, this does not allow the stronger party to fail to provide a copy of the agreement containing the arbitration clause, which amounts to hiding the arbitration clause and other provisions of the agreement from the weaker party such that it can be said that there is procedural unconscionability arising from surprise.

In summary, there is evidence before the court showing that the plaintiffs have a likelihood of success in establishing procedural unconscionability by an oppressive/adhesive agreement and surprise.

- Substantive Unconscionability

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 franchisees 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-side 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.)

There is another analysis that requires "particular scrutiny" of arbitration agreements where the asserted claim relates to violation of unwaivable rights grounded in public policy. "An arbitration procedure passes muster under *Armendariz* if it " '(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum....' " [Footnote omitted.]" (Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal.App.4th 708, 716.)

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." (Omnibus Declaration in Support of Application, Exhibit D – Concept Acquisitions, LLC Franchise Agreement, 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 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: ¶ (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.) (Omnibus Declaration in Support of Application, Exhibit D – Concept Acquisitions, LLC Franchise Agreement, 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.) (Omnibus Declaration in Support of Application, Exhibit D – Concept Acquisitions, LLC Franchise Agreement, 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.**" (Omnibus Declaration in Support

of Application, Exhibit D – Concept Acquisitions, LLC Franchise Agreement, 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, 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.

"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 if 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.)

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.

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.”

(Omnibus Declaration in Support of Application, Exhibit D – Concept Acquisitions, LLC Franchise Agreement, Paragraph 17.K.(Subject Franchise Agreement Assigned to Plaintiffs.))

This is a provision that unfairly bars plaintiffs from asserting any claims against the defendant franchisor unless arbitration is commenced within one year and then allows the stronger defendant to assert claims 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.

"…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/or oppressive term that this “Mom and Pop” plaintiff organization in El Dorado Hills must arbitrate across the nation in Florida. The provision is substantively unconscionable.

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 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 are 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.)

While the pre-dispute waiver of trial by jury in court actions involving trademark actions the franchisor brings against the franchisee that are 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 these claims that can be asserted only by the defendant franchisor as triable in court proceedings, while requiring plaintiffs to arbitrate all claims they may have against defendant, as stated earlier in this ruling.

The court finds that the totality of the circumstances establishes that there are multiple 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 that plaintiffs have established a likelihood of success in their assertion that the arbitration provision is

unenforceable and that these claims should be determined in the instant civil case and not by compelled arbitration.

Having reviewed the evidence in support of the motion and weighing the likelihood of the moving party ultimately prevailing on the merits and the relative interim harm to the parties from the issuance of a preliminary injunction (Butt v. State of California (1992) 4 Cal.4th 668, 677-678.), the court finds that the scale tips in favor of granting the preliminary injunction.

Bond Requirement

"On granting an injunction, the court or judge must require an undertaking on the part of the applicant to the effect that the applicant will pay to the party enjoined any damages, not exceeding an amount to be specified, the party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction. Within five days after the service of the injunction, the person enjoined may object to the undertaking. If the court determines that the applicant's undertaking is insufficient and a sufficient undertaking is not filed within the time required by statute, the order granting the injunction must be dissolved." (Code of Civil Procedure, § 529(a).)

An undertaking by bond in an amount to be fixed by the Court is required. (Code of Civil Procedure, §§ 529(a), 532.)

An undertaking in some amount is mandated by statute when a preliminary injunction is issued, unless there is a statutory exception that applies or a waiver of the bond requirement. (Smith v. Adventist Health System/West (2010) 182 Cal.App.4th 729, 744.) Where an undertaking is set by the court as required by statute, "Within five days after the service of the injunction, the person enjoined may object to the undertaking…" (Code of Civil Procedure, § 529(a).)

The application for preliminary injunction has not addressed the bond requirement. Appearances are required regarding argument about the bond amount.

TENTATIVE RULING # 10: PLAINTIFFS' REQUEST FOR ISSUANCE OF A PRELIMINARY INJUNCTION IS GRANTED. APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, MARCH 18, 2022, IN DEPARTMENT NINE FOR ORAL ARGUMENT ON THE BOND AMOUNT. 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. NO HEARING ON THE RULING GRANTING THE REQUEST FOR ISSUANCE OF THE PRELIMINARY INJUNCTION 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, MARCH 18, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

11. PHAN v. MARSHALL MEDICAL CENTER PC-20190029

Motion for Preliminary Approval of Class and PAGA Settlement.

Plaintiffs in Herrera v. Marshall Medical Center (Case Number PC-20190475) and Phan v. Marshall Medical Center (Case Number PC-20190029), which were later consolidated, filed two class actions against defendant allegedly on behalf of defendant's employees for alleged unfair and unlawful business practices, wage and hour violations, including alleged overtime, meal, rest period, minimum wage violations, failure to maintain required records maintenance, failure to indemnify employees for business expenses to discharge their duties, failure to timely make final wage payments, and wage statement violations. Having reached a settlement, plaintiffs move for the court's preliminary approval of the class and PAGA action settlement.

The proof of service declares that notice of the hearing and the moving papers were served by email on defense counsel and plaintiff Herrera's counsel on January 18, 2022. There is no opposition to the motion in the court's file.

"A class action shall not be dismissed, settled, or compromised without the approval of the court, and notice of the proposed dismissal, settlement, or compromise shall be given in such manner as the court directs to each member who was given notice pursuant to subdivision (d) and did not request exclusion." (Civil Code, § 1781(f).)

""Approval under 23(e) involves a two-step process in which the Court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.,* 221 F.R.D. 523, 525 (C.D.Cal.2004). At the final approval stage, the primary inquiry is whether the proposed settlement "is fundamentally fair, adequate, and reasonable." *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1026 (9th Cir.1998). Having already

completed a preliminary examination of the agreement, the court reviews it again, mindful that the law favors the compromise and settlement of class action suits. *See, e.g., Churchill Village, LLC. v. Gen. Elec.,* 361 F.3d 566, 576 (9th Cir.2004); *Class Plaintiffs v. City of Seattle,* 955 F.2d 1268, 1276 (9th Cir.1992); *Officers for Justice v. Civil Serv. Comm'n,* 688 F.2d 615, 625 (9th Cir.1982). Ultimately, "the decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is exposed to the litigants and their strategies, positions, and proof." *Hanlon,* 150 F.3d at 1026. ¶ An objector to a proposed settlement agreement bears the burden of proving any assertions they raise challenging the reasonableness of a class action settlement. *United States v. State of Oregon,* 913 F.2d 576, 581 (9th Cir.1990). The court iterates that the proper standard for approval of the proposed settlement is whether it is fair, reasonable, adequate, and free from collusion—not whether the class members could have received a better deal in exchange for the release of their claims. *See Hanlon,* 150 F.3d at 1027 ("Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion.")." (Noll v. eBay, Inc. (N.D. Cal. 2015) 309 F.R.D. 593, 602.)

"A settlement or compromise of an entire class action, or of a cause of action in a class action, or as to a party, requires the approval of the court after hearing." (Rules of Court, Rule 3.769(a).)

Any agreement, express or implied, that has been entered into with respect to the payment of attorney's fees or the submission of an application for the approval of attorney's fees must be set forth in full in any application for approval of the dismissal or settlement of an action that has been certified as a class action." (Rules of Court, Rule 3.769(b).)

"Any party to a settlement agreement may serve and file a written notice of motion for preliminary approval of the settlement. The settlement agreement and proposed notice to class members must be filed with the motion, and the proposed order must be lodged with the motion." (Rules of Court, Rule 3.769(c).)

"California law controls in this case. While we are not bound to follow the certification requirements of Rule 23, we note that California courts have recognized that "class action settlements should be scrutinized more carefully if there has been no adversary certification." (*Dunk, supra,* 48 Cal.App.4th at p. 1803, fn. 9, 56 Cal.Rptr.2d 483.) This reflects concerns that the absent class members, whose rights may not have been considered by the negotiating parties, be adequately protected against fraud and collusion. (*Id.* at pp. 1801, 1807, fn. 19, 56 Cal.Rptr.2d 483; *Officers for Justice v. Civil Service Com'n., etc.* (9th Cir.1982) 688 F.2d 615, 624.) However, these concerns are satisfied by a careful fairness review of the settlement by the trial court. Even in the federal cases cited by Doherty, pre-certification settlements are routinely approved if found to be fair and reasonable. (See *In re Baldwin–United Corp.* (S.D.N.Y.1984) 105 F.R.D. 475, 478; *Mars Steel Corp. v. Continental Illinois Nat. Bank* (7th Cir.1987) 834 F.2d 677, 681; *In re Beef Industry Antitrust Litigation* (5th Cir.1979) 607 F.2d 167, 174; *Hanlon v. Chrysler Corp., supra,* 150 F.3d at pp. 1019, 1030.) The possibility of abuse in such cases is "held in check by the requirement that the judge determine the fairness of the settlement before he can approve it." (*Mars Steel Corp. v. Continental Illinois Nat. Bank, supra,* 834 F.2d at p. 681.) As we discuss more fully below, among the factors considered by the court in evaluating fairness is whether the settlement is the result of an arm's length negotiating process and whether class members have reacted favorably or unfavorably to the proposed settlement. In addition, in this case it is clear from the record that the court carefully considered the remedies provided by the settlement to each subclass of class members in

determining fairness. We conclude that even bearing in mind the heightened need for class protection in pre-certification settlements, the court did not abuse its discretion here." (Emphasis added.) (Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 240.)

Counsel for plaintiffs Phan and Racicot declares: the proposed class consists of all persons employed by defendant in California at any time from January 16, 2015 through September 4, 2021, which consists of a proposed class of 2,777 individuals and 2,155 PAGA members, who worked during the PAGA period of July 6, 2018 through September 4, 2021; written notice of allege violations was sent to the California Labor and Workforce Development Agency (LWDA) on July 10, 2019, the 65 day notice period expired on September 13, 2020 for plaintiff Racicot, and as of the filing of the motion, the LWDA has not provided notice to plaintiffs' counsel that it intends to investigate the alleged violations set forth in the notice letter; a 1st amended complaint was filed on March 19, 2021 in case number PC-20190029, which added a cause of action for PAGA penalties and added plaintiff Racicot as a plaintiff and PAGA representative; prior to reaching a settlement of the consolidated actions, defendant was served with written discovery consisting of interrogatories, requests for admission, and requests for production; defendant was also served with a notice of deposition of its person most knowledgeable; shortly thereafter, the parties agreed to private mediation and to informally exchange information and documents in lieu of formal discovery; defendant produced relevant documents in advance of the mediation; counsel engaged an expert data analyst to analyze the data sample in those documents before mediation; the parties were unable to reach a settlement through mediation; on June 4, 2021 the parties accepted a mediator's proposal subject to the parties entering into a more comprehensive written settlement agreement; on December 2, 2021 the parties executed the stipulation for class and PAGA action settlement agreement and on December 20, 2021 entered into an amendment to that stipulation in order

to correct a typo in the definition of "PAGA period"; counsel's office calculate the maximum potential damages to be approximately $138,700,322; considering the risks of litigation, the uncertainties involved in achieving class certification, the burdens of proof necessary to establish liability, and the probability of appeal from a favorable judgment, it is clear that the non-reversionary settlement amount of $5,000,000 is within the ballpark of reasonableness and in the best interests of the class; the net settlement amount is estimated to be $3,085,833.33, which will result, on average, that class members will each receive $1,111.21 and PAGA group members will receive an average PAGA payment of $17.40; and the individual plaintiff class representatives will each receive $7,500.

The agreement provides that the class counsel award will consist of 33 1/3% of the maximum settlement amount, plus payment of actual costs not to exceed $40,000.

Plaintiff Herrera's counsel declares based on his years of experience and independent investigation and evaluation, his opinion is that the settlement consideration and terms are fair, reasonable, and adequate and it is in the best interests of the settlement class and aggrieved employees considering all known facts and circumstances and the expenses and risks inherent in litigation.

It appears appropriate under the circumstances presented to grant preliminary approval and set a final approval hearing.

"If the court grants preliminary approval, its order must include the time, date, and place of the final approval hearing; the notice to be given to the class; and any other matters deemed necessary for the proper conduct of a settlement hearing." (Rules of Court, Rule 3.769(e).)

The proposed notice of settlement and fact information sheet concerning the settlement to be sent to class and PAGA members are attached as Exhibits 1 and 2 to the stipulation for settlement.

A proposed order setting forth procedural deadlines, notice to class members and date and time for the final approval hearing must been submitted.

TENTATIVE RULING # 11: ABSENT OPPOSITION, THE MOTION IS GRANTED. THE PLAINTIFFS MUST APPEAR AT 8:30 A.M. ON FRIDAY, MARCH 18, 2022, IN DEPARTMENT NINE AND SUBMIT A PROPOSED ORDER SETTING FORTH PROCEDURAL DEADLINES, NOTICE TO CLASS MEMBERS AND DATE AND TIME FOR THE FINAL APPROVAL 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.

12. GAUTSCHI v. KRICKFIT, INC. PC-20200074

Motion for Summary Judgment.

On February 6, 2020, plaintiff filed an action against defendants asserting a cause of action for injuries incurred at a one-on-one exercise program training session at defendant's fitness training business. The complaint alleges that defendant created an exercise program for the 70 year-old plaintiff that incorporated exercises for someone over 35 years-old; that required plaintiff to balance on an unstable platform that tips quickly and unexpectedly while lifting weights; defendants did not provide written or verbal instructions or warnings as are commonly set forth by the Bosu style ball manufacturer; failed to provide a spotter, fixed safety rail or safety floor mats, while leaving plaintiff unattended and precariously balanced on a platform; and that defendant not only breached the ordinary duty of due care, but also recklessly increased the risk of injury, which reflected an extreme departure from the applicable standard of care amounting to a want of event scant care or gross negligence. (Complaint, paragraph 18.)

Defendants' answer asserted affirmative defenses that the action is barred by the doctrine of waiver and plaintiff entered a liability waiver with defendants, which bars this action. (Defendants' Answer, Affirmative Defense, Numbers Nine and Ten.)

Defendants filed a motion for summary judgment against plaintiff asserting that plaintiff's execution of a waiver, release and assumption of the risk form bars the current action.

Plaintiff opposes the motion on the following grounds: defendants' conduct amounts to gross negligence, therefore, the plaintiff's execution of the Waiver, Release, and Assumption of the Risk Form does not bar this action; and defendants' admitted failure to follow the

manufacturer's warnings and use instructions creates a triable issue of material fact related to the issue of gross negligence.

Plaintiff also objected to the defendant's undisputed material facts asserted in support of the motion, numbers 1, 2, 4, 5, 7-14, and 18.

Defendants replied to the opposition: the hearing on the MSJ should be continued to allow for the deposition of plaintiff's expert; plaintiff failed to successfully dispute any of the undisputed material facts necessary to enter summary judgment in favor of defendants and against plaintiff; plaintiff has not submitted any evidence of ordinary or gross negligence; plaintiff's expert's declaration is inadmissible as lacking a foundation for many of the expert opinions in the declaration, the declaration did not include a curriculum vitae demonstrating the requisite background and experience to qualify Mr. Brodnicki as an expert, Mr. Brodnicki failed to offer any description of his experience and/or training with the sole piece of equipment at issue – the Bosu Ball, while Mr. Brodnicki declared he reviewed various documents in preparing his opinions, he did not attach any of those documents to his declaration, he does not cite to any exhibits to either the MSJ or opposition, and he has not properly authenticated the photos attached as to his exhibit to his declaration, which requires that any testimony about the photos be disregarded; defendant Krick's testimony does not raise triable issues of material fact; and plaintiff's argument of lack of consent is not compelling as there is no duty for a physical trainer to provide a trainee with every manufacturer's manual for every piece of exercise equipment in the gym; the consent in the subject waiver cannot be genuinely disputed; and plaintiff admitted to have carefully reviewed the waiver before signing it.

Plaintiff's Objections to Defendants' Undisputed Material Facts in Support of the Motion

Evidentiary objections to the asserted material facts themselves are inappropriate as the asserted undisputed facts are not evidence. The court will consider the objections to be directed at the evidence stated in support of the facts.

The objections are overruled.

Continuance to Depose Plaintiff's Expert

Plaintiff filed a motion for a protective order to bar the deposition of plaintiff's expert, Clarke Brodnicki, who submitted a declaration in opposition to the motion for summary judgment.

Defendants opposed the motion for protective order on the following grounds: there are serious concerns about the questionable or total lack of foundation for many of the expert opinions in the declaration; the declaration did not include a curriculum vitae demonstrating the requisite background and experience to qualify Mr. Brodnicki as an expert; Mr. Brodnicki failed to offer any description of his experience and/or training with the sole piece of equipment at issue – the Bosu Ball; while Mr. Brodnicki declared he reviewed various documents in preparing his opinions, he did not attach any of those documents to his declaration and does not cite to any exhibits to either the MSJ or opposition; due to such lack of documentation there is no way of knowing if the manufacturer's training and instruction manual mentioned in the declaration is the same one as attached as an exhibit to plaintiff's opposition; the defense should be afforded an opportunity to examine the witness regarding the foundation for his opinions; and plaintiff's suggestion that plaintiff should be allowed to cure the declaration defects in order to avoid the deposition is not allowed under Code of Civil Procedure, § 437c.

Attached to the reply declaration in the motion for protective order was the amended declaration of Clarke Brodnicki in opposition to the MSJ. The attached Exhibit is a single page profile of his expertise as a personal trainer.

Mr. Brodnicki declares his opinions related to the issue of gross negligence are premised upon his training and experience as a personal trainer; and his familiarity with the Bosu, including the materials made available by the manufacturer such as the manufacturer training and instruction manual and warning labels. (Declaration of Clarke Brodnicki in Opposition to MSJ, paragraphs 7-9.)

The declaration also describes the content of the manufacturer's manual provisions, instructions, warnings, and warning labels that were considered in reaching his opinions. (Declaration of Clarke Brodnicki in Opposition to MSJ, paragraphs 8.b.-8f. and 9a.)

In granting the protective order after oral argument at the hearing on February 4, 2022, the court found that under the totality of the circumstances, there are no legitimate questions regarding the foundation of the opinion of the expert.

The court having reviewed the declaration of Clarke Brodnicki and the defendants' objections to the expert's declaration asserted in the plaintiff's additional undisputed material facts, the court overrules the objections.

Summary Judgment Principles

"For purposes of motions for summary judgment and summary adjudication: ¶ * * * (2) A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff or cross-complainant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact

exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (Code of Civil Procedure, § 437c(p)(2).)

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

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

"A defendant has met its burden of showing a cause of action has no merit if it 'has shown that one or more elements of the cause of action ... cannot be established, or that there is a

complete defense to that cause of action. Once the defendant ... has met that burden, the burden shifts to the plaintiff ... to show ... a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff ... may not rely upon the mere allegations or denials of its pleading to show ... a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists ....' (*Id.*, subd. (o)(2); *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 464 & fn. 4 [63 Cal.Rptr.2d 291, 936 P.2d 70].)" (Scheiding v. Dinwiddie Constr. Co. (1999) 69 Cal.App.4th 64, 69.)

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

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

"Even where the complaint does present a cognizable claim, so that the court proceeds to the second or third step, the pleadings remain significant. Summary judgment cannot be granted on a ground not raised by the pleadings. (*Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848, 885, 164 Cal.Rptr. 510, 610 P.2d 407, revd. on other grounds (1981) 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800.) Conversely, summary judgment cannot be *denied* on a ground not raised by the pleadings. (*Lewinter v. Genmar Industries, Inc.* (1994) 26 Cal.App.4th

1214, 1223, 32 Cal.Rptr.2d 305 [complaint alleged failure to warn of manufacturing defect in boat; plaintiff could not avoid summary judgment by showing failure to warn based on post-manufacture discovery of defect]; *Danieley v. Goldmine Ski Associates, Inc.* (1990) 218 Cal.App.3d 111, 119–120, 266 Cal.Rptr. 749 [complaint alleged owner negligently maintained ski slopes; plaintiff could not avoid summary judgment by showing owner negligently cared for her after accident]; *Cochran v. Linn* (1984) 159 Cal.App.3d 245, 250, 205 Cal.Rptr. 550 [complaint alleged products liability based on manufacture and sale of liquid protein diet; plaintiffs could not avoid summary judgment by showing defendant negligently wrote book promoting diet]; see generally *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381–382, 282 Cal.Rptr. 508.) ¶ If either party wishes the trial court to consider a previously unpleaded issue in connection with a motion for summary judgment, it may request leave to amend. (*Lee v. Bank of America* (1994) 27 Cal.App.4th 197, 216, 32 Cal.Rptr.2d 388; *Dorado v. Knudsen Corp.* (1980) 103 Cal.App.3d 605, 611, 163 Cal.Rptr. 477.) Such requests are routinely and liberally granted. However, " ' "[I]n the absence of some request for amendment there is no occasion to inquire about possible issues not raised by the pleadings." ' " (*Metromedia, Inc. v. City of San Diego, supra,* 26 Cal.3d at p. 885, 164 Cal.Rptr. 510, 610 P.2d 407, quoting *Krupp v. Mullen* (1953) 120 Cal.App.2d 53, 57, 260 P.2d 629.) Declarations in opposition to a motion for summary judgment "are no substitute for amended pleadings." (*AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1065, 225 Cal.Rptr. 203.) If the motion for summary judgment presents evidence sufficient to disprove the plaintiff's claims, as opposed to merely attacking the sufficiency of the complaint, the plaintiff forfeits an opportunity to amend to state new claims by failing to request it. (See *Kirby v. Albert D. Seeno Construction Co., supra,* 11 Cal.App.4th at p. 1068, 14 Cal.Rptr.2d 604.)" (Bostrom v. County of San Bernardino (1995) 35 Cal.App.4th 1654, 1663–1664.)

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

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

Waiver of Liability

"Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." (Civil Code, § 3513.)

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

While it is true that Summary judgment cannot be granted on a ground not raised by the pleadings; and cannot be denied on a ground not raised by the pleadings. (Bostrom v. County of San Bernardino (1995) 35 Cal.App.4th 1654, 1663), it is the totality of the pleadings, including the complaint and answer, which raise the issues that must be addressed in a motion for summary judgment.

The California Supreme Court has stated with approval the legal proposition that the plaintiff is not required to anticipate the affirmative defense of a valid release of liability, and it is for the

defendant to raise the issue. "…A plaintiff is not required to anticipate such a defense (see 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 381, p. 481); instead, the defendant bears the burden of raising the defense and establishing the validity of a release as applied to the case at hand. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2006) ¶ 6.436, p. 6–115.)…" (City of Santa Barbara v. Superior Court (2007) 41 Cal.4th 747, 780, fn. 58.) "As a defense, Nunnink had the burden, as the *Santa Barbara* court stated, of "establishing the validity of [the] release as applied to the case at hand." (*Santa Barbara, supra,* 41 Cal.4th at p. 780, fn. 58, 62 Cal.Rptr.3d 527, 161 P.3d 1095.) " (Eriksson v. Nunnink (2015) 233 Cal.App.4th 708, 733.)

Defendants' Answer asserted the waiver defense in Affirmative Defense Numbers Nine and Ten.

Plaintiff anticipated that defense by alleging that defendant not only breached the ordinary duty of due care, but also recklessly increased the risk of injury, which reflected an extreme departure from the applicable standard of care amounting to a want of event scant care or gross negligence. (Complaint, Paragraph 18.)

The Third District Court of Appeal has stated: "We agree with defendant that releases of negligence claims are not against public policy (*Olsen v. Breeze, Inc.* (1996) 48 Cal.App.4th 608, 619-622, 55 Cal.Rptr.2d 818), that contract principles apply when interpreting a release, and that normally the meaning of contract language, including a release, is a legal question, not a factual question. (See *Westlye v. Look Sports, Inc.* (1993) 17 Cal.App.4th 1715, 1727, 22 Cal.Rptr.2d 781 (*Westlye*).)" (Solis v. Kirkwood Resort Co. (2001) 94 Cal.App.4th 354, 360.)

"A pre-tort release must be " 'clear, unambiguous and explicit' " and "[a] release effective as to one type of misconduct may not be effective as to another." (Olsen v. Breeze, Inc., supra, 48

Cal.App.4th at p. 622, 55 Cal.Rptr.2d 818.) It is sometimes said that a pre-tort release is interpreted more strictly, to favor the party releasing liability. (See, e.g., *Westlye*, supra, 17 Cal.App.4th at p. 1729, fn. 7, 22 Cal.Rptr.2d 781 [citing a learned treatise].) Therefore, an ambiguity about the scope of a release should normally be construed against the drafter, as with other contracts. (See Civ.Code, § 1654 [" 'In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist' "]; *Pacific Lbr. Co. v. Ind. Acc. Com.* (1943) 22 Cal.2d 410, 422, 139 P.2d 892; *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1184, 101 Cal.Rptr.2d 532.) ¶ An ambiguity exists when a party can identify an alternative, semantically reasonable, candidate of meaning of a writing. (See *Zabetian v. Medical Board* (2000) 80 Cal.App.4th 462, 466, 94 Cal.Rptr.2d 917 [statutory language]; *California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1986) 177 Cal.App.3d 855, 859, fn. 1, 223 Cal.Rptr. 246 [contract language].) An ambiguity can be patent, arising from the face of the writing, or latent, based on extrinsic evidence. (*Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 39-40, 69 Cal.Rptr. 561, 442 P.2d 641; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865, 44 Cal.Rptr. 767, 402 P.2d 839.)" (Solis v. Kirkwood Resort Co. (2001) 94 Cal.App.4th 354, 360.) (3rd Dist Case.)

""An express release is not enforceable if it is not easily readable." (Conservatorship of Estate of Link (1984) 158 Cal.App.3d 138, 141, 205 Cal.Rptr. 513.) "Furthermore, the important operative language should be placed in a position which compels notice and must be distinguished from other sections of the document. A [layperson] should not be required to muddle through complex language to know that valuable, legal rights are being relinquished." (Id. at 142, 205 Cal.Rptr. 513.) An exculpatory clause is unenforceable if not distinguished from other sections, if printed in the same typeface as the remainder of the document, and if not

likely to attract attention because it is placed in the middle of a document. (Ibid.) In other words, a release must not be buried in a lengthy document, hidden among other verbiage, or so encumbered with other provisions as to be difficult to find. (*Bennett v. United States Cycling Federation* (1987) 193 Cal.App.3d 1485, 1489, 239 Cal.Rptr. 55.)" (Leon v. Family Fitness Center (No. 107), Inc. (1998) 61 Cal.App.4th 1227, 1232.)

"To be valid and enforceable, a written release purporting to exculpate a tortfeasor from damage claims based on its future negligence or misconduct must clearly, unambiguously, and explicitly express this specific intent of the subscribing parties. (Allabach v. Santa Clara County Fair Assn. (1996) 46 Cal.App.4th 1007, 1015, 54 Cal.Rptr.2d 330.) " ' "If a tortfeasor is to be released from such liability the language used 'must be clear, explicit and comprehensible in each of its essential details. Such an agreement, read as a whole, must clearly notify the prospective releasor or indemnitor of the effect of signing the agreement.' " ' " (Ibid., quoting *Paralift, Inc. v. Superior Court* (1993) 23 Cal.App.4th 748, 755, 29 Cal.Rptr.2d 177.)" (Leon v. Family Fitness Center (No. 107), Inc. (1998) 61 Cal.App.4th 1227, 1233.)

The Third District Court of Appeal has held: "A release cannot absolve a party from liability for gross negligence. (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 750-751, 776-777, 62 Cal.Rptr.3d 527, 161 P.3d 1095.) In *Santa Barbara*, our Supreme Court reasoned that "the distinction between 'ordinary and gross negligence' reflects 'a rule of policy' that harsher legal consequences should flow when negligence is aggravated instead of merely ordinary." (*Id*. at p. 776, 62 Cal.Rptr.3d 527, 161 P.3d 1095, quoting *Donnelly v. Southern Pacific Co.* (1941) 18 Cal.2d 863, 871, 118 P.2d 465.)" (Willhide-Michiulis v. Mammoth Mountain Ski Area, LLC (2018) 25 Cal.App.5th 344, 358.)

"Gross negligence is pleaded by alleging the traditional elements of negligence: duty, breach, causation, and damages. (*Jones v. Wells Fargo Bank* (2003) 112 Cal.App.4th 1527, 1541, 5 Cal.Rptr.3d 835.) However, to set forth a claim for "gross negligence" the plaintiff must allege extreme conduct on the part of the defendant. (*Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1185–1186, 7 Cal.Rptr.3d 552, 80 P.3d 656 (*Eastburn*).) The conduct alleged must rise to the level of "either a ' " 'want of even scant care' " ' or ' " 'an extreme departure from the ordinary standard of conduct.' " ' [Citations.]" (*Santa Barbara, supra,* 41 Cal.4th at p. 754, 62 Cal.Rptr.3d 527, 161 P.3d 1095, fn. omitted.)" (Rosencrans v. Dover Images, Ltd. (2011) 192 Cal.App.4th 1072, 1082.)

"…to support a theory of " '[g]ross negligence,' " a plaintiff must allege facts showing "either a ' " 'want of even scant care' " ' or ' " 'an *extreme* departure from the ordinary standard of conduct.' " ' [Citations.]" (*Santa Barbara*, *supra*, at p. 754, 62 Cal.Rptr.3d 527, 161 P.3d 1095, italics added; accord, *Eriksson*, *supra*, 191 Cal.App.4th at p. 857, 120 Cal.Rptr.3d 90; *Rosencrans v. Dover Images, Ltd.*, *supra*, 192 Cal.App.4th at p. 1086, 122 Cal.Rptr.3d 22.) " ' "[G]ross negligence" falls short of a reckless disregard of consequences, and differs from ordinary negligence only in degree, and not in kind. ...' " (*Gore v. Board of Medical Quality Assurance* (1980) 110 Cal.App.3d 184, 197, 167 Cal.Rptr. 881.) ¶ Thus, in cases involving a waiver of liability for future negligence, courts have held that conduct that substantially or unreasonably increased the inherent risk of an activity or actively concealed a known risk could amount to gross negligence, which would not be barred by a release agreement. (See *Eriksson*, *supra*, 191 Cal.App.4th at p. 856, 120 Cal.Rptr.3d 90). Evidence of conduct that evinces an extreme departure from manufacturer's safety directions or an industry standard also could demonstrate gross negligence. (See *Jimenez v. 24 Hour Fitness USA, Inc.*, *supra*, 237 Cal.App.4th at p. 561, 188 Cal.Rptr.3d 228.) Conversely, conduct demonstrating the

failure to guard against, or warn of, a dangerous condition typically does not rise to the level of gross negligence. (See *DeVito v. State of California* (1988) 202 Cal.App.3d 264, 272, 248 Cal.Rptr. 330.)" (Anderson v. Fitness Internat., LLC (2016) 4 Cal.App.5th 867, 881.)

"While the court in *Anderson* also noted "[e]vidence of conduct that evinces an extreme departure from manufacturer's safety directions or an industry standard also could demonstrate gross negligence" ¶ (*Anderson, supra*, 4 Cal.App.5th at p. 881, 208 Cal.Rptr.3d 792), it did not hold that a plaintiff is required to establish an industry standard as a matter of law to defeat a motion for summary judgment. [Footnote omitted.]" (Emphasis added.) (Kim v. County of Monterey (2019) 43 Cal.App.5th 312, 330 [256 Cal.Rptr.3d 525, 540.)

The following facts are undisputed: defendant Krick is a personal trainer and owner of defendant Krickfit, Inc.; plaintiff is a licensed real estate broker; plaintiff owns and operates American Commercial Real Estate; plaintiff was defendant Krick's real estate agent in leasing the El Dorado Hills studio for defendant KirckFit, Inc.; in 2018 plaintiff approached defendant Krick about personal training; on October 26, 2018 plaintiff completed a new client questionnaire and stated she wanted to get back into shape so she could endure more strenuous activities like hiking and snow skiing; on October 26, 2018 plaintiff completed a Health and Medical History and Physical Activity Readiness Questionnaire; it is plaintiff's practice to advise her clients to review contracts prior to execution; it is plaintiff's practice in her life to review contracts before signing; plaintiff carefully reviewed the KrickFit forms before signing them; plaintiff underwent two physical assessments at KrickFit on November 9, 2018 and January 25, 2019; beginning February 16, 2018 and prior to her injury on February 25, 2019 plaintiff had 26 training sessions at KrickFit; a Bosu Ball was incorporated into plaintiff's workouts beginning December 27, 2018; and she had three sessions using the Bosu Ball prior

to February 25, 2019. (Plaintiff's Responses to Defendants' Separate Statement of Undisputed Material Facts, Numbers 1, 2, 4-10 and 12-17.)

It is also undisputed that on October 26, 2018, plaintiff executed and initialed plaintiff's Policies and Waiver, Release, and Assumption of the Risk Forms; the Policies form provides: "1. Take Time to Read These Forms Carefully. In addition to this form, you understand that you will need to sign and return the following forms prior to receiving a Fitness Consultation, Training Program Design, or beginning any Personal Training Program: a. Waiver, Release and Assumption of Risk Form…11. You Are In Control Of Your Workouts. You may terminate a particular exercise, session, or workout at any time if an exercise is uncomfortable or painful, or if you want to stop for any reason, you agree you will do so…You expressly agree that your participation in KrickFit and any activity is purely voluntary and at your sole discretion. You are also aware of the potential stress, physical, and mental requirements, and physical and mentally. You understand that sessions may involve a trainer touching you, and if you feel uncomfortable at any time or that touch is inappropriate, you agree that you will bring it to the attention of the trainer immediately."; and the Waiver, Release and Assumption of Risk Form provides: "In signing this agreement I hereby certify that I am over the age of 18 years…and have read and fully understand the terms and conditions set forth herein. I also certify that I am in good health and physically and mentally capable of handling any proposed activity. ¶ Specifically, I have volunteered to participate in a fitness program provided to me by a trainer at KrickFit. This program may include, but not be limited to, resistance/strength training and aerobic/cardiovascular exercise. In exchange for the trainer's agreement to instruct me, I do here now and forever and discharge and hereby hold harmless KrickFit, its trainers, and its or their respective agents, heirs, assigns, contractors, and employees from any and all claims, demands, damages, rights or causes of action, present or future, arising out for connected with

my participation in this or any exercise program, including any injuries resulting therefrom. If an activity is proposed for which I do not feel physically or mentally prepared, I will not undertake that activity. ¶ ___ THIS WAIVER AND RELEASE OF LIABILITY INCLUDES, WITHOUT LIMITATION, INJURIES WHICH MAY OCCUR AS A RESULT OF (1) EQUIPMENT BELONGING TO A TRAINER OR TO MYSELF THAT MAY MALFUNCTION OR BREAK; (2) ANY SLIP, FALL, OR DROPPING OF EQUIPMENT; AND/OR (3) NEGLIGENT INSTRUCTION OR SUPERVISION." (Emphasis in original.) (Plaintiff's Responses to Defendants' Separate Statement of Undisputed Material Facts, Numbers 10 and 11.)

There is evidence of the following facts: plaintiff started as a licensed real estate salesperson in 1979 and then became a licensed real estate broker; and that on the date of the subject incident defendant Krick walked to the weight rack leaving plaintiff on the Bosu Ball without helping her off, at which point she started to take her weight off her right foot, was launched into the air, and landed in excruciating pain. (Defendants' Exhibit 3 – Plaintiff's Deposition Transcript, page 88, line 6 to page 89, line 8; and plaintiff's Declaration in Opposition to Motion, paragraphs 20 and 22.)

The following facts are also undisputed: at the time of the subject physical training services plaintiff was 70 years old; defendant Krick had no specific training or courses in dealing with an older population; during plaintiff's first visit on November 9, 2018 defendant Krick performed a physical assessment after which he advised plaintiff that despite her age, he was going to train her as a 45 year-old; following an evaluation by defendant Krick on January 25, 2019, defendant Krick advised plaintiff that he was going to train her as a 35 year-old; there are no documents used by defendant Krick in providing services that explain how to instruct a client to perform a particular activity; part of the trainer's job is to facilitate the client performing the exercise safely and one-on-one supervision allows the trainer to do everything to ensure that a

client could safely stop an exercise to avoid injury; as long as the client is performing the exercise they are under defendant Krick's instruction and supervision as to how to perform and finish an exercise safely to avoid injury; defendant Krick never received any specific training with the Bosu Ball; defendant Krick admitted that the only exercise in the manual using the platform side up was a pushup; defendant Krick was unaware of any instruction in the manufacturer's manual for using the Bosu ball platform side while standing or with weights; all of the exercises defendant Krick directed plaintiff to perform involved her standing on the platform side of the Bosu with the dome surface on the floor; the Bosu that plaintiff was directed by defendant Krick to use was always presented to her with the platform side up and the dome side on the floor; the warnings on the Bosu were positioned so they could only be read when the platform side was on the floor and the warnings were always upside down when plaintiff used the Bosu so she never had the opportunity to review the warnings; on each occasion while plaintiff used the Bosu ball prior to her injury, she was assisted by defendant Krick holding her hand as she got onto the platform side and after which he would hand her weights to perform exercises; defendant Krick spotted for her while performing the exercises; after she finished with the weights, defendant Krick would continue to spot her as he assisted her off the Bosu by holding her hand before he returned the weight to the weight rack; on the date of the subject incident defendant Krick did not continue to spot her and provide her assistance after he took the weights from her and instead he turned his back on her and walked to the weight rack; the area around the Bosu did not have a safety rail or safety floor mat; plaintiff lost her balance on the Bosu and launched backwards into the air, causing her to extend her hands behind her to attempt to break her fall; and as a result of the fall, plaintiff suffered a comminuted fracture of her right wrist and severed tendon in her left wrist, which both required surgery. (Defendants' Response to Plaintiff's Statement of Additional Undisputed

Facts in Opposition to Motion for Summary Judgment, Fact Numbers 5-11, 15, 17, 18, 25-27, 29, 30, 34, 35, 36, 40, 41, 42, and 44.)

There is also evidence of the following facts submitted in opposition: based upon Mr. Brodnicki's education, training and experience in the field of personal exercise training and his familiarity with the Bosu, including materials from the manufacturer, the Bosu is exercise equipment that looks like one half of a large exercise ball with a rounded rubber side and a flat side; the rounded top side is commonly referred to as the dome, while the flat bottom side is commonly referred to as the platform side; the rounded dome is inflated and under pressure as specified in the manual; virtually all exercises recommended by the Bosu manufacturer in its manual are performed with the flat bottom side on the floor and the domed side facing up; this flat platform side forms a stationary base that the user can the perform exercises while laying on, seated, or stepping on and off the domed surface; when the Bosu is inverted with the dome side down on the floor, it is highly unstable and the single exercise shown in the manual where the Bosu is inverted is a pushup; the manufacturer's instructions and warnings advise that not all exercises are appropriate for all people and specifically for people over the age of 35; the manufacturer's instructions and warnings advise that standing on the platform is not recommended as it increases the risk of serious death or injury; the Bosu warning labels specify that standing on the platform side increases the risk of falling because the platform tips quickly and extra precautions are required, such as using a fixed handhold, not hold weights, having a spotter, or using mats; and it is the expert's opinion that the defendants' conduct was below the applicable standard of care for personal trainers and reflected an indifference to the risk of injury or the want of even scant care, because defendant failed to incorporate into plaintiff's exercise the manufacturer's instructions and warnings about how to safely perform exercises for a person over the age of 35 as noted in the manual, given plaintiff's age of 70,

defendant failed to consider developing an exercise program to address plaintiff's disclosed taking of two blood pressure medications that could cause light headedness, particularly since she had become dizzy during one instance when exercising, the material reflects that plaintiff's training program should have centered on weight loss, which would be more appropriately accomplished by a series of cardiovascular exercises and leave the balance exercise to the warm-up and cool down portion of the program, the weighted portion of the program should have been separated from any balance movements using the platform and incorporating the weights, which required special precautions such as a hand rail, spotter or mats, the risk vs reward of including exercises on the platform side of the inverted Bosu is too steep as there are available exercises using the rounded dome side would have accomplished the same goal, and given the instability of the inverted Bosu, if a 70 year-old client is going to perform balance exercises on the platform side of the Bosu as training, Mr. Brodnicki would always help them on and off the Bosu; and defendant turning his back on plaintiff and walking a distance away where he could not help plaintiff safely dismount the Bosu reflects a want of even scant care; and these failures were a substantial factor in causing plaintiff to fall from the Bosu and suffer injury. (Declaration of Clarke Brodnicki in Opposition to MSJ, paragraphs 8-10.)

Defendant Krick admitted in his deposition testimony that when he went through the Bosu ball manual he kind of skimmed it to see if there was anything that would benefit his knowledge; the last time he reviewed that manual was probably in July 2014; and in developing the exercise program for plaintiff he did not ever take into consider the warning in the manual that certain exercise programs or types of equipment may not be appropriate for all people, especially important for people over age 35, pregnant women, persons with pre-existing conditions, orthopedic conditions or balance impairments. (Transcript of Defendant

Krick's Deposition Testimony, page 113, lines 1-12; page 114, lines 16-20; and page 115, lines 10-24.)

There is evidence that defendant Krick at no time provided instruction to plaintiff or directed her to warm up on the domed top side of the Bosu ball as directed by the manual; and whenever she was directed to use the Bosu ball, the rounded top was an always facing down with the warnings on the Bosu ball in an upside-down position where they were not readable or noticeable by plaintiff. (Plaintiff's Declaration in Opposition to Motion, paragraphs 13 and 14.)

Strictly construing the moving party's evidence, liberally construing the evidence submitted in opposition to the motion, resolving doubts as to the propriety of granting the motion in favor of the party resisting the motion, and considering all of the evidence and all of the inferences reasonably drawn therefrom in the light most favorable to the opposing party (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843; and Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal.App.4th 1509, 1524.), the court finds the evidence and undisputed facts before the court raises a triable issue of material fact as to whether the conduct of defendants amounted to want of even scant care or an extreme departure from the ordinary standard of conduct that shows defendants were grossly negligent such that the executed waiver of liability does not apply.

Defendants' motion for summary judgment is denied.

TENTATIVE RULING # 12: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT 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, MARCH 18, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

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

Defendant's Motion to Strike Punitive Damages.

Plaintiffs filed an action against defendant asserting causes of action 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 20-23 and 30-33 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; and allegations that the defendant erected temporary pop-up tents without anchoring the poles is ordinary negligence and does rise to the level that bodily injury is virtually certain.

Plaintiffs oppose the motion on the following grounds: punitive damages are available for non-intentional torts; and plaintiffs have sufficiently alleged facts to support a claim for punitive damages.

Defendant replied to the opposition.

"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 viewed considering the clear and convincing burden of proof.

" 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civil Code, § 3294(c)(1).)

" 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civil Code, § 3294(c)(2).)

" 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (Civil Code, § 3294(c)(3).)

"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.)

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.) <u>The statute's reference to "despicable conduct" represents "a new substantive limitation on punitive damage awards."</u> (*College Hospital, Inc. v. Superior Court, supra,* 8 Cal.4th at p. 725, 34 Cal.Rptr.2d 898, 882 P.2d 894.) ¶ Additionally, <u>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.]"</u> (*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.) (<u>Lackner v. North</u> (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.)

Plaintiffs allege: defendant knew the tents were not tied down, weighed down, anchored or affixed to the asphalt which could cause tents to move, shift, slide, and fly upward with gusting winds causing injuries to patrons; defendant knew of the dangerous condition, yet failed to take any steps to protect against the risk; defendant did not adequately inspect, safeguard, remedy, or otherwise operate the facility and eliminate the hazards in areas where patrons would be dining; as a result of callous acts of defendants, while dining at the restaurant plaintiff suffered serious and severe injury because the tent violently flew upward causing him to react to protect himself and others resulting in injury; despite the availability of many measures that defendant could have taken, defendant callously chose to do nothing in order to keep costs down and increase profits and defendant wanted a cheap, inexpensive seating area set up for customers to dine at, even though weighing down or anchoring the tents would be a minimal cost;

defendant did not make the area safe for business reasons; this establishes that defendant acted despicably and with a willful and conscious disregard for the rights and safety of others making defendant liable for punitive damages. (Complaint, paragraphs 19-23 and 29-33.)

The facts alleged to support the conclusions of callous, despicable, and willful and conscious disregard simply do not rise to the level required to establish punitive damages when taken as true for the purposes of this motion. The facts do not clearly and convincingly show that the conduct alleged was so vile, base, contemptible, miserable, wretched, or loathsome that it would be looked down upon and despised by ordinary decent people or the acts are reprehensible, fraudulent or in blatant violation of law or policy.

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

TENTATIVE RULING # 13: DEFENDANT'S MOTION TO STRIKE PUNITIVE DAMAGES IS GRANTED WITH TEN DAYS LEAVE TO AMEND. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY

AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.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, MARCH 18, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.