1. DIIORIO v. WILLIAMS PC-201700494

Judgment Debtor Examination.

TENTATIVE RULING # 1: THE PERSONAL APPEARANCE OF THE DEBTOR IS REQUIRED AT 8:30 A.M., FRIDAY, MAY 6, 2022, IN DEPARTMENT NINE, PROVIDED PROOF OF SERVICE OF THE ORDER TO APPEAR FOR EXAMINATION IS FILED PRIOR TO THE HEARING SHOWING THAT PERSONAL SERVICE ON THE DEBTOR WAS AFFECTED NO LATER THAN TEN DAYS PRIOR TO THE HEARING DATE (CCP, § 708.110(d)). IF THE APPROPRIATE PROOF OF SERVICE IS NOT FILED, NO EXAMINATION WILL TAKE PLACE.

2. MATTER OF DAVIS 22CV0343

OSC Re: Name Change.

Petitioner failed to complete and execute the declaration at paragraph 7.f. of the form petition to change name. This needs to be completed.

TENTATIVE RULING # 2: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, MAY 6, 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. MATTER OF MICHAEL 22CV0312

OSC Re: Name Change.

TENTATIVE RULING # 3: THE PETITION IS GRANTED.

4. HIGH HILL RANCH, LLC v. COUNTY OF EL DORADO 21CV0178

Review Hearing Re: Receipt of Administrative Record.

High Hill Ranch appeals from the administrative decision in a code enforcement case. The administrative record was not lodged as of the date this ruling was prepared.

TENTATIVE RULING # 4: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, MAY 6, 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.

5. DUPPMAN v. WAGSTER PC-20210407

Hearing Re: Default Judgment.

Plaintiff filed an action against defendant for personal injuries allegedly sustained during a motor vehicle accident. The proof of service filed on December 22, 2021, declares that defendant was personally served the summons and complaint on December 16, 2022. Default was entered on April 1, 2022. Plaintiff seeks entry of a judgment in the amount of $1,000,000 in damages, plus an award of attorney fees and costs.

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

Where damages are sought for personal injuries or wrongful death the plaintiff is statutorily mandated to serve a statement of damages on defendants in the same manner as a summons that specifies the separate amounts of general and special damages sought to be recovered from the defendants (Code of Civil Procedure, § 425.11(d).) and either the complaint or the statement of damages must separately state the amounts of special and general damages sought. (See Schwab v. Southern California Gas Co. (2004) 114 Cal.App.4th 1308, 1322; and Schwab v. Rondel Homes, Inc. (1991) 53 Cal.3d 428, 434.)

The Third District Court of Appeal has held with regard to sufficient allegations of the amount of damages in order to enter a default judgment: "Under *Greenup* and *Schwab,* this is insufficient to give the requisite notice of the amount of damages claimed. In order to meet the notice requirements imposed by due process, a plaintiff must either give notice of the damages

claimed in a separate statement of damages or by the allegations of the complaint. To pass constitutional muster, the complaint must either allege a specific dollar amount of damages in the body or prayer or at the very least allege the boilerplate damages are "in an amount that exceeds the jurisdictional requirements" of the superior court. An allegation seeking damages "according to proof" fails to fulfill the mandate of section 425.11 or of due process. After all, a "defendant is entitled to actual notice of the liability to which he or she may be subjected, a reasonable period of time before default may be entered." (*Schwab, supra,* 53 Cal.3d at p. 435, 280 Cal.Rptr. 83, 808 P.2d 226.)" (Parish v. Peters (1991) 1 Cal.App.4th 202, 216.)

The Third District Court of Appeal has held: "A defendant's failure to answer the complaint has the same effect as admitting the well-pleaded allegations of the complaint, and as to these admissions *no further proof of liability is required.* (§ 431.20, subd. (a); *Kim, supra,* 201 Cal.App.4th at pp. 281–282, 133 Cal.Rptr.3d 774.) Thus, in a default situation such as this, if the complaint properly states a cause of action, the only additional proof required for the judgment is that needed to establish the amount of damages. (See *Beeman v. Burling, supra,* 216 Cal.App.3d at p. 1597, 265 Cal.Rptr. 719; see also *Ostling v. Loring, supra,* 27 Cal.App.4th at p. 1745, 33 Cal.Rptr.2d 391.)" (Emphasis added.) (Carlsen v. Koivumaki (2014) 227 Cal.App.4th 879, 898.)

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

""It is imperative in a default case that the trial court take the time to analyze the complaint at issue and ensure that the judgment sought is not in excess of or inconsistent with it. It is not in plaintiffs' interest to be conservative in their demands, and without any opposing party to point out the excesses, it is the duty of the court to act as gatekeeper, ensuring that only the

appropriate claims get through." (*Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 868, 121 Cal.Rptr.2d 695 (*Heidary*).)" (Electronic Funds Solutions v. Murphy (2005) 134 Cal.App.4th 1161, 1179.)

With the above-cited principles in mind, the court will rule on the request to enter a default judgment against defendant.

First, plaintiff filed a complaint for personal injuries, which does not allege a specific amount of damages sought. There is no proof of service of a statement of damages on plaintiff in the court's file. Therefore, the court can not enter a judgment in any amount.

"Under section 580, subdivision (a), "[t]he relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in the complaint[.]" "The courts have consistently held section 580 is an unqualified limit on the jurisdiction of courts entering default judgments. As a general rule, a default judgment is limited to the damages of which the defendant had notice. Further, the courts have reaffirmed the language of section 580 is mandatory. Therefore, 'in all default judgments the demand sets a ceiling on recovery.' " (*Finney v. Gomez* (2003) 111 Cal.App.4th 527, 534, 3 Cal.Rptr.3d 604, quoting *Greenup v. Rodman* (1986) 42 Cal.3d 822, 824, 231 Cal.Rptr. 220, 726 P.2d 1295.) ¶ Because that ceiling is jurisdictional, "a default judgment is void when the damages are in excess of the damages specified in the complaint or the statement of damages." (*Yeung v. Soos* (2004) 119 Cal.App.4th 576, 582, 14 Cal.Rptr.3d 502.) "A void judgment may be challenged at any time." (*Ibid.*)" (David S. Karton, a Law Corp. v. Dougherty (2009) 171 Cal.App.4th 133, 150.)

Since a party to be defaulted has not appeared in the action, such a statement must be personally served prior to entry of default. (Code of Civil Procedure, §§ 425.11(c) and (d).)

The appellate court in Hamm v. Elkin (1987) 196 Cal.App.3d 1343, found at page 1346: "The court correctly interpreted the statute as requiring the statement of damages before the

clerk's default. This interpretation is appropriate for a number of reasons. It furthers the strong policy of the law in favor of adjudication on the merits. It recognizes that knowledge of the alleged amount of damages may be crucial to a defendant's decision whether to permit a clerk's default. (See *Jones v. Interstate Recovery Service* (1984) 160 Cal.App.3d 925, 930, 206 Cal.Rptr. 924.) It reflects the common understanding that a clerk's default is 'taken' by counsel while the default judgment is 'entered' by the court. Finally, one purpose of section 425.11 is to give the defendant a final chance to respond to the allegations of the complaint (*Stevenson v. Turner* (1979) 94 Cal.App.3d 315, 319-320, 156 Cal.Rptr. 499), and this purpose would be frustrated if the plaintiff could wait until after the clerk's default before serving the statement, when the defendant could respond only on the issue of damages."

Absent notice provided to defendant of the amount of damages plaintiff seeks in this case before entry of judgment, there is no damages ceiling set for recovery on a default and, therefore, no amount of damages can be awarded as any amount of damages would be void as exceeding the zero amount requested. The court can enter judgment awarding zero damages.

Second, even assuming for the sake of argument that there was no problem with the failure to serve a statement of damages, there is no evidence submitted by plaintiff establishing plaintiff's claimed damages of $1,000,000, or any legal citation supporting a claim for an award of attorney fees in a personal injury case.

TENTATIVE RULING # 5: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, MAY 6, 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.

6. RUSSELL v. GUMINA PC-20210360

Hearing Re: Default Judgment.

Plaintiff Special Administrator of the Estate of Heather Gumina filed an action against defendant asserting causes of action for wrongful death and survival action on behalf of the surviving heirs of the decedent. The complaint alleges that defendant, the spouse of the decedent, assaulted the decedent twice in two days, with the second assault resulting in injuries that caused her death. The complaint requests an award of general and special damages according to proof and punitive damages.

The proof of service filed on September 10, 2021, declares that defendant was personally served the summons, complaint, notice of case assignment, and case management form at the Placerville Jail on September 1, 2021. The proof of service filed on November 2, 2021, declares that defendant was personally served the statement of damages at the Placerville Jail on October 19, 2021. Default was entered against defendant on November 8, 2021.

The statement of damages, dated September 28, 2021, was filed on December 10, 2021. It asserts that plaintiff is seeking an award of $1,500,000 in damages for loss of society and companionship; $10,000 for funeral expenses; $1,000,000 for future contributions; $600,000 for value of personal service, advice, or training; and $1,000,000 for punitive damages.

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

Where damages are sought for personal injuries or wrongful death the plaintiff is statutorily mandated to serve a statement of damages on defendants in the same manner as a summons that specifies the separate amounts of general and special damages sought to be recovered from the defendants (Code of Civil Procedure, § 425.11(d).) and either the complaint or the statement of damages must separately state the amounts of special and general damages sought. (See Schwab v. Southern California Gas Co. (2004) 114 Cal.App.4th 1308, 1322; and Schwab v. Rondel Homes, Inc. (1991) 53 Cal.3d 428, 434.)

The Third District Court of Appeal has held with regard to sufficient allegations of the amount of damages in order to enter a default judgment: "Under *Greenup* and *Schwab,* this is insufficient to give the requisite notice of the amount of damages claimed. In order to meet the notice requirements imposed by due process, a plaintiff must either give notice of the damages claimed in a separate statement of damages or by the allegations of the complaint. To pass constitutional muster, the complaint must either allege a specific dollar amount of damages in the body or prayer or at the very least allege the boilerplate damages are "in an amount that exceeds the jurisdictional requirements" of the superior court. An allegation seeking damages "according to proof" fails to fulfill the mandate of section 425.11 or of due process. After all, a "defendant is entitled to actual notice of the liability to which he or she may be subjected, a reasonable period of time before default may be entered." (*Schwab, supra,* 53 Cal.3d at p. 435, 280 Cal.Rptr. 83, 808 P.2d 226.)" (Parish v. Peters (1991) 1 Cal.App.4th 202, 216.)

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

judgment is that needed to establish the amount of damages. (See *Beeman v. Burling, supra,* 216 Cal.App.3d at p. 1597, 265 Cal.Rptr. 719; see also *Ostling v. Loring, supra,* 27 Cal.App.4th at p. 1745, 33 Cal.Rptr.2d 391.)" (Emphasis added.) (Carlsen v. Koivumaki (2014) 227 Cal.App.4th 879, 898.)

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

""It is imperative in a default case that the trial court take the time to analyze the complaint at issue and ensure that the judgment sought is not in excess of or inconsistent with it. It is not in plaintiffs' interest to be conservative in their demands, and without any opposing party to point out the excesses, it is the duty of the court to act as gatekeeper, ensuring that only the appropriate claims get through." (*Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 868, 121 Cal.Rptr.2d 695 (*Heidary*).)" (Electronic Funds Solutions v. Murphy (2005) 134 Cal.App.4th 1161, 1179.)

- Proof of General and Special Damages

"Wrongful death is a statutorily created cause of action for pecuniary loss brought by heirs against a person who causes the death of another by a wrongful act or neglect. It is original in nature and does not represent a right of action that the deceased would have had if the deceased had survived the injury. (Code Civ.Proc., § 377; *Reyna v. San Francisco* (1977) 69 Cal.App.3d 876, 138 Cal.Rptr. 504.) It is a cause of action for the heir who recovers for the pecuniary loss suffered on account of the death of the relative. (Id. at p. 882, 138 Cal.Rptr. 504.)" (Jacoves v. United Merchandising Corp. (1992) 9 Cal.App.4th 88, 105.)

"A survivor claim is also a statutory cause of action; however, unlike a wrongful death claim, the survival statutes do not *create* a cause of action but merely prevent the abatement of the

decedent's cause of action and provide for its enforcement by the decedent's personal representative or successor in interest. (§§ 377.20, 377.30; *Grant v. McAuliffe* (1953) 41 Cal.2d 859, 864, 264 P.2d 944.) Damages for a survivor claim include punitive damages and all the decedent's losses incurred prior to death, but exclude any award for the decedent's pain or suffering. (§ 377.34.) ¶ There is but one survivor cause of action belonging to the decedent that is brought on behalf of the decedent by the decedent's personal representative or successor in interest. (§§ 377.20, 377.30.)" (San Diego Gas & Elec. Co. v. Superior Court (2007) 146 Cal.App.4th 1545, 1553.)

There is no evidence in the court's file establishing the claimed amounts of general and special damages in the statement of damages, or any amounts of such damages.

Unless plaintiff presents evidence at the hearing to establish the amounts of special and general damages incurred by the decedent's heirs and the damages sustained by decedent for the survival cause of action, the court would have no alternative other than to deny any judgment for general and special damages as plaintiff would not have met the burden to prove the amount of damages.

- Proof of Punitive Damages

In assessing punitive damages, the damages awarded must bear a reasonable relationship to the net assets of the defendants. (Little v. Stuyvesant Life Ins. Co. (1977) 67 Cal.App.3d 451, 469.) The factors to consider in determining the amount of punitive damages include the nature of defendant's acts and the wealth of the defendant. (Michaelson v. Hamada (1994) 29 Cal.App.4th 1566, 1593.) The amount awarded must be supported by substantial evidence of the defendant's financial condition. (Adams v. Murakami (1991) 54 Cal. 3d 105, 116.) In the absence of evidence of defendant's net worth, the court can not properly assess an amount for punitive damages. Without such evidence, the amount imposed would be based on mere

speculation. Sound public policy should preclude awards based on mere speculation. (Adams, supra at page 114.)

While a statement of damages that includes a claim for punitive damages sets the limit on the amount of punitive damages the court may award, the court must still determine under the law the amount of punitive damages that appears just under the evidence produced at the default prove-up hearing. (Code of Civil Procedure, § 585(b) and 6 Witkin, California Procedure (5th ed. 2008) Proceedings Without Trial, § 169, pages 609-610.) "Only evidence in support of the allegations of the complaint is admissible. (*Jackson v. Bank of America* (1986) 188 C.A.3d 375, 387, 233 C.R. 162.) If the evidence is sufficient to support those allegations, the court must enter judgment for the plaintiff. (*Csordas v. United Slate Tile & Composition Roofers* (1960) 177 C.A.2d 184, 186, 2 C.R. 133.) If the evidence does not support the allegations, the court will deny a default judgment. (*Taliaferro v. Hoogs* (1963) 219 C.A.2d 559, 560, 33 C.R. 415.) (See *Johnson v. Stanhiser* (1999) 72 C.A.4th 357, 361, 85 C.R.2d 82 [at prove-up hearing trial judge erroneously applied preponderance of evidence standard in determining whether plaintiff was entitled to damages; correct standard requires that plaintiff merely establish prima facie case, which plaintiff did through sworn supplemental statement and numerous exhibits detailing relationship with defendant]; *Kahn v. Lasorda's Dugout* (2003) 109 C.A.4th 1118, 1124, 135 C.R.2d 790 [trial court has discretion to accept copy of promissory note where original is lost].)" (6 Witkin, California Procedure (5th ed. 2008) Proceedings Without Trial, § 170, pages 610-611.) Plaintiff must produce evidence of the net worth of the defendant for the court to determine an appropriate punitive damages amount.

The court continued the hearing of this matter from April 15, 2022, to May 6, 2022, with notice given to the plaintiff. Plaintiff was to provide the evidence to support the damages

claimed prior to the hearing. At the time this ruling was prepared there was no evidence in the court's file and not proof that the April 15, 2022, minute order was served on the plaintiff.

Absent evidence of defendant's net worth, the court can not properly assess an amount for punitive damages. Unless the plaintiff presents evidence of defendant's net worth prior to the hearing, the court will have no alternative other than to deny the request for a judgment awarding punitive damages.

TENTATIVE RULING # 6: YOU HAVE NOT PROVIDED ANY EVIDENCE FOR GENERAL, SPECIAL OR PUNITIVE DAMAGES. THE COURT ORDERS ON ITS OWN MOTION WILL GIVE ONE MORE CONTINUANCE TO JUNE 3, 2022, AT 8:30 A.M. IN DEPARTMENT 9.

7. WORTH v. SQUIRES 21UD0052

Defendants' Motion to Set Aside/Vacate Default.

On January 3, 2022, defendants filed an answer to the complaint for unlawful detainer. On February 15, 2022, the court clerk served by mail to plaintiff's and defendants' addresses of record notice that the trial was set to commence on March 14, 2022, at 9:30 a.m. in Department Nine. Defendants failed to appear at trial, plaintiff made an offer of proof, counsel was questioned, and judgment entered against defendants.

Defendants move to vacate the judgment on the grounds of inadvertence, surprise and excusable neglect due to improper service of the notification of trial in that plaintiff purportedly removed from defendant's mailbox the notification of trial.

There is no proof of service of notice of the hearing and a copy of the moving papers on plaintiff in the court's file and no opposition in the court's file. Therefore, the court can not enter a ruling on the merits of the motion and should proof of adequate service on plaintiff is not filed, the court will have no alternative other than to deny the motion without prejudice due to lack of proof of service.

Code of Civil Procedure, § 473(b) allows for a party to obtain relief from a default and default judgment which was taken against the party through his or her mistake, inadvertence, surprise, or excusable neglect. (Code of Civil Procedure, § 473(b).)

"It is settled that the law favors a trial on the merits (*Elms v. Elms* (1946) 72 Cal.App.2d 508, 513, 164 P.2d 936; *Benjamin v. Dalmo Mfg. Co.* (1948) 31 Cal.2d 523, 525, 190 P.2d 593; *Davis v. Thayer* (1980) 113 Cal.App.3d 892, 904, 170 Cal.Rptr. 328; *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233, 211 Cal.Rptr. 416, 695 P.2d 713; *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 243 Cal.Rptr. 902, 749 P.2d 339) and therefore liberally construes

section 473. (*Elms v. Elms*, supra, 72 Cal.App.2d at p. 513, 164 P.2d 936.) Doubts in applying section 473 are resolved in favor of the party seeking relief from default (*Elston v. City of Turlock*, supra, 38 Cal.3d at p. 233, 211 Cal.Rptr. 416, 695 P.2d 713) and if that party has moved promptly for default relief only slight evidence will justify an order granting such relief." (Iott v. Franklin (1988) 206 Cal.App.3d 521, 526.)

Defendants declares a third party witnessed plaintiff taking the notification of trial from the plaintiff's mailbox; at the time it was witnessed by the third party, defendants did not know that what was taken was the hearing notification, as plaintiff had rummaged through defendants' mailbox illegally a number of times before as had been witnessed by several third parties; knowing the courts were delayed, and new to the legal process, defendants did not question the fact they had not yet received notice of the hearing; and due to plaintiff's conduct, defendants had no way of knowing about the hearing and could not have attended.

There are no declarations from the third-party witnesses in the court's file.

Absent proof of adequate service on plaintiff the motion is denied without prejudice due to lack of proof of service.

TENTATIVE RULING # 7: DEFENDANTS' MOTION TO SET ASIDE/VACATE DEFAULT IS DENIED WITHOUT PREJUDICE DUE TO LACK OF PROOF OF SERVICE. 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, MAY 6, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

8. ALLIANCE FOR RESPONSIBLE PLANNING v. EL DORADO COUNTY PC-20160346

Motion for Attorney Fees.

On April 8, 2022, the parties submitted a stipulation and order wherein they agreed to set attorney fees payable by County to Alliance for Responsible Planning in the sum of $5,000 in full satisfaction of the request for attorney fees from County related to the County's motion for discovery filed on October 21, 2021; and that the May 6, 2022, hearing be vacated. The court entered the order as requested on April 8, 2022.

TENTATIVE RULING # 8: THIS HEARING WAS VACATED PURSUANT TO PRIOR COURT ORDER.

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

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

TENTATIVE RULING # 9: THIS MATTER IS CONTINUED TO 8:30 A.M. ON FRIDAY, JUNE 17, 2022, IN DEPARTMENT NINE.

10. SHTULVARG CORP. v. HWANG 21CV0220

Defendants Hwang's and Lee's Demurrer to 1st Amended Complaint.

On January 28, 2022, plaintiff filed a 1st amended complaint asserting causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, unfair competition and breach of the Uniform Trade Secrets Act.

Defendants Hwang and Lee assert: the entire 1st amended complaint is uncertain as it can not be determined which causes of action are directed at which defendants and it is uncertain as to how the defendants' complained of conduct caused plaintiff damages where sushi restaurant customers choose to patronize restaurants other than plaintiff's restaurant; the facts alleged do not sufficiently allege that defendants Hwang and Lee breached any contract they had with plaintiff; the breach of implied covenant cause of action is duplicative of the breach of contract cause of action and is defective for the same reasons; the conduct complained of is not unfair competition as a matter of law; and the 1st amended complaint fails to state a cause of action for violation of the Trade Secrets Act as plaintiff has failed to allege, and can not truthfully allege, that that the recipes were among the assets transferred.

Plaintiff opposes the demurrers on the following grounds: the complaint's allegations of fact sufficiently allege that the non-competition clause was agreed to by defendants and defendants breached that non-competition clause by operating sushi businesses within a 15 mile radius of the sushi business defendants sold to plaintiff and indirectly competing with plaintiff by hiring away its employees; since Section 6 of the agreement provides that no asset of the business was excluded from the sale to plaintiff, this included the sale of the recipes to plaintiff and defendants and use of those recipes also constituted a breach of the non-competition clause of the agreement; the bill of sale containing the second non-competition

provision is also an enforceable contract and is supported by valuable consideration of $3,000 in exchange for the sale of furniture and equipment of the business; the breach of implied covenant of good faith and fair dealing is not merely a duplicate of the breach of contract cause of action and sufficiently alleges such a cause of action; the unfair competition cause of action adequately alleges such a cause of action premised upon unfair conduct involving violation of the non-competition causes of the agreement; and the 1st amended complaint adequately alleges a violation of trade secret act as the 1st amended complaint alleges that plaintiff owned the subject sauce recipes as they were sold as an asset of the business to plaintiff, those trade secret sauce recipes are vital to the plaintiff's business, plaintiff took efforts to maintain secrecy of the recipes as public dissemination of the recipes will cause plaintiff irreparable injury, those recipes were misappropriated by defendants when they solicited and hired one of plaintiff's employees, and defendants hired the employee to use the recipe in a competing restaurant.

Defendants replied to the opposition.

Demurrer Principles

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

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

572 [108 Cal.Rptr. 480, 510 P.2d 1032].)" (Highlanders, Inc. v. Olsan (1978) 77 Cal.App.3d 690, 696-697.)

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

""To determine whether a cause of action is stated, the appropriate question is whether, upon a consideration of all the facts alleged, it appears that the plaintiff is entitled to any judicial relief against the defendant, notwithstanding that the facts may not be clearly stated, or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he is not entitled under the facts alleged. (*Elliott v. City of Pacific Grove*, 54 Cal.App.3d 53, 56, 126 Cal.Rptr. 371.) Mistaken labels and confusion of legal theory are not fatal because the doctrine of "theory of the pleading" has long been repudiated in this state. (*Lacy v. Laurentide Finance Corp*., 28 Cal.App.3d 251, 256-257, 104 Cal.Rptr. 547.)" (Spurr v. Spurr (1979) 88 Cal.App.3d 614, 617.)

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

With the above-cited legal principles in mind, the court will rule on defendants' demurrers to the 1st amended complaint.

Breach of Contract Cause of Action

Defendants Lee and Hwang argue that the complaint fails to state sufficient facts against them to establish they breached an agreement that they were parties to; the box next to the noncompetition clause in the agreement was not checked; and the agreement did not include intellectual property, such as recipes.

"Under a breach of contract theory, the plaintiff must demonstrate a contract, the plaintiff's performance or excuse for nonperformance, the defendant's breach, and damage to the plaintiff. (4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 476, p. 570.)" (Amelco Electric v. City of Thousand Oaks (2002) 27 Cal.4th 228, 243.)

The complaint alleges: defendant Woori Jiang, Inc. is a suspended corporation; defendant Woori Jiang, Inc. is the alter ego of defendant Hwang as it is undercapitalized and/or defunct, and there is a unity of interest and ownership between Woori Jiang, Inc. and defendant Hwang such that there is no separate existence between the corporation and individual; defendant Lee is and at all times relevant, the owner of Sky Sushi located in Rancho Cordova; each defendant is a joint venturer, partner, successor in interest, related entity, and/or alter ego of each of the other defendants acting within the scope of authority conferred on them by consent, approval, and/or ratification, whether said authority was actual or apparent; on November 5, 2018 the Shtulvargs entered in an agreement to purchase form defendant Woori Jiang, Inc. the subject Sky Sushi restaurant on Park Drive in El Dorado Hills for $250,000; defendant Hwang executed the agreement upon behalf of the corporation; the agreement transferred the restaurant's liquor license, furniture, fixtures, and all tangible and intangible assets, such as recipes, to the Shtulvargs; Section 11 of the agreement included a non-

competition clause that prohibited the seller from operating or engaging in directly or indirectly in any business that is the same as or substantially similar to the business sold within 15 miles of the current location of the business for the next five years from the final date of transfer of the business, so long as the buyer or the buyer's successor in interest is operating the business in that area; the Shtulvargs formed the Shtulvarg Corporation in December 2018; the Shtulvargs have served as directors of the corporation since it was formed; the Shtulvargs transferred and assigned all their rights under the agreement and related claims to the corporation; on May 31, 2019 defendant Hwang, on behalf of Woori Jiang, Inc., executed a separate bill of sale conveying Sky Sushi to the Shtulvarg Corporation; an additional non-competition provision was included in the bill of sale; the bill of sale was accompanied by escrow instructions to transfer the liquor license; defendants breached the non-competition provision by their involvement in multiple competing restaurants within a 15 mile radius of the plaintiff's restaurant, which offer the same or substantially the same menu items and dining experience as Sky Sushi, including a second Sky Sushi restaurant located on Sunrise Boulevard in Rancho Cordova, which is 12.7 miles away from the Ski Sushi business located on Park Drive in El Dorado Hills that plaintiff purchased; defendants personally and through their agents solicited and hired employees away from plaintiff's business, including Luis Raza; defendants also misappropriated one of plaintiff's trade secret sauce recipes by hiring one of plaintiff's former employees who knew the sauce recipe; the trade secret recipe was transferred to plaintiff along with all other assets of the business at the time plaintiff purchased the business; the trade secret sauce recipe is vital to plaintiff's business, and public dissemination of the recipe would cause irreparable harm to plaintiff's business; plaintiff has fully performed all obligations required of plaintiff by the agreement, including payment of $250,000 to defendants; all conditions precedent requiring full performance by defendants

have occurred or were excused; and as a result of defendants' breaches of the agreement, plaintiff has been damaged in an amount according to proof at trial, but not less than $25,000. (1st Amended Complaint, paragraphs 3, 4, 5, 9-17, 22-27 and 28.)

Defendants argue that the bill of sale is not a contract.

"It is essential to the existence of a contract that there should be: ¶ 1. Parties capable of contracting; ¶ 2. Their consent; ¶ 3. A lawful object; and, ¶ 4. A sufficient cause or consideration." (Civil Code, § 1550.)

Exhibit 2 attached to the 1st amended complaint is the bill of sale executed by defendant Hwang for defendant Woori Jiang, Inc. That bill of sale expressly states that for valuable consideration paid and received by Woori Jiang, Inc., the furniture and equipment for the Sky Sushi business is sold and conveyed to Shtulvarg Corporation. The bill of sale includes a list of equipment and furniture sold and conveyed for value allocated in the amount of $3,000. A non-competition provision is also included in the bill of sale. Taking a true the allegations of the 1st amended complaint for the purposes of demurrer, plaintiff has alleged sufficient facts to establish that the bill of sale is a valid enforceable contract.

Plaintiff has also adequately alleged that defendants Hwang and Lee are bound as parties to the subject sales agreement and bill of sale. General allegations have been incorporated into the breach of contract cause of action wherein it is alleged that defendant Woori Jiang, Inc. is the alter ego of defendant Hwang; defendant Lee is and at all times relevant, the owner of Sky Sushi located in Rancho Cordova; and defendants are joint venturers, partners, successors in interest, related entities, and/or alter egos of each other.

Attached to the complaint is Exhibit 1, which is the subject form business purchase agreement. The blanks of Section 11 have been fully filled out to provide for non-competition within a radius of 15 miles for five years. Immediately below that provision are the initials of the

buyers and seller on that page. (See 1st Amended Complaint, Exhibit 1, Business Purchase Agreement, Section 11, page 3 of 9.) The complaint affirmatively alleges in paragraph 10 that the agreement contained that provision, which stated it was a material part of the agreement.

"…to the extent the factual allegations conflict with the content of the exhibits to the complaint, we rely on and accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits. (*Weitzenkorn v. Lesser* (1953) 40 Cal.2d 778, 785, 256 P.2d 947; *Dodd v. Citizens Bank of Costa Mesa* (1990) 222 Cal.App.3d 1624, 1627, 272 Cal.Rptr. 623.)" (Barnett v. Fireman's Fund Ins. Co. (2001) 90 Cal.App.4th 500, 505.)

However, where the exhibit is ambiguous and can be construed to be consistent with the allegations of the complaint, then the court must adopt the construction consistent with the allegations of the pleading. "If the allegations in the complaint conflict with attached exhibits, we rely on and accept as true the contents and legal effect of the exhibits. (*SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 83, 76 Cal.Rptr.3d 73; *Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505, 108 Cal.Rptr.2d 657.) However, "if the exhibits are ambiguous and can be construed in the manner suggested by plaintiff, then we must accept the construction offered by plaintiff." (*SC Manufactured Homes, Inc. v. Liebert, supra,* at p. 83, 76 Cal.Rptr.3d 73.) " 'So long as the pleading does not place a clearly erroneous construction upon the provisions of the contract, in passing upon the sufficiency of the complaint, we must accept as correct plaintiff's allegations as to the meaning of the agreement.' [Citation.]" (*Aragon–Haas v. Family Security Ins. Services, Inc.* (1991) 231 Cal.App.3d 232, 239, 282 Cal.Rptr. 233.)" (Chisom v. Board of Retirement of County of Fresno Employees' Retirement Association (2013) 218 Cal.App.4th 400, 410-411.)

Inasmuch as the blanks in Section 11 were filled out and the box was not checked, there is an ambiguity that can be reasonably construed to be consistent with the allegations of the complaint that the parties intended to include the provision. Therefore, the court must adopt the construction consistent with the allegations of the pleading. It is not clearly erroneous to accept that construction, because the blanks were filled in indicating and intent to include the provision in the agreement and the failure to check the box could be a clerical error.

Section 6 of the Business Purchase agreement expressly includes buyer purchasing "all assets of the Business" without limitation and then lists assets that are included, "but not limited to". (See 1st Amended Complaint, Exhibit 1, Business Purchase Agreement, Section 6, page 3 of 9.) Plaintiff alleges in paragraph 17 of the 1st Amended Complaint that the sale of all assets included the trade secret recipes. The court must take the allegation as true for the purposes of demurrer.

In summary, treating as true all the complaint's material factual allegations and construing the complaint liberally to determine whether a cause of action has been stated, given the assumed truth of the facts pleaded, for the purposes of demurrer (Picton v. Anderson Union High School Dist. (1996) 50 Cal.App.4th 726, 732-733.), the court finds that plaintiff has adequately alleged a breach of contract cause of action against defendants Hwang and Lee. The demurrer to the breach of contact cause of action is overruled.

Breach of the Implied Covenant of Good Faith and Fair Dealing Cause of Action

Defendants contend that the breach of implied covenant cause of action is duplicative of the breach of contract cause of action and is defective for the same reasons as the breach of contract cause of action.

"It has long been recognized, of course, that every contract imposes upon each party a duty of good faith and fair dealing in the performance of the contract such that neither party shall do

anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 36, 44 Cal.Rptr.2d 370, 900 P.2d 619.) The Supreme Court has clarified, however, that an implied covenant of good faith and fair dealing cannot contradict the express terms of a contract. (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 374, 6 Cal.Rptr.2d 467, 826 P.2d 710 (Carma).) [Footnote omitted.]" (Storek & Storek, Inc. v. Citicorp Real Estate, Inc. (2002) 100 Cal.App.4th 44, 55.)

""The prerequisite for any action for breach of the implied covenant of good faith and fair dealing is the existence of a contractual relationship between the parties, since the covenant is an implied term in the contract." (*Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 49, 275 Cal.Rptr. 17.) " 'The implied covenant of good faith and fair dealing is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated by the contract.' " (*Pasadena Live v. City of Pasadena* (2004) 114 Cal.App.4th 1089, 1094, 8 Cal.Rptr.3d 233.)" (Spinks v. Equity Residential Briarwood Apartments (2009) 171 Cal.App.4th 1004, 1033.)

"The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made.* (E.g., *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 36, 44 Cal.Rptr.2d 370, 900 P.2d 619.) The covenant thus cannot " 'be endowed with an existence independent of its contractual underpinnings.' " (*Ibid.,* quoting *Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1153, 271 Cal.Rptr. 246.) It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (Guz v. Bechtel Nat. Inc. (2000) 24 Cal.4th 317, 349-350.)

"A " 'breach of the implied covenant of good faith and fair dealing involves something beyond breach of the contractual duty itself' and it has been held that '[b]ad faith implies unfair dealing rather than mistaken judgment.... [Citation.]' [Citation.]" (*Congleton v. National Union Fire Ins. Co.* (1987) 189 Cal.App.3d 51, 59, 234 Cal.Rptr. 218.) [Footnote omitted.]" (Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal.App.3d 1371, 1394.)

"…Nor is it necessary that the party's conduct be dishonest. Dishonesty presupposes subjective immorality; the covenant of good faith can be breached for objectively unreasonable conduct, regardless of the actor's motive. (Summers, "*Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code, supra,* 54 Va.L.Rev., at pp. 204–206.)" (Carma Developers (Cal.), Inc. v. Marathon Development California, Inc. (1992) 2 Cal.4th 342, 373.)

"A " 'breach of the implied covenant of good faith and fair dealing involves something beyond breach of the contractual duty itself,' and it has been held that ' "[b]ad faith implies unfair dealing rather than mistaken judgment...." [Citation.]' [Citation.]" (*Congleton v. National Union Fire Ins. Co.* (1987) 189 Cal.App.3d 51, 59, 234 Cal.Rptr. 218.) For example, in the context of the insurance contract, it has been held that the insurer's responsibility to act fairly and in good faith with respect to the handling of the insured's claim " 'is not the requirement mandated by the terms of the policy itself-to defend, settle, or pay. It is the obligation ... under which the insurer must act fairly and in good faith in discharging its contractual responsibilities.' [Citation.]" (*California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 54, 221 Cal.Rptr. 171, italics omitted, [quoting from *Gruenberg v. Aetna Ins. Co.*, supra, 9 Cal.3d at pp. 573-574, 108 Cal.Rptr. 480, 510 P.2d 1032].) ¶ "Thus, allegations which assert such a claim must show that the conduct of the defendant, whether or not it also constitutes a breach of a consensual contract term, demonstrates a failure or refusal to discharge contractual

responsibilities, prompted not by an honest mistake, bad judgment or negligence but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement. Just what conduct will meet these criteria must be determined on a case by case basis and will depend on the contractual purposes and reasonably justified expectations of the parties." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395, 272 Cal.Rptr. 387; accord *State Farm Fire & Casualty Co. v. Superior Court* (1996) 45 Cal.App.4th 1093, 1105, 53 Cal.Rptr.2d 229.)" (Chateau Chamberay Homeowners Ass'n v. Associated Intern. Ins. Co. (2001) 90 Cal.App.4th 335, 345-346.)

All prior allegations of the 1st amended complaint are incorporated by reference into the breach of implied covenant of good faith and fair dealing cause of action. (1st Amended Complaint, paragraph 30.) The following allegations are also alleged in the breach of implied covenant of good faith and fair dealing cause of action: on November 5, 2018 the Shtulvargs entered in an agreement to purchase form defendant Woori Jiang, Inc. the subject Sky Sushi restaurant on Park Drive in El Dorado Hills for $250,000; the agreement transferred the restaurant's liquor license, furniture, fixtures, and all tangible and intangible assets, such as recipes, to the Shtulvargs; there was a separate bill of sale conveying Sky Sushi to Shtulvarg Corporation; an additional non-competition provision was included in the bill of sale that also required defendants not to compete directly or indirectly with Sky Sushi within a 15 mile radius of the subject business in El Dorado Hills for a period of five years; the Shtulvargs transferred and assigned all their rights under the agreement and related claims to the corporation; the agreement included the implied covenant of good faith and fair dealing; plaintiff has fully performed all obligations required of plaintiff by the agreement, including payment of $250,000 to defendants; all conditions precedent requiring full performance by defendants have occurred

or were excused; defendants breached the implied covenant by unfairly interfering with plaintiff's right to receive the benefits of the agreement by competing with plaintiff's business directly or indirectly, soliciting and/or hiring employees away from Sky Sushi, and a misappropriation of one of plaintiff's trade secret recipes for sauce; and as a result of defendants' breaches of the agreement, plaintiff has been damaged in an amount according to proof at trial, but not less than $25,000. (1st Amended Complaint, paragraphs 31-37.)

Plaintiff has adequately alleged a separate cause of action for breach of the implied covenant of good faith and fair dealing by defendants' alleged conduct that was something beyond breach of the contractual duty itself and had the effect of destroying or injuring the plaintiff's right to receive the fruits of the contract.

Treating as true all the complaint's material factual allegations and construing the complaint liberally to determine whether a cause of action has been stated, given the assumed truth of the facts pleaded, for the purposes of demurrer (Picton v. Anderson Union High School Dist. (1996) 50 Cal.App.4th 726, 732-733.), the court finds that plaintiff has adequately alleged a breach of the implied covenant of good faith and fair dealing cause of action. The demurrer to the breach of the implied covenant of good faith and fair dealing cause of action is overruled.

Unfair Competition Cause of Action

Defendants Hwang and Lee argue that since they have not agreed to alleged contracts in this action, they are not bound by any non-competition provision in those agreements and, therefore, competing with plaintiff can not be unfair conduct as a matter of law.

As stated earlier in this ruling, plaintiff has adequately alleged that defendants Hwang and Lee are bound as parties to the subject sales agreement and bill of sale, because it is alleged that defendant Woori Jiang, Inc. is the alter ego of defendant Hwang; defendant Lee is and at all times relevant was, the owner of Sky Sushi located in Rancho Cordova; and defendants are

joint venturers, partners, successors in interest, related entities, and/or alter egos of each other.

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

"Section 17200 'borrows' violations from other laws by making them independently actionable as unfair competitive practices. (*Cel-Tech*, supra, 20 Cal.4th at p. 180, 83 Cal.Rptr.2d 548, 973 P.2d 527.) In addition, under section 17200, 'a practice may be deemed unfair even if not specifically proscribed by some other law.' (*Cel-Tech*, at p. 180, 83 Cal.Rptr.2d 548, 973 P.2d 527.)" (Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1143.)

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

"Unlawful practices are practices "forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." (*Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 838–839, 33 Cal.Rptr.2d 438.) To state a cause of action based on an unlawful business act or practice under the UCL, a plaintiff must allege facts sufficient to show a violation of some underlying law." (Prakashpalan v. Engstrom, Lipscomb and Lack (2014) 223 Cal.App.4th 1105, 1133.)

"In contrast to its limited remedies, the unfair competition law's scope is broad. Unlike the Unfair Practices Act, it does not proscribe specific practices. Rather, as relevant here, it defines "unfair competition" to include "any unlawful, unfair or fraudulent business act or

practice." (§ 17200.)[8] Its coverage is "sweeping, embracing ' "anything that can properly be called a business practice and that at the same time is forbidden by law." ' " (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1200, 17 Cal.Rptr.2d 828, 847 P.2d 1044, quoting *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 113, 101 Cal.Rptr. 745, 496 P.2d 817.) It governs "anti-competitive business practices" as well as injuries to consumers, and has as a major purpose "the preservation of fair business competition." (*Barquis v. Merchants Collection Assn., supra,* 7 Cal.3d at p. 110, 101 Cal.Rptr. 745, 496 P.2d 817; see also *People v. McKale* (1979) 25 Cal.3d 626, 631–632, 159 Cal.Rptr. 811, 602 P.2d 731; *People ex rel. Mosk v. National Research Co. of Cal.* (1962) 201 Cal.App.2d 765, 771, 20 Cal.Rptr. 516.) By proscribing "any unlawful" business practice, "section 17200 'borrows' violations of other laws and treats them as unlawful practices" that the unfair competition law makes independently actionable. (*State Farm Fire & Casualty Co. v. Superior Court* (1996) 45 Cal.App.4th 1093, 1103, 53 Cal.Rptr.2d 229, citing *Farmers Ins. Exchange v. Superior Court, supra,* 2 Cal.4th at p. 383, 6 Cal.Rptr.2d 487, 826 P.2d 730.) ¶ However, the law does more than just borrow. The statutory language referring to "any unlawful, unfair *or* fraudulent" practice (italics added) makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law. "Because Business and Professions Code section 17200 is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent. 'In other words, a practice is prohibited as "unfair" or "deceptive" even if not "unlawful" and vice versa.' " (*Podolsky v. First Healthcare Corp.* (1996) 50 Cal.App.4th 632, 647, 58 Cal.Rptr.2d 89, quoting *State Farm Fire & Casualty Co. v. Superior Court, supra,* 45 Cal.App.4th at p. 1102, 53 Cal.Rptr.2d 229.) The case of *Motors, Inc. v. Times Mirror Co.* (1980) 102 Cal.App.3d 735, 162 Cal.Rptr. 543 is an example of the unfair competition law's independent force. There, the plaintiff challenged a newspaper's two-tiered advertising rate structure. The Court of

Appeal held that the plaintiff stated a valid cause of action under the unfair competition law even though the Unfair Practices Act did not itself prohibit the pricing policy at issue. (*Motors, Inc. v. Times Mirror Co., supra,* 102 Cal.App.3d at p. 741, 162 Cal.Rptr. 543 [citing § 17042, which states that nothing in the Unfair Practices Act "prohibits" certain price differentials].) ¶ The unfair competition law, which has lesser sanctions than the Unfair Practices Act, has a broader scope for a reason. "[T]he Legislature ... intended by this sweeping language to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur. Indeed, ... the section was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable ' "new schemes which the fertility of man's invention would contrive." ' (*American Philatelic Soc. v. Claibourne* (1935) 3 Cal.2d 689, 698 [46 P.2d 135].) As the *Claibourne* court observed: 'When a scheme is evolved which on its face violates the fundamental rules of honesty and fair dealing, a court of equity is not impotent to frustrate its consummation because the scheme is an original one....' (3 Cal.2d at pp. 698–699 [46 P.2d 135] ...; accord, *FTC v. The Sperry & Hutchinson Co.* (1972) 405 U.S. 233, 240 [92 S.Ct. 898, 903, 31 L.Ed.2d 170, 177].) With respect to 'unlawful' or 'unfair' business practices, [former] section 3369 [today section 17200] specifically grants our courts that power. [¶] In permitting the restraining of all 'unfair' business practices, [former] section 3369 [today section 17200] undeniably establishes only a wide standard to guide courts of equity; as noted above, given the creative nature of the scheming mind, the Legislature evidently concluded that a less inclusive standard would not be adequate." (*Barquis v. Merchants Collection Assn., supra,* 7 Cal.3d at pp. 111–112, 101 Cal.Rptr. 745, 496 P.2d 817, fn. omitted.) "[I]t would be impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited [citations], since unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery." (*People ex rel. Mosk v. National Research*

Co. of Cal., supra, 201 Cal.App.2d at p. 772, 20 Cal.Rptr. 516.) [FN 9.] ¶ FN 9. Apparently taking her cue from the brief of amicus curiae American Council of Life Insurance, Justice Kennard asserts the unfair competition law did nothing more than codify the common law. (Conc. & dis. opn. of Kennard, J., post, 83 Cal.Rptr.2d at p. 570, 973 P.2d at p. 549.) (Even L.A. Cellular does not make such a sweeping argument.) She relies primarily on International etc. Workers v. Landowitz (1942) 20 Cal.2d 418, 126 P.2d 609. (Conc. & dis. opn. of Kennard, J., post, 83 Cal.Rptr.2d at pp. 570, 571, 572, 574, 973 P.2d at pp. 549, 550, 551, 553.) That decision does, indeed, contain some language supporting her position. However, in Barquis v. Merchants Collection Assn., supra, 7 Cal.3d at page 109, 101 Cal.Rptr. 745, 496 P.2d 817, we unanimously concluded "that 'unfair competition' as used in the section cannot be equated with the common law definition of 'unfair competition,' but instead specifies that, for the purposes of its provisions, unfair competition 'shall mean and include unlawful, unfair or fraudulent business practice....' (Italics added.)" Regarding the language Justice Kennard cites, we stated, "Although the Landowitz opinion does contain some language which may be read to limit [Civil Code former] section 3369 [the original unfair competition law] to common law 'unfair competition,' subsequent cases ... have not confined the section so narrowly; in view of the factual context of Landowitz, such language was not crucial to the decision." (Id. at pp. 111–112, fn. 12, 101 Cal.Rptr. 745, 496 P.2d 817; see also Rubin v. Green, supra, 4 Cal.4th at p. 1200, 17 Cal.Rptr.2d 828, 847 P.2d 1044 ["to state a claim under the act one need not plead and prove the elements of a tort"]; Bank of the West v. Superior Court, supra, 2 Cal.4th at p. 1264, 10 Cal.Rptr.2d 538, 833 P.2d 545 ["the statutory definition of 'unfair competition' 'cannot be equated with the common law definition....' "]; Motors, Inc. v. Times Mirror Co., supra, 102 Cal.App.3d 735, 162 Cal.Rptr. 543 [discussed in the text].) ¶ A year after the decision in People ex rel. Mosk v. National Research Co. of Cal., supra, 201 Cal.App.2d 765, 20 Cal.Rptr.

516, again about three months after the decision in Barquis v. Merchants Collection Assn., supra, 7 Cal.3d 94, 101 Cal.Rptr. 745, 496 P.2d 817, and on occasion since, the Legislature amended the unfair competition law. On these occasions, rather than overrule these cases or Motors, Inc. v. Times Mirror Co., supra, 102 Cal.App.3d 735, 162 Cal.Rptr. 543, the Legislature expanded the law's coverage. (Stats.1963, ch. 1606, § 1, p. 3184; Stats.1972, ch. 1084, § 1, pp.2020–2021; see Stop Youth Addiction, Inc. v. Lucky Stores, Inc., supra, 17 Cal.4th at pp. 569–570, 71 Cal.Rptr.2d 731, 950 P.2d 1086.) (Emphasis added.) (Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 180–181.)

All prior allegations of the 1st amended complaint are incorporated by reference into the unfair competition cause of action. (1st Amended Complaint, paragraph 38.) The complaint further alleges that the unfair conduct is the competition with plaintiff's restaurant in violation of the purchase agreement. (1st Amended Complaint, paragraphs 39-43.)

Treating as true all the complaint's material factual allegations and construing the complaint liberally to determine whether a cause of action has been stated, given the assumed truth of the facts pleaded, for the purposes of demurrer (Picton v. Anderson Union High School Dist. (1996) 50 Cal.App.4th 726, 732-733.), the court finds that plaintiff has adequately alleged an unfair competition cause of action. The demurrer to the unfair competition cause of action is overruled.

Violation of Uniform Trade Secrets Act Cause of Action

Defendants Hwang and Lee argue: they can not be held liable for violation of the trade secret act, because violating a non-competition provision they never agreed to is not the misappropriation of a trade secret s defined by the Act; defendants can not be held liable for misappropriation of a trade secret by hiring plaintiff's employees in an at-will state such as California, particularly since defendants did not agree not to hire away plaintiff's employees;

the allegations are insufficient to establish that the recipes and menu items are proprietary to plaintiff; there is no factual basis for the recipes being proprietary in nature such that they are capable of having been misappropriated; and it is impossible for defendants Lee and Hwang to have any liability for misappropriation of what clearly is not a trade secret.

As stated earlier in this ruling, plaintiff has adequately alleged that defendants Hwang and Lee are bound as parties to the subject sales agreement and bill of sale, because it is alleged that defendant Woori Jiang, Inc. is the alter ego of defendant Hwang; defendant Lee is and at all times relevant was, the owner of Sky Sushi located in Rancho Cordova; and defendants are joint venturers, partners, successors in interest, related entities, and/or alter egos of each other.

As used in the Uniform Trade Secrets Act (Civil Code, §§ 3426, et seq.) "'Trade secret' means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: ¶ (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and ¶ (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." (Civil Code, § 3426.1(d).)

"The test for trade secrets is whether the matter sought to be protected is information (1) which is valuable because it is unknown to others and (2) which the owner has attempted to keep secret. (ABBA Rubber Co. v. Seaquist (1991) 235 Cal.App.3d 1, 18, 286 Cal.Rptr. 518.)" (Whyte v. Schlage Lock Co. (2002) 101 Cal.App.4th 1443, 1454.)

All prior allegations of the 1st amended complaint are incorporated by reference into the unfair competition cause of action, including allegations that the trade secret sauce recipe is vital to plaintiff's business, and public dissemination of the recipe would cause irreparable harm to plaintiff's business. (1st Amended Complaint, paragraph 44.) Plaintiff further alleges that the

recipes were trade secrets as they are formulas, methods, techniques and processes that derive independent economic value from not being known to the general public or to other persons who can obtain economic value from their disclosure or use; they are the subject of efforts to maintain their secrecy that are reasonable under the circumstances; and the recipes were trade secrets misappropriated by defendants by hiring individuals previously employed by plaintiff knowing or having reason to know at the time of use or disclosure of the trade secret that the trade secrets were acquired under circumstances giving rise to a duty of the former employee to maintain their secrecy. (1st Amended Complaint, paragraphs 45 and 46.)

Treating as true all the complaint's material factual allegations and construing the complaint liberally to determine whether a cause of action has been stated, given the assumed truth of the facts pleaded, for the purposes of demurrer (Picton v. Anderson Union High School Dist. (1996) 50 Cal.App.4th 726, 732-733.), the court finds that plaintiff has adequately alleged a violation of trade secret act cause of action. The demurrer to the violation of trade secret act cause of action is overruled.

Special Demurrer

"A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures. (5 Witkin, Cal.Procedure (3d ed. 1985) Pleading, § 927, p. 364; 1 Weil & Brown, Civil Procedure Before Trial (1990) § 7:85, p. 7-23.)" (Khoury v. Maly's of California, Inc. (1993) 14 Cal.App.4th 612, 616.)

"A special demurrer should be overruled where the allegations of the complaint are sufficiently clear to apprise the defendant of the issues which he is to meet. *People v. Lim*, 18 Cal.2d 872, 882, 118 P.2d 472. All that is required of a complaint, even as against a special demurrer, is that it set forth the essential facts of plaintiff's case with reasonable precision and

with particularity sufficiently specific to acquaint defendant of the nature, source, and extent of the cause of action. *Smith v. Kern County Land Co.*, 51 Cal.2d 205, 209, 331 P.2d 645." (Gressley v. Williams (1961) 193 Cal.App.2d 636, 643-644.)

The 1st amended complaint sets forth the essential facts of plaintiff's case with reasonable precision and with particularity sufficiently specific to acquaint defendants of the nature, source, and extent of the cause of action. The special demurrer is overruled.

TENTATIVE RULING # 10: DEFENDANTS HWANG'S AND LEE'S DEMURRERS TO 1ST AMENDED COMPLAINT ARE OVERRULED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR 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, MAY 6, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

11. ALL ABOUT EQUINE ANIMAL RESCUE V. BYRD PC-20200294

OSC Re: Preliminary Injunction.

On June 22, 2020, plaintiff filed a complaint against numerous defendants asserting causes of action for trespass to real property, trespass to chattel, quiet title to real property, and declaratory relief. The complaint alleges the dispute arises from defendant's use, conduct, and arguments concerning two easements across plaintiff's land.

Plaintiff All About Equine Animal Rescue filed an ex parte application for issuance of a TRO and OSC Re: Preliminary Injunction related to defendants' conduct and use of an easement over plaintiff's land.

Defendants Alexander Byrd, Maynard Byrd, Debra Byrd, Laura Byrd Rodarte, Joshua Rodarte, Terry Wilson, and Dawn Wilson opposed the ex parte application on the grounds that they will be irreparably harmed by loss of access to their property for construction/development purposes, which outweighs any harm claimed by plaintiff; and it is reasonably probable that defendants will prevail on the merits of the case. Defendants requested an award attorney fees incurred pursuant to Code of Civil Procedure, § 128.5.

On March 4, 2022, the court granted the application, issued a TRO, issued an OSC Re: Preliminary Injunction, and set this hearing on the OSC. The OSC ordered defendants to appear at the hearing on April 15, 2022 at 8:30 a.m. in Department Nine to show cause why the court should not issue a preliminary injunction restraining, enjoining, and ordering each of the defendants and their agents servant and employees to keep all gates closed at all times along the boundaries of plaintiff's real property; to open the gates only for the purpose of ingress and egress to defendants' real property and must be shut immediately after transitioning through the gate; gates on the southerly boundary of the plaintiff's property are to

be kept locked at all times; they are to restore all damaged fencing and gates belonging to plaintiff with respect to plaintiff's property so that all the plaintiff's perimeter is secured and will safely contain livestock; to remove any fencing defendants have installed along a north-south line approximately 50 feet east of the westerly boundary of plaintiff's property, and not to trespass onto plaintiff's property outside the easement boundary or use any easement encumbering plaintiff's property for purposes other than for ingress and egress to defendants' respective real properties.

The court also ordered that the normal briefing schedule was to be followed and defendants are to provide a declaration from the fire department should they obtain one.

The proof of service of notice of service of the notice of entry of the order/OSC declares that on March 4, 2022, plaintiff's counsel served counsel for Defendants Alexander Byrd, Maynard Byrd, Debra Byrd, Laura Byrd Rodarte, Joshua Rodarte, Terry Wilson, and Dawn Wilson and counsels for other parties interested in this consolidated action by mail on March 4, 2022.

The initial hearing date was set for April 15, 2022. The opposition/response to the OSC was due to be filed and served by April 4, 2022. At the time the initial tentative ruling was prepared on April 13, 2022, the defendants' time to file and serve the opposition/response to the OSC was expired and there was no opposition/response to the OSC by defendant in the court's file other than the defendants' objection/opposition to the application for the TRO and OSC and documents submitted in support, which were filed on March 4, 2022.

At the initial hearing on April 15, 2022, plaintiff's counsel requested a long cause hearing which defense counsel opposed. The court asked if there was any oral argument that would be presented other than what was in the brief. Plaintiff's counsel stated "yes" and apologized for the late filing of an opposition. The court continued the hearing to May 6, 2022, at 8:30 a.m. for

the purposes of the preparation of a tentative ruling and further set the actual hearing on the OSC for long case oral argument in Department Nine at 2:30 p.m. on May 6, 2022.

Plaintiff seeks issuance of the preliminary injunction asserting the following grounds: the subject easements are non-exclusive and the defendants have engaged in aggressive conduct to essentially assert they have the right to exclude plaintiff from its property and impose whatever burden they want on the plaintiff's property as they have easements over the property; and the declarations and exhibits submitted in support of the application establish that plaintiff has a likelihood of succeeding in this litigation on the merits, it will be irreparably harmed if the injunction is not issued, and that the balance of the relative harms of plaintiff and defendants tips in favor of issuing the preliminary injunction.

Plaintiff also requests that the court set the bond amount as $2,500.

Defendants oppose issuance of the preliminary injunction on the following grounds: there is no emergency that requires issuance of a preliminary injunction; plaintiff is merely attempting to avoid the application of the County codes related to gate permits; defendants have two easements over plaintiffs property and they should not be limited in their use of those easements; once construction of an easement road connected to the Rattlesnake Bar Road and installation of utilities are completed, plaintiff can move its fences to reasonable setback from the road where it is possible; Georgetown Divide Recreation District has improperly blocked the Highway 49 easement and refused to approve a map of the easement showing the location of the easement despite having been provided with two alternative locations, thereby leaving only the Rattlesnake Bar easement to access their properties; defendant will suffer irreparable harm from the preliminary injunction as it will prevent them from developing their land without using the Rattlesnake Bar easement, whereas the only harm to plaintiff is that it will lose access to some of its land and there is a possibility that some of its horses will be

harmed; plaintiff presents no facts to establish that the harm to it would amount to immediate or irreparable harm; the issue of no grading permit and no encroachment permit is not proper to consider during a proceeding for preliminary injunction as it does not necessitate an emergency and an encroachment permit has been obtained; defendants were justified in removing plaintiff's fencing in order to develop the easement as it was in the middle of the easement and relocation of the fence 47 feet from the westerly border of plaintiff's land was required due to the topography of the land and the trees and boulders located in the easement; defendants need two lanes of traffic, ditches on either side of the road, offset water, electric lines, and must wind the easement road through large heritage oaks and boulders; plaintiff is not prevented from using the easement land; plaintiff has not fulfilled the conditions for issuance of the gate permit; the agricultural exception to the County gate permit ordinance does not apply to the properties as they were not meant to be used for agricultural purposes; plaintiff has unclean hands as plaintiff misled the court that the gate was allowed as the agricultural exclusion applied where an Administrative Hearing Officer found the gate permit was required and plaintiffs did not appeal from that decision; and this application is frivolous and maintained in bad faith such that defendants should be awarded attorney fees pursuant to the provisions of Code of Civil Procedure, § 128.5

Defendants did not address the issue of the amount of the bond should the requested preliminary injunction be issued.

On April 8, 2022, plaintiff filed a reply to the opposition that plaintiff states was untimely served at 9:00 p.m. on April 6, 2022. Plaintiff replied: the late served opposition prejudiced plaintiff by its being served so close to the hearing date thereby leaving plaintiff very limited time to respond; defendant's late opposition should be stricken or the court should refuse to consider them pursuant to rules of Court, Rule 3.1300(d) and Kapitanski v. Von's Grocery Co.

(1983) 146 Cal.App.3d 29, 32-33; defendants misstate the facts and relief sought as plaintiff does not dispute the existence of the easements and only wants the defendants to keep the gates shut when they enter the easements from the south and when they enter their respective properties in the north; defendants grossly exaggerate the development potential of their properties and potential development should not change the court's analysis, since should the circumstances change in the future the matter may be revisited; defendant's assertion in the opposition that the Highway 49 easement is a public road is false as the road is and always has been a private road and has not been offered for dedication to or accepted by El Dorado County; the Georgetown Divide Recreation District activities are irrelevant; as private parties, defendants have no standing to assert in a civil court that there is a purported violation of a municipal code as held in Mendez v. Rancho Valencia Resort Partners, LLC (2016) 3 Cal.App.5th 248, 264-269; and Hill v. San Jose Family Housing Partners, LLC (2011) 198 Cal.App.4th 764, 775-776; the plaintiff has obtained a permit for gates at each end of the Highway 49 easement, has contacted the El Dorado Fire District, and is working to ensure compliance with its safety requirements; plaintiff can not be excluded from the easements on its property; defendants have ignored the court's TRO; and defendants' claim of unclean hands and request for sanctions is frivolous.

Consideration of Late Opposition

"No paper shall be rejected for filing on the ground that it was untimely submitted for filing. If the court, in its discretion, refuses to consider a late filed paper, the minutes or order shall so indicate." (Rules of Court, Rule 3.1300(d).)

The opposition was filed late. Despite the claim of prejudice by plaintiff, the reply adequately addresses the issues raised in the late opposition. The court will consider the late opposition.

Plaintiff's Objections to Defendants' Evidence Submitted in Opposition

- Declaration of Alexander Byrd

Objection numbers 1-3 to paragraph 3, the portion of paragraph 5 related to information and belief concerning citations issued for the Highway 49 gates and conversations with Code enforcement personnel, and paragraph 12 are sustained.

- Declaration of Terry Wilson

Objection number 4 to paragraph 5 of the declaration of Terry Wilson is sustained.

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).)

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

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

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

"The plaintiff bears the burden of presenting facts establishing the requisite reasonable probability: "[T]he drastic remedy of an injunction pendente lite may not be permitted except upon a sufficient factual showing, by someone having knowledge thereof, made under oath or by declaration under penalty of perjury." (*Ancora–Citronelle Corp. v. Green, supra,* 41

Cal.App.3d at p. 150, 115 Cal.Rptr. 879.)" (Fleishman v. Superior Court (2002) 102 Cal.App.4th 350, 356.)

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

""To obtain a preliminary injunction, a plaintiff ordinarily is required to present evidence of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending an adjudication of the merits." (*White v. Davis, supra,* 30 Cal.4th at p. 554, 133 Cal.Rptr.2d 648, 68 P.3d 74; see generally Code Civ. Proc. § 526, subd. (a)(2) [preliminary injunction may issue when it appears the plaintiff would suffer great or irreparable injury from the commission or continuance of some act during the litigation].) While the mere possibility of harm to the plaintiffs is insufficient to justify a preliminary injunction, the plaintiffs are "not required to wait until they have suffered *actual harm* before they apply for an injunction, but may seek injunctive relief against the *threatened infringement* of their rights." (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1292, 240 Cal.Rptr. 872, 743 P.2d 932, italics added; accord, *City of Torrance v.*

Transitional Living Centers for Los Angeles, Inc. (1982) 30 Cal.3d 516, 526, 179 Cal.Rptr. 907, 638 P.2d 1304 [injunctive relief is available where the injury sought to be avoided is " 'actual or threatened' "]; *7978 Corporation v. Pitchess* (1974) 41 Cal.App.3d 42, 46, 115 Cal.Rptr. 746 [same].) ¶ If the threshold requirement of irreparable injury is established, then we must examine two interrelated factors to determine whether the trial court's decision to issue a preliminary injunction should be upheld: "(1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction." (*Butt v. State of California* (1992) 4 Cal.4th 668, 677–678, 15 Cal.Rptr.2d 480, 842 P.2d 1240.) Appellate review is generally limited to whether the trial court's decision constituted an abuse of discretion. (*Ibid.*). (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1463, 47 Cal.Rptr.3d 147.) However, [t]o the extent that the trial court's assessment of likelihood of success on the merits depends on legal rather than factual questions, [such as when the meaning of a contract or a statute are at issue,] our review is de novo.' " (*City of Lake Forest v. Evergreen Holistic Collective* (2012) 203 Cal.App.4th 1413, 1428, 138 Cal.Rptr.3d 332; *Garamendi v. Executive Life Ins. Co.* (1993) 17 Cal.App.4th 504, 512, 21 Cal.Rptr.2d 578.)" (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.)

A trial court's decision on a motion for preliminary injunction is not a adjudication of the ultimate rights in controversy (Association for Los Angeles Deputy Sheriffs v. County of Los Angeles (2008) 166 Cal.App.4th 1625, 1634.); the order is not a determination of the merits of

the case; and the order may not be given issue-preclusive effect with respect to the merits of the action (Upland Police Officers Ass'n v. City of Upland (2003) 111 Cal.App.4th 1294, 1300.).

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

Easement Principles

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

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

When the easement is "nonexclusive" the common users "have to accommodate each other." (*Applegate v. Ota* (1983) 146 Cal.App.3d 702, 712, 194 Cal.Rptr. 331.) An obstruction which unreasonably interferes with the use of a roadway easement can be ordered removed "for the protection and preservation" of the easement. (*Id.* at pp. 712–713, 194 Cal.Rptr. 331.)" (Emphasis added.) (Scruby v. Vintage Grapevine, Inc. (1995) 37 Cal.App.4th 697, 703.)

"Plaintiff's easement merely gives her the right to use the area for ingress and egress. Defendant is not required to make any changes from the natural condition of the ground, or any grading thereof necessary to permit its reasonable use. Those matters will have to be done, if necessary, by plaintiff, and, as the easement is nonexclusive, in such manner as not to obstruct or prevent the reasonable use thereof by defendant. Defendant has the right to use the land defined by the court for any use not inconsistent with plaintiff's easement. *Parks v. Gates*, 186 Cal. 151, 199 P. 40." (Emphasis added.) (Greiner v. Kirkpatrick (1952) 109 Cal.App.2d 798, 803.)

Plaintiff's Executive Director declares: she oversaw the purchase of the property; the two subject easements' terms are very basic as they do not prohibit gates or require unrestricted access and merely provide for nonexclusive road and utilities easements; plaintiff negotiated the purchase of the land for the purpose of securing immediate pasture for the animals plaintiff cares for and ultimately to provide a home for its operations; it was obvious to all that plaintiff intended to graze livestock on its property; historically all the parcels at issue in this litigation were used for grazing cattle as one unit and a perimeter for larger holding was fenced; neighboring properties are also used for grazing livestock, which is customary in the rural setting; as the land was historically used for grazing when the property was purchased in 2018, there was existing fencing along the plaintiff's property's west, east, and south property lines and a locked gate at the southern end of the Highway 49 easement; all the existing fencing

and Highway 49 easement gate had existed for decades; in 2019 plaintiff began to construct fencing along the perimeter of its property where fencing did not already exist; pasture gates were also installed at the northerly end of the Highway 49 easement and at both ends of the unimproved Rattlesnake Bar easement; the only active road used by defendants was the Highway 49 easement, which always had a locked gate at its southern end; the gate was meticulously kept closed and locked while she was seeking to purchase the property and has historically always been used to contain livestock and for security; only one more gate needed to be installed to contain livestock on plaintiff's land with respect to the Highway 49 easement; plaintiff's fencing goal was to contain and graze livestock and secure its property from trespassers; defendants Byrd and Wilson have constructed gates at the North end of the Highway 49 easement to secure their respective properties; the Byrds have indicated to the declarant that they too intend to graze livestock on their property; she is informed and believes that the Wilsons will do the same as Terry Wilson also appears to own horses and has constructed a barn on his property; neither the Byrd family nor the Wilson family live on their respective properties; the Saunders family only uses the subject roads on rare occasion as they have their own access to Highway 49 to the North; various defendants have responded to the plaintiff's fencing by destroying plaintiff's fencing and gate at the northern end of the Rattlesnake Bar easement, buried or otherwise rendered inoperable the gate at the northern end of the Highway 49 easement, and dismantled, stolen, and damaged the gate at the southern end of the Highway 49 easement multiple times; when repaired, defendants refuse to keep the southern gate closed and locked, which leaves plaintiff's property unsecured and vulnerable to trespassers from an adjoining public park; defendants contend that they are entitled to cross-fence both easements traversing plaintiff's land to exclude plaintiff's livestock from the nonexclusive easements on plaintiff's land; on or about May 26, 2021 Terry Wilson

admittedly stole the entire gate at the south end of the Highway 49 easement as established in Thomas Swett's declaration; when that gate was replaced, it was then damaged to the point it was inoperable; as part of the perimeter fencing project, plaintiff installed a double gate at the northern end of the Highway 49 easement, which was destroyed (Exhibit 8); thereafter defendants Byrd and Wilson constructed their own gates across the easement (Exhibit 4); as a result of the repeated destruction of fencing and gates, plaintiff has been forced to install temporary panels across its property in order to contain it livestock safely (Exhibit 9); since this dispute commenced plaintiff has had to replace the lock on the southern Highway 49 easement approximately 21 times at a cost of over $400; there is video evidence of defendant Alexander Byrd taking multiple locks and she has observed locks having disappeared when defendant Terry Wilson has transitioned through the property; the gates have been left open by defendants; should a horse escape when the southern Highway 49 easement gate is open, the horse, a human, or both could be seriously injured or killed; Exhibit 11 is a true and correct copy of a photo taken by motion sensing camera showing that the same gate was open at approximately midnight; many instances of harassment and misconduct by defendants have been captured by motion sensing cameras, observed by the declarant, and observed by plaintiff's volunteers; on February 11, 2022 defendant Terry Wilson cut the locks on the northwest and southwest corner gates of plaintiff's property with the northwest corner gate left open (Exhibit 13) that could have allowed all of plaintiff's cattle and horses to escape, amounting to 35 animals; the northwest and southwest corners of the property are at opposite ends of the Rattlesnake Bar easement, which is unimproved and not used by any defendants; all of the locks are combination locks that have always had the same combination, which was repeatedly shared with defendants; defendants are free to either use the lock provided by plaintiff, or they could place their own lock at a different portion of the gate chain so they could

independently manage their access; beginning February 25, 2022 defendants Terry Wilson and Alexander Byrd destroyed plaintiff's gates and fence at the Rattlesnake Bar easement, dismantled plaintiff's temporary panels, and otherwise created conditions by which plaintiff's livestock could escape the property (Exhibit 15); in connection with this activity, defendants disabled plaintiff's security cameras, trespassed outside the 50 foot easement corridor, began to construct a fence to exclude plaintiff and its livestock from the easement, thereby depriving plaintiff of use of its property; declarant has checked the public records of El Dorado County with respect to grading and encroachment permits related to defendants' properties and the Rattlesnake Bar Easement; there is no evidence that any defendant has obtained a grading permit for road construction or permit to encroach on Rattlesnake Bar road; without these permits, no road can be constructed, thereby making the destruction of plaintiff's property and construction of an exclusionary fence conduct that serves no legitimate purpose and can only be done for the purpose of harassment of plaintiff; defendants have also been parking on the easement area and trespassing outside the easement area onto plaintiff's property as depicted in Exhibit 16 photos of this activity; defendants have also been hiking and jogging in the easement area using it for recreational purposes and not just for ingress and egress as depicted in the Exhibit 17 photos of this behavior; Exhibit 18 is a recent aerial photo from Google Earth showing plaintiff's property and the location of the gates at issue and depicting the active Highway 49 easement and the unimproved condition of the Rattlesnake Bar easement; and plaintiff is a non-profit corporation relying on donations to fund its animal rescue work, the attorney fees already incurred in connection with this case have put a severe financial strain on the organization, and while plaintiff can afford to post a $2,500 bond, a larger bond may deprive plaintiff of this provisional remedy. (Declaration of Wendy Digiorno in Support of Motion for Preliminary Injunction, paragraphs 6-25.)

The two easements are depicted in Exhibit 1 to the Declaration of Wendy Digiorno in Support of the Motion. The recorded grant deed conveying the property to plaintiff describes the Rattlesnake Bar easement as "a non-exclusive easement road and public utilities easement" consisting of the West 50 feet measured at right angles from the West line of Parcel 1. (Declaration of Wendy Digiorno in Support of Motion for Preliminary Injunction, Exhibit 2.) The Highway 49 easement is depicted on a parcel map and described as a 50-foot-wide road and public utilities easement. (Declaration of Wendy Digiorno in Support of Motion for Preliminary Injunction, Exhibit 3.)

Plaintiff's Counsel declares: attached as Exhibits 1, 2, and 4 are true and correct emails from defendant Terry Wilson to him threatening to take the action that plaintiff is currently experiencing, expressing that he is willing to leave gates open or otherwise interfere with plaintiff's fencing even if doing so would lead to the escape of plaintiff's livestock and result in harm to plaintiff and the public, and an admission by him that he stole the plaintiff's gate at the south end of the Highway 49 easement. (Declaration of Thomas Swett in Support of Motion for Preliminary Injunction, paragraphs 3, 4 and 6 and Exhibits 1, 2, and 4.)

The authenticated emails from Terry Wilson state: "I have the capacity and willingness to be a caring, kind, watchful and generous neighbor. This is what I hope I'll be able to embody. And I am not seeing that from your side …at all. ¶ When plan A isn't working I go to plan B which I am heavily leaning in to right now. I also have the capacity and willingness to be very aggressive, pull out all stops and go to war. I can do both REALLY well. ¶ I can do either, you choose which path to proceed on. Once I pick a plan I stay with it until the finish." (Declaration of Thomas Swett in Support of Motion for Preliminary Injunction, Exhibit 1.); "You have been notified. Your client needs to move their fence out of our easement or I'm moving it and will send her the bill. There are not [sic] cattle on that side of the road yet. So it won't cause the

danger you suggest. But if your client now moves cattle to that side of the road after you've been notified to remove it? What's that called? I know what I call it. ¶ Pretty silly to think your client can install a fence on our easement without a court order and I need a court order to remove it. Really? And silly is a nice word I'm choosing right now (Declaration of Thomas Swett in Support of Motion for Preliminary Injunction, Exhibit 2.); and "…Your client should have removed the gates to be in compliance with the code enforcement judgement yet she continues to keep the gate up and locks us out of our road. I removed it for her today." (Declaration of Thomas Swett in Support of Motion for Preliminary Injunction, Exhibit 4 – Email from defendant Terry Wilson dated May 26, 2021.)

Defense Counsel authenticates plaintiff's application for gate permit that was approved with conditions on November 5, 2021. (Declaration of Taylor P. Call in Opposition to Motion for Preliminary Injunction, Exhibit B.)

Defense counsel further authenticates a printout of the County record of an encroachment permit issued on March 9, 2022. (Declaration of Taylor P. Call in Opposition to Motion for Preliminary Injunction, Exhibit C.)

Defendant Terry Wilson declares: on February 25, 2022 he and defendant Alexander Byrd started to develop the Rattlesnake Bar easement; upon information and belief, Wendy Digiorno called the Sheriff to stop their work; the Sheriff arrived and we showed him the easement deeds and the Sheriff said they were within their rights to continue their work; he and the other defendants removed the plaintiff's fencing that was inside the Rattlesnake Bar easement to approximately 47 feet from plaintiff's property line and their neighbor to the west; the fencing was reinstalled in a way to protect plaintiff's animals from escaping; the Rattlesnake Bar easement travels through many large boulders, sloping topography, and large heritage oaks which sometimes encroach into the easement by 25 feet defendants plan to create a road that

winds through the easement and moving 47 feet from the property line is required for defendants to install the road, utilities, ditches, cutbacks, and a sidewalk; and this is the minimum amount of use of the easement that is necessary to develop it. (Declaration of Terry Wilson in Opposition to Motion for Preliminary Injunction, paragraphs 4-6.)

Defendant Alexander Byrd declares: he and other family members purchased certain property planning to build a family compound; they intended to move their aging grandmother to the property, but were unable to do so due to the gates and undeveloped Rattlesnake Bar easement, because she could not read combination locks and her hands were not strong enough to operate the locks and if she resided on the Byrd property, she would be unable to receive emergency attention due to the gates; he told plaintiff it was maintaining gates in violation of County codes and set back requirements and informed plaintiff that they intended to develop the easement roads to the County's minimum design standards for private roads; he complained to code enforcement about the gates on the Highway 49 easement; visitors to their property have been locked in or out of their property because they did not remember the combination to the locks, the combinations were changed, or the lock was stuck; they enjoy having people on their property for semi-public gatherings and the gates have been a major impediment to opening their property to the community at large; on February 25, 2022 he and defendant Alexander Byrd started to develop the Rattlesnake Bar easement; upon information and belief, Wendy Digiorno called the Sheriff to stop their work; the Sheriff arrived and we showed him the easement deeds and the Sheriff said they were within their rights to continue their work; he and the other defendants removed the plaintiff's fencing that was inside the Rattlesnake Bar easement to approximately 47 feet from plaintiff's property line and their neighbor to the west; the fencing was reinstalled in a way to protect plaintiff's animals from escaping; the Rattlesnake Bar easement travels through many large boulders, sloping

topography, and large heritage oaks which sometimes encroach into the easement by 25 feet defendants plan to create a road that winds through the easement and moving 47 feet from the property line is required for defendants to install the road, utilities, ditches, cutbacks, and a sidewalk; this is the minimum amount of use of the easement that is necessary to develop it; he plans to build a small house on the Byrd property commencing construction in the spring of 2022; he needs uninhibited access route to his home where his developers and contractors will be able to access his property with large loads of material and heavy equipment to build a pad and his home; the Highway 49 easement is unavailable for this purpose due to the limitations imposed by the court; he is unable to build on the Byrd property and has spent thousands of dollars to rent a home when he could be living in a house on his property; and defendants installed a new gate adjacent to plaintiff's gate on the Highway 49 easement between the plaintiff's property and the Georgetown Divide Recreation District easement intending to make it an electric gate.. (Declaration of Alexander Byrd in Opposition to Motion for Preliminary Injunction, paragraphs 2, 5, 6-8, and 10-13.)

Plaintiff has submitted declarations in reply from two animal fencing experts, Traci Hansen and Dina Stolba. They each are of the opinion that the fencing recently installed on plaintiff's property was unsafe for horses, does not meet the industry standard, and should be removed.

Plaintiff's Executive Director, Wendy Digiorno, submitted a reply declaration wherein she describes continuing misconduct; damage to a lock and fencing; removal of fencing and a gate; trespassing outside the easement; defendant Alexander Byrd installing a second gate adjacent to plaintiff's existing gate without notice and installed directly over plaintiff's main waterline to the property that could be damaged by grading or vehicle traffic; plaintiff blocked the gate to prevent damage to plaintiff's main water line from grading or vehicle traffic; defendants' conduct in installing a second gate creates two entry roads and could be avoided

simply by automating the existing gate; in connection with the Rattlesnake Bar easement road construction, defendants continued to trespass outside the 50 foot easement corridor, cut down plaintiff's trees, destroyed plaintiff's property fencing, and perpetuated a condition where livestock could escape the property; and Fire District personnel installed a District approved lock on the South gate and she remains in contact with Fire Inspector Sterling to ensure that any concerns of the Fire District are addressed. (Declaration of Wendy Digiorno's Declaration in Reply, paragraphs 3-8 and 10-12.)

- Purported Location of Highway 49 Easement on Georgetown Divide Recreation District Property

An issue that remains to be tried in the related case involving the Georgetown Divide Recreation District is the location of the Highway 49 easement as it is specified in the grant of easement. The dispute over whether the District is mandated to approve a map showing the easement where the opposing parties contend it should be located remains at issue pending trial. While the lack of access on the Highway 49 easement is relevant to the need for the Rattlesnake Bar easement, it does not justify self-help conduct related to the Rattlesnake Bar easement

- Gate Permit – Unclean Hands

Plaintiff argues that a gate permit from the County is not required to maintain gates on the subject easement as the gates are for agricultural use, which is expressly exempt from the gate permit requirement of County Ordinance Code § 130.30.090.

Defendants contend that the permit exclusion does not apply, because the properties the plaintiff and defendants purchased were sold to them by a land developer and were not meant to be used for agricultural purposes; and that plaintiff has unclean hands as plaintiff misled the

court that the gate was allowed by the agricultural exclusion where the Administrative Hearing Officer found the gate permit was required and plaintiffs did not appeal from that decision.

Plaintiff argues plaintiff appealed the decision; El Dorado County Counsel settled the matter rather than defend the administrative decision by facilitating the issuance of the plaintiff's gate permit; upon issuance of the permit the appeal was withdrawn; nevertheless, the plain language of the County Ordinance Code remains the same; and the argument concerning the County Ordinance Code is irrelevant to this proceeding.

There is evidence that a gate permit was issued with conditions and that plaintiff is working with the County regarding the gate.

"…[T]he unclean hands doctrine is not a legal or technical defense to be used as a shield against a particular element of a cause of action. Rather, it is an equitable rationale for refusing a plaintiff relief where principles of fairness dictate that the plaintiff should not recover, regardless of the merits of his claim. It is available to protect the court from having its powers used to bring about an inequitable result in the litigation before it. (*Ford v. Buffalo Eagle Colliery Co.* (4th Cir.1941) 122 F.2d 555, 563; 5 McCarthy on Trademarks and Unfair Competition (4th ed.1997) § 31:45.)" (Kendall-Jackson Winery, Ltd. v. Superior Court (1999) 76 Cal.App.4th 970, 985.)

"The determination of the unclean hands defense cannot be distorted into a proceeding to try the general morals of the parties. (*Fibreboard*, supra, 227 Cal.App.2d at pp. 728-729, 39 Cal.Rptr. 64.) Courts have expressed this relationship requirement in various ways. The misconduct 'must relate directly to the transaction concerning which the complaint is made, i.e., it must pertain to the very subject matter involved and affect the equitable relations between the litigants.' (Id. at p. 728, 39 Cal.Rptr. 64.) '[T]here must be a direct relationship between the misconduct and the claimed injuries "'... so that it would be inequitable to grant

[the requested] relief.'"' (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 846, 60 Cal.Rptr.2d 780.) 'The issue is not that the plaintiff's hands are dirty, but rather '"'that the manner of dirtying renders inequitable the assertion of such rights against the defendant.'"'" (Ibid.) The misconduct must '"'prejudicially affect the rights of the person against whom the relief is sought so that it would be inequitable to grant such relief.'"' (Ibid.) ¶ From these general principles, the Blain court gleaned a three-pronged test to determine the effect to be given to the plaintiff's unclean hands conduct. Whether the particular misconduct is a bar to the alleged claim for relief depends on (1) analogous case law, (2) the nature of the misconduct, and (3) the relationship of the misconduct to the claimed injuries. (*Blain*, supra, 222 Cal.App.3d at p. 1060, 272 Cal.Rptr. 250; accord, *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 618- 621, 12 Cal.Rptr.2d 741; *CrossTalk Productions, Inc. v. Jacobson*, supra, 65 Cal.App.4th at pp. 641-643, 76 Cal.Rptr.2d 615.)" (Emphasis added.) (Kendall-Jackson Winery, Ltd. v. Superior Court (1999) 76 Cal.App.4th 970, 979.)

The grant of easement in the recorded deed and described in the parcel map in this case does not prohibit gates across the easements. The easement grant specified the Rattlesnake Bar easement was "a non-exclusive easement road and public utilities easement" and a parcel map specified the Highway 49 easement was a road and public utilities easement.

Under the circumstances presented, the purported maintenance of gates after a permit with conditions is issued, though not all conditions to the permit have been satisfied, does not render inequitable the assertion of plaintiff's right to maintain such gates in order to prevent the escape of plaintiff's livestock from plaintiff's property.

Under the circumstances presented, the purported maintenance of gates after a permit with conditions is issued, though not all conditions to the permit have been satisfied, does not prejudicially affect the easement rights of the person against whom the relief is sought so that it

would be inequitable to grant preliminary relief to allow plaintiff to maintain gates it is entitled to maintain as there is no gate prohibition in the easement and such gates are necessary to prevent the escape of plaintiff's livestock on its property. The court rejects defendants' argument that the motion for preliminary injunction must be denied due to unclean hands.

- Irreparable Harm

Plaintiff argues that it is irreparably harmed by defendants' interference with its property rights; pursuant to the holding in Mendelson v. McCabe (1904) 144 Cal. 230, 231-233, the right to have a gate shut immediately upon having transitioned through the gate gives rise to injunctive relief even if there is no other damage proven; and should defendants' conduct related to the gates result in an animal escaping onto Highway 49, the loss of human life is possible, which is indisputably irreparable harm.

Defendants contend defendants will suffer irreparable harm from the preliminary injunction as it will prevent them from developing their land without using the Rattlesnake Bar easement, whereas the only harm to plaintiff is that it will lose access to some of its land and there is a possibility that some of its horses will be harmed; and plaintiff presents no facts to establish that the harm to it would amount to immediate or irreparable harm.

"If the defendant has the right to maintain the gates, the plaintiff has the right to open them only for the purpose of passing through and over the way, and then it is his duty to close them. Goddard's Law of Easements (Bennett's Ed.) p. 331; Jones on Easements, § 412; *Phillips v. Dressler,* 122 Ind. 414, 24 N. E. 226, 17 Am. St. Rep. 375; *Amondson v. Severson*, 37 Iowa, 602. The right to an injunction is not defeated by the mere absence of substantial damage from the acts sought to be enjoined. The acts of the plaintiff in leaving the gates open, if persisted in as he threatens, will constitute a continual invasion of the right of the defendant to maintain the gates, which, if continued for a sufficient length of time, will ripen into a right by prescription,

which will destroy the defendant's right to maintain the gates, so that thereafter the plaintiff would have an unobstructed right of way, and the defendant's property would be deprived of the protection arising from the maintenance of the gates." (Mendelson v. McCabe (1904) 144 Cal. 230, 232.)

The grant of easement in the recorded deed and described in the parcel map in this case does not prohibit gates across the easements. The easement grant specified the Rattlesnake Bar easement was "a non-exclusive easement road and public utilities easement" and a parcel map specified the Highway 49 easement was a road and public utilities easement.

Allowing defendants unfettered discretion to leave the gates open, remove them, or damage/destroy them could destroy plaintiffs' property right to maintain those gates, which amounts to irreparable harm to plaintiff's property rights; and should leaving the gates open result in an animal escaping onto Highway 49, the loss of human life is possible, which is irreparable harm.

- Plaintiff's Likelihood of Ultimately Prevailing on the Merits

Plaintiff contends that the defendants only have a non-exclusive right to use of the road easement; defendants have no right to effectively exclude plaintiff from use of its own property within the easement; and defendants' only right is to use the road easement for ingress and egress. Plaintiff further argues that it has established with the evidence presented that it is likely that it will prevail on the merits of this case.

"The task of the reviewing court has been described as placing itself in the position of the contracting parties in order to ascertain their intent at the time of the grant. [Citation.] If the intent of the parties can be derived from the plain meaning of the words used in the deed, the court need not, and should not, resort to technical rules of construction." (*Machado v. Southern Pacific Transportation Co.* (1991) 233 Cal.App.3d 347, 352–353, 284 Cal.Rptr. 560

(*Machado*).) Similarly, "[i]f the language is clear and explicit in the conveyance, there is no occasion for the use of parol evidence to show the nature and extent of the rights acquired." (*Scruby, supra,* 37 Cal.App.4th at p. 702, 43 Cal.Rptr.2d 810.) ¶ Here, Parks's 1941 grant provides the following: "RESERVING to the grantor, her successors, assigns and/or heirs, the right of ingress and egress for public road purposes over, along and across the Easterly 40 feet thereof." The meaning of Parks's grant, at least as relevant to the determination of the issues presented in this appeal, is clear and unambiguous. The grant is limited to a "right of ingress and egress ... over, along and across" a portion of the Schmidt parcel. The phrase "for public road purposes" reflects the impetus for the reservation and the reason for the right of ingress and egress. It is a qualification of, and limitation on, the right of ingress and egress reserved in the grant. It does not expand the right to include activities other than ingress and egress." (Schmidt v. Bank of America, N.A. (2014) 223 Cal.App.4th 1489, 1500.)

The Third District Court of Appeal has held: "We recognize that " '[u]nless it is expressly stipulated that the way shall be an open one, or it appears from the terms of the grant or the circumstances that such was the intention, the owner of the servient estate may erect gates across the way, if they are constructed so as not unreasonably to interfere with the right of passage.' " (*McCoy v. Matich* (1954) 128 Cal.App.2d 50, 53, 274 P.2d 714, quoting 73 A.L.R. 779.) [FN 5.] However, "[w]here an easement under a grant is specific in its terms, '[i]t is decisive of the limits of the easement' [citations]." (*Wilson v. Abrams, supra,* 1 Cal.App.3d at p. 1034, 82 Cal.Rptr. 272.) ¶ FN5. "[T]he grant of a way without reservation of the right to maintain gates does not necessarily preclude the servient estate owner from having such gates, and unless it is expressly stipulated in the grant that the way shall be an open one, or unless a prohibition of gates is implied from the circumstances, the servient owner may maintain a gate across the way if necessary for the use of the servient estate and if the gate

does not unreasonably interfere with the right of passage." (Annot., Right to Maintain Gate or Fence Across Right of Way (1973) 52 A.L.R.3d 9, 15, § 2, and cases cited.)" (Emphasis added.) (Van Klompenburg v. Berghold (2005) 126 Cal.App.4th 345, 350.)

As stated earlier in this ruling, the grant of easements in the recorded deed in this case does not prohibit gates across the easements. The Rattlesnake Bar easement grant specified it was "a non-exclusive easement road and public utilities easement" and the parcel map of the Highway 49 easement stated it was a road and public utilities easement. There is no language that prohibits the servient estate owner, the plaintiff, from gating each end of the easements in order to prevent the grazing livestock on plaintiff's land from escaping.

Furthermore, the plaintiff's property is being used for agricultural purposes. There is evidence that plaintiff requires the existence of the gates and that the gates be closed after entry onto the easement in order to contain their livestock on the property. There is no provision in the grant or parcel map that allows the dominant tenement owner to demand exclusive use of the easement to the exclusion of plaintiff's use of the land upon which the easement exists to graze livestock. Gates across the easements in order to contain the servient tenement owner's livestock on the property is not an unreasonable interference with the right of passage, particularly since the combinations of the lock on the gates are known or readily available to the dominant tenement owners and, if they so choose, they could purchase their own locks with their own keys/combinations and merely place their locks between other links of a chain securing the gates. Access by aged persons could be accommodated by placement of gates that can be opened and closed electronically by remote control at the expense of the dominant estate owner who requires such an accommodation. Access for construction equipment, materials and personnel would not appear to be hindered by the subject gates with common combination locks whose combination is shared with the dominant

estate owners. The problem defendants complain of is the undeveloped state of the Rattlesnake Bar easement as an impediment to such road usage. There is evidence that defendants started development of the road without any grading permit for road construction and there is no evidence before the court that such permits have been obtained.

In affirming a judgment entered after a nonjury trial awarding plaintiff Ferdinando Daluiso, damages for personal injuries sustained as a result of defendant's forcible entry onto certain land on which plaintiff resided when defendants, the California Supreme Court discussed the public policy against self-help to resolve civil disputes involving land as follows: "We intend by our holding today to give to a plaintiff in peaceable possession of land a right to recover In tort for damages for injuries to his person and goods against one forcibly entering the land. We reiterate that this holding gives full effect to the declared policy of this state against the use of self-help to recover possession of land and imposes liability on persons who engage in conduct which leads to a breach of the peace. 'It is a general principle that one who is or believes he is injured or deprived of what he is lawfully entitled to must apply to the state for help. ¶ Self help is in conflict with the very idea of the social order. It subjects the weaker to risk of the arbitrary will or mistaken belief of the stronger. Hence the law in general forbids it.' (5 Pound, Jurisprudence (1959) s 142, pp. 351—352.) To the extent that they are inconsistent, we overrule *Canavan v. Gray*, Supra, 64 Cal. 5, 27 P. 788, and *Walker v. Chanslor*, Supra, 153 Cal. 118, 94 P. 606." (Daluiso v. Boone (1969) 71 Cal.2d 484, 500.) In Daluiso, supra, after a survey of the boundary between defendant's and plaintiff's land the plaintiff's son and defendant had several discussions about relocation of the West fence of the Melody Ranch property to conform to survey findings. Defendant claimed that he and plaintiff reached an agreement whereby Salvatore was to move the fence to a position east of where it was then located. Salvatore denied this. Apparently intending to relocate and realign the fence to

conform to the survey, employees of defendant, at the latter's direction and under his personal supervision, proceeded to remove a section of the fence running along the west line of Melody Ranch. Defendant did not provide previous notice of this action or plaintiff or his son. Plaintiff arrived at the scene and asked defendant what was occurring. He was informed of defendant's intentions. The 85-year-old plaintiff, who was ailing with a heart condition, asked defendant to order the work stopped. Defendant refused and a heated argument between plaintiff and defendant ensued, and plaintiff became very excited and upset. Plaintiff repeatedly requested defendant during the argument to order his employees to stop and to settle the controversy about the location of the fence by legal means.

There is a significant amount of evidence that after the commencement of this litigation where the dispute over the easements must be resolved, defendants admitted in their declarations in opposition to the motion for preliminary injunction that rather await a decision by the legal means already pending in court concerning the easement litigation, they disregarded the civil litigation process and engaged in self-help conduct to drastically change the status quo concerning the easements. This included defendant Terry Wilson and Alexander Byrd declaring that they and the other defendants started to develop the Rattlesnake Bar easement which they planned to install the road, utilities, ditches, cutbacks, and a sidewalk; and they removed the plaintiff's fencing that was purportedly inside the Rattlesnake Bar easement and reinstalled it approximately 47 feet from plaintiff's property line and their neighbor to the west, thereby excluding use of a significant portion of plaintiff's land from use for grazing. There is also other evidence of many instances of cut locks, removed and damaged gates, and an admission by defendant Terry Wilson that he removed a gate.

This conduct violates the declared policy of this state against the use of self-help related to possession of land.

Having read and considered the moving papers, opposition papers, reply, and the admitted evidence before the court, the court finds that plaintiff has established a reasonable likelihood of success on the merits in this case.

- Relative Interim Harms

The relative interim harms are defendants will be delayed in building a home on their properties and an aged relative would be unable to move into the house to be built on the property pending a final judgment in this action, while the plaintiff will lose the ability to contain its livestock on its property, or will be prevented from usage of a significant portion of its property as defendants will effectively have exclusive use of the property as a road to their properties by requiring plaintiff to re-fence its property in order to exclude the easements from being used as grazing land and to contain the livestock without any gates at the north and south ends of the easements.

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.

The evidence is that there is no residence on the Byrd property, and it is contemplated to be constructed this year. Defendants have acknowledged that there are alternatives to the combination locked gates on each end on the Rattlesnake Bar easement to accommodate the access for defendant Byrd's aged relative after a residence is constructed on his property, such as electronic gates that defendants could install. Electronic gates will resolve any complaints regarding problems relating to emergency access, visitor access and aged relative access. Defendants are free to seek a modification of the preliminary injunction should the residence be built, and defendant Byrd agrees to construct an accommodation with the

electronic gates that will not unreasonable interfere with the gates being closed after transitioning through the gates onto the easement, which will also provide ready access to the aged relative, visitors, and emergency personnel to the property while at the same time securing the plaintiff's livestock on plaintiff's property.

In addition, defendants are free to seek a modification of the preliminary injunction should they obtain the required permits to construct their homes on their properties and obtain the required grading permit for the Rattlesnake Bar easement to connect the easement road to Rattlesnakes Bar Road. If such a proceeding is commenced, the court will be required to determine the likelihood of success of the parties related to whether the proposed easement development on the Rattlesnake Bar easement falls within the scope of the easement granted.

Undertaking/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); California Rules of Court, Rule 359.)

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).)

Plaintiff argues that since plaintiff is a charitable organization, a reasonable amount of bond to require is $2,500.

Defendants have not addressed the issue of the amount of the undertaking/bond.

The court sets the bond/undertaking amount as $2,500 subject to defendant's objection to the amount.

TENTATIVE RULING # 11: PLAINTIFF'S REQUEST FOR ISSUANCE OF A PRELIMINARY INJUNCTION IS GRANTED. PLAINTIFF SHALL POST AN UNDERTAKING/BOND IN THE AMOUNT OF $2,500, SUBJECT TO DEFENDANTS' OBJECTION TO THE AMOUNT WITHIN FIVE DAYS AFTER THE SERVICE OF THE INJUNCTION. APPEARANCES ARE REQUIRED AT 2:30 P.M. ON FRIDAY, MAY 6, 2022, IN DEPARTMENT NINE FOR LONG CAUSE ORAL ARGUMENT. 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. BOWMAN v. GOLD COUNTRY HOMEOWNERS PC-20200539

Plaintiffs' Motion to Compel Deposition and Production of Documents.

Defendant Gold Country Homeowners' Association filed an action against plaintiffs Bowman and others for quiet title, trespass, damages and injunctive relief regarding the Bowmans' use of a section of road in the HOA in order to access the Bowmans' property. (Case Number PC-20170366) The Bowmans cross-complained against Gold Country Homeowners' Association, Randall Benton, Charlene Ott, and Robert Vannucci in case number PC-20170366 asserting causes of action for specific performance, breach of contract, breach of their warranty of authority to enter into the MOU that resulted in the Bowmans' entitlement to use of the subject road; quiet title – prescriptive easement; quit tile by estoppel; quiet title – balancing the equities; quiet title – irrevocable license; declaratory relief, and trespass. After the conclusion of a five-day court trial the court issued its ruling after trial on January 1, 2019. The Judgment was entered on April 12, 2019, in favor of the Bowmans on the complaint and cross-complaint, the Bowmans recovered damages against Gold Country Homeowners' Association in the amount of $126,971.98, and the Bowmans recovered their costs of suit against the cross-defendants, including Randall Benton, Charlene Ott, and Robert Vannucci.

On October 21, 2020, plaintiffs Bowman filed this action against defendants Gold Country Homeowners' Association, Darlene Ott, Randell Benton, Bambara Erb, Donald Erb, Robert Vannucci, and Richard Warriner asserting an action for malicious prosecution of case number PC-20170366 and civil conspiracy to maliciously prosecute case number PC-20170366.

Plaintiffs' counsel declares: during 2021 he served demands for production of documents on defendants Randal Benton, Darlene Ott, Barbara Erb, and Gold Country Homeowners' Association; defendants made various objections to the requests, including attorney-client

privilege; privilege logs were provided, which are attached as Exhibits 1-6; plaintiffs noticed the depositions of defendants Diane Shakal and Russel Collins; the separate statement contains true and correct transcriptions of the inspection demands and responses; the separate statement includes Diane Shakal's refusal during her deposition to answer questions about communications with the HOA's attorneys, Crystal Center and Russell Townsend, who were prosecuting the underlying action, on the ground of attorney-client privilege; the separate statement includes Diane Shakal's objections to production of certain documents as requested in the deposition notice on, among other grounds, attorney-client privilege; and the separate statement includes Russell Collins' refusal during his deposition to answer questions about communications with attorneys about interpretation of the C,C,&Rs and before initiating litigation, on the ground of attorney-client privilege. (Declaration of Plaintiffs' Counsel in Support of Motion, paragraphs 2-4 and 8; and Exhibits 1-8; and Plaintiffs' Separate Statement in Support of Motion, page 11 line 19 to page 12, line 13; page 12, line 20 to page 13, line 9; page 14, lines 9-20; page 15, lines 20-25; page 16, lines 1-8; and page 16, lines 11-15.)

The court takes judicial notice that on October 1, 2021, the court entered the parties' stipulation and order to consolidate Bowman v. Gold Country HOA, case number PC-20200539 with Burnley v. Erb, case number PC-20200069, for the purposes of discovery only.

Plaintiffs move to compel further responses to requests for production, numbers 13-16 propounded on Randall Benton; further responses to requests for production, numbers 4 and 7 propounded on Barbara Erb; further responses to request for production, number 7 propounded on Darlene Ott; further responses to requests for production numbers 3 and 4 propounded on Diane Shakal in her notice of deposition; further responses to two deposition questions that deponent Diane Shakal refused to answer on the ground of attorney-client privilege, which were directed at documents brought to a meeting with attorney Crystal Center

and email communications with attorney Russell Townsend; further responses to two deposition questions that deponent Russell Collins refused to answer on the ground of attorney-client privilege, which were directed at discussions with an attorney concerning his interpretation of the C,C,&Rs and discussions with an attorney before initiating litigation; and further responses to request for production, number 13 propounded on defendant Gold Country HOA seeking the HOA minute books for the period of January 1997 through October 2021, which defendant HOA objected to on several grounds, which included an attorney-client privilege objection.

Plaintiffs argue in support of the motion: the assertions of attorney-client privilege related to documents and communications with attorneys Russell Townsend, Crystal Center, and Kathrine Parks are without merit as defendants Ott, Benton, Erb, and Vannucci waived the privilege by asserting the affirmative defense of advice of counsel in their answer to the complaint for malicious prosecution of the prior action against plaintiffs and civil conspiracy to maliciously prosecute the prior action against plaintiffs; while the Association has not waived the attorney-client privilege by asserting advice of counsel defense, the individual defendants who are former board members and agents of the defendant HOA have waived the attorney-client defense which allows the court to order production and answers to deposition questions concerning communications between the individual defendants and the HOA counsel and the counsel defending the individual defendants against the Bowmans' cross-complaint in the prior action; and in the absence of an order to produce privileged documents and compel testimony, the court should strike the reliance of counsel defense.

Defendants Ott, Benton, Erb, and Vannucci oppose the motion on the following grounds: the motion should be denied in that plaintiffs improperly combined eight motions into one; defendants have rightfully pled the affirmative defense of advice of counsel; plaintiffs have not

established with legal authorities that the individual defendants have waived any right to assert the attorney-client privilege as to insurance defense attorney Katherine Parks concerning her representation of the individual defendants in defending against the cross-complaint asserted by the Bowmans against them in the prior action; the Gold Country HOA members have a right to privacy in their member votes on Gold Country HOA issues; and ordering defendants to waive their advice of counsel defense is an extreme, unduly prejudicial option, particularly since the parties all agree these documents should be produced with a protective order in place.

Defendant Gold Country HOA opposes the motion on the following grounds: Gold Country is the actual holder of the attorney-client privilege and the defendants who are merely former board members who engaged counsel on behalf of the HOA can not waive the privilege; on March 25, 2022 the HOA Board authorized a limited scope waiver of the HOA's privilege solely related to attorneys Center and Townsend and to the date of judgment entered on April 12 2019, subject to a protective order; defendant HOA did not waive the privilege as it has not claimed the advice of counsel defense; protective orders are authorized as remedies for safeguarding confidential information such as attorney-client privileged materials; the advice of counsel waiver is a limited scope waiver of the attorney-client privilege and is narrowly defined so that it fits within the confines of the waiver; and any potential waiver does not extend to insurance defense counsel Katherine Parks, who only defended the HOA and individual defendants against the cross-complaint.

Defendant Gold Country HOA requests that the motion be denied in its entirety; as a necessary precondition to any waiver of the attorney-client privilege and production of privileged materials that the HOA be granted leave to file an amended answer to asset reliance on the advice of counsel defense; if disclosure is ordered, the court should issue a protective

order concerning the attorney-client privileged materials restricting use of those materials and prohibiting dissemination outside the instant malicious prosecution litigation and if materials are permitted to distribution outside the action, to stay production in order to allow the HOA to consider seeking a writ; and the court should impose monetary sanctions in the amount of $3,682.50 against plaintiffs and their counsel.

Plaintiffs replied to the oppositions: plaintiffs are willing to entertain an order in the format suggested by defendants, with modifications, and invites an appropriate court order; plaintiffs are entitled to communications with attorney Katherine Parks, because she represented the HOA on identical quiet title claims as attorney Russell Townsend represented the HOA in the underlying complaint and her advice and information given to her by the HOA to defeat the Bowmans' easement bears directly on the subject matter of the litigation brought against the Bowmans; Ms. Parks may have had opinions that substantially differed from those held by the HOA and attorney Townsend, which could call into question the defendants' probable cause to maintain the underlying complaint; plaintiffs are entitled to discovery of post-judgment attorney-client documents and communications, because post-judgment communications with counsel could possibly contain unintended admissions of lack of probable cause to bring the action in the first place; and the defendants must produce the unredacted election tally sheet on the issue of whether the Bowmans should become members of the Association.

Defendants Ott's, Benton's, Erb's, and Vannucci's Procedural Objection

Defendants' objection that the instant motion is eight separate motions, which must be denied as improper is denied.

Advice of Counsel Defense and Waiver of Attorney-Client Privilege

"To prevail on a malicious prosecution claim, the plaintiff must demonstrate the following: the prior action (1) was commenced by or at the direction of the defendant and was pursued to

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

"" 'Probable cause may be established by the defendants in a malicious institution proceeding when they prove that they have in good faith consulted a lawyer, have stated all the facts to him, have been advised by the lawyer that they have a good cause of action and have honestly acted upon the advice of the lawyer.' [Citations.]" [Footnote omitted.] (*DeRosa v. Transamerica Title Ins. Co.* (1989) 213 Cal.App.3d 1390, 1397–1398, 262 Cal.Rptr. 370; 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 449, pp. 533–534.) Conversely, if the defendant acted in bad faith or withheld facts from counsel he or she knew or should have known would have defeated the cause of action, probable cause is not established. "[C]ounsel's advice must be sought in good faith [citation] and '... not as a mere cloak to protect one against a suit for malicious prosecution.' [Citation.]" (*Bertero v. National General Corp., supra,* 13 Cal.3d 43, 54, 118 Cal.Rptr. 184, 529 P.2d 608.) The burden of proving good faith reliance on the advice of counsel falls on the party asserting the defense. (*Ibid.*) Because, as we have said, Esmat lacked any evidence of a conspiracy, the jury reasonably could have

concluded he had not acted in good faith." (Palmer v. Zaklama (2003) 109 Cal.App.4th 1367, 1383–1384.)

""The probable cause element is objective, not subjective, with the trial court required to determine whether, on the basis of the facts known to [respondents], it was legally tenable to bring the prior action. The benchmark for legal tenability is whether any reasonable attorney would have thought the claim was tenable. [Citation.] Good faith reliance on the advice of counsel, after truthful disclosure of all the relevant facts, is a complete defense to a malicious prosecution claim. [Citation.]" (*Bisno v. Douglas Emmett Realty Fund 1988, supra,* 174 Cal.App.4th at p. 1544, 95 Cal.Rptr.3d 492.) "However, if the initiator acts in bad faith or withholds from counsel facts he knew or should have known would defeat a cause of action otherwise appearing from the information supplied, that defense fails. [Citations.]" (*Bertero v. National General Corp*. (1974) 13 Cal.3d 43, 53-54, 118 Cal.Rptr. 184, 529 P.2d 608.)" (Emphasis added.) (Oviedo v. Windsor Twelve Properties, LLC (2012) 212 Cal.App.4th 97, 114.)

"The burden of proving the advice of counsel defense is on Nunez. (*Bertero, supra,* at p. 54, 118 Cal.Rptr. 184, 529 P.2d 608.) In his anti-SLAPP motion, Nunez "failed to establish that [he] informed counsel of specific relevant facts prior to the filing of the ... action" (*ibid.*), including that (1) he did not permit Pennisi to complete his work on the refrigeration system, (2) he did not replace the generators required to run the refrigeration system as Pennisi recommended, (3) Quality Refrigeration performed work on the refrigeration system before Faherty inspected it, and (4) he failed to pay Pennisi money owed under the contract. Therefore, the advice of counsel defense fails. ¶ With respect to Edward, however, the Pennisis failed to carry their burden to make a prima facie showing of lack of probable cause. The Pennisis point us to no evidence indicating Edward had the opportunity to learn the action lacked merit in the short

time he was a plaintiff. Nothing in the record demonstrates Edward knew or should have known what the complaint alleged or the legal theories on which the suit relied. Accordingly, the motion to strike the cause of action against Edward should have been granted." (Nunez v. Pennisi (2015) 241 Cal.App.4th 861, 877.)

"Generally, implied waivers are limited to situations where the client has placed into issue the decisions, conclusions, and mental state of the attorney who will be called as a witness to prove such matters. (*Estate of Kime* (1983) 144 Cal.App.3d 246, 259, 193 Cal.Rptr. 718.) ¶ Generally, too, the deliberate injection of the advice of counsel into a case waives the attorney-client privilege as to communications and documents relating to the advice. (See *Handgards, Inc. v. Johnson & Johnson* (N.D.Cal.1976) 413 F.Supp. 926, 929.) However, an insurer does not waive the attorney-client privilege where it is not defending itself on the basis of the advice it received. (*Aetna Casualty & Surety Co. v. Superior Court* (1984) 153 Cal.App.3d 467, 200 Cal.Rptr. 471.)" (Transamerica Title Ins. Co. v. Superior Court (1987) 188 Cal.App.3d 1047, 1053.)

With the above-cited principles in mind, the court will rule on the claim of implied waiver of the attorney-client privilege by the individual defendants' assertion of the advice of counsel defense.

- Attorneys Crystal Center and Russel Townsend

The individual defendants were apparently board officers or agents of the HOA prior to and at the time the prior action was prosecuted against plaintiffs. Attorney Center represented the HOA just prior to initiation of the action against the Bowmans and attorney Townsend represented the plaintiff HOA during the underlying litigation. (Declaration of Matthew Tang in Opposition to Motion, paragraph 2.)

Defendant HOA is the same organization that unsuccessfully prosecuted the civil action against the Bowmans. Plaintiffs Bowman allege: defendants used Gold Country HOA as their named plaintiff in the prior action against defendant to seek an injunction preventing plaintiffs from using Gold Country Drive; defendant HOA allegedly conspired with the HOA Board members and agents to maliciously prosecute the prior action without probable cause as they knew that in 2001 Gold Country had consummated an agreement with the Bowmans' predecessors in interest that gave the HOA a right of access over a portion of their property in exchange for the right of access over Gold Country Drive for the benefit of what became the Bowmans' property; and on April 12, 2019 judgment was entered in favor of the Bowmans denying all relief to Gold Country and quieting the Bowmans' title to an easement over Gold Country Drive. (Complaint, paragraphs 8-12.)

Apparently, there is new management of the defendant HOA.

"We are concerned in this matter with a *corporate* client. As a general matter, the power to assert and waive the attorney-client privilege held by a corporation belongs to corporate management and is normally exercised by the corporation's officers and directors. (*Venture Law Group v. Superior Court* (2004) 118 Cal.App.4th 96, 105, 12 Cal.Rptr.3d 656.)" (Melendrez v. Superior Court (2013) 215 Cal.App.4th 1343, 1353–1354.)

"…real parties argue that the individual defendants waived Soft Plus's attorney-client privilege as holders of the privilege who have asserted the advice of counsel defense. We disagree. Former management of a merged company does not hold the merged company's attorney-client privilege and may not waive the attorney-client privilege post-merger. The California Supreme Court observed, in a case involving the transfer of the attorney-client privilege to a successor trustee, that other courts have concluded "the power to assert the attorney-client privilege passes from a predecessor officer to a successor in the analogous

context of corporate affairs." (*Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1136–1137, 69 Cal.Rptr.2d 317, 947 P.2d 279.) ¶ One of the other courts is the United States Supreme Court, which in *Commodity Futures Trading Comm'n v. Weintraub* (1985) 471 U.S. 343, 348–349, 105 S.Ct. 1986, 85 L.Ed.2d 372, stated, "[T]he power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors. The managers, of course, must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals." The Supreme Court further declared, "when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well. New managers installed as a result of a takeover, merger, loss of confidence by shareholders, or simply normal succession, may waive the attorney-client privilege with respect to communications made by former officers and directors. Displaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties." (*Id.* at p. 349, 105 S.Ct. 1986, fn. omitted.) ¶ It therefore follows that the individual defendants, as displaced managers, have no authority to waive Soft Plus's attorney-client privilege over the wishes of the current managers of USI. Moreover, the implied waiver caused by asserting the advice of counsel defense is "limited to situations where *the client* has placed into issue the decisions, conclusions, and mental state of the attorney who will be called as a witness to prove such matters." (*Transamerica Title Ins. Co. v. Superior Court, supra,* 188 Cal.App.3d at p. 1053, 233 Cal.Rptr. 825, italics added.) Thus, waiver is established by showing that *the client* " 'put the otherwise privileged communication directly at issue and that disclosure is essential for a fair adjudication of the action.' " (*Wellpoint Health Networks, Inc. v. Superior Court, supra,* 59 Cal.App.4th at p. 128, 68 Cal.Rptr.2d 844.) ¶ Here, there is no

dispute that the defendants in their individual capacities as directors, officers, and majority shareholders were not the clients of VLG and Giesler. Since they were not clients, the individual defendants cannot impliedly waive the attorney-client privilege that attached to their confidential communications with VLG and Giesler on behalf of Soft Plus by asserting the advice of counsel defense. We understand real parties' argument that they must be allowed to depose Giesler in order to test the validity of the advice of counsel defense and the individual defendants' credibility. However, as this court has explained, "the privilege is not vitiated by the fact that its exercise may occasionally suppress relevant evidence. It has been recognized that the search of truth must sometimes give way to the purposes of the privilege." (*Transamerica Title Ins. Co. v. Superior Court, supra,* 188 Cal.App.3d at p. 1052, 233 Cal.Rptr. 825.) Thus, "the privilege is not to be set aside when one party seeks verification of the authenticity of its adversary's position." (*Id.* at p. 1053, 233 Cal.Rptr. 825.) ¶ For these reasons, we find that real parties failed to meet their burden to show either that the claimed attorney-client privilege did not apply to petitioners' confidential communications with Soft Plus or that there was an implied waiver of Soft Plus's privilege. Accordingly, we conclude that the trial court erred in granting real parties' motion to compel Giesler to answer deposition questions that would violate the attorney-client privilege and extraordinary relief is necessary to correct the error." (Emphasis added.) (Venture Law Group v. Superior Court (2004) 118 Cal.App.4th 96, 104–106.)

Therefore, the holder of the attorney-client privilege concerning communications of counsel prior to the initiation of litigation, during litigation and post-litigation is the HOA and not the individual agents, directors and officers. Only the current management, officers, and directors may waive the attorney-client privilege related to the prior litigation.

This leaves plaintiffs with the problem that certain defendants assert an advice of counsel defense that requires them to present at trial evidence of the confidential communications that

support their claim that they had probable cause to maintain the prior action against the Bowmans due to the advice they received from the HOA's attorneys, while at the same time the plaintiffs can not obtain the evidence related to advice of counsel by pre-trial discovery as the holder of the privilege, the defendant HOA, has not waived the privilege. Defendant Gold Country HOA's assertion of its privilege in discovery proceedings and refusal to waive the privilege will also bar the individual defendants from introducing such evidence in defense leaving them with no evidence to meet their burden to prove reliance on advice of counsel in prosecuting the underlying action.

This leaves the court with a potential quandary of a last-minute waiver of the attorney-client privilege concerning the subject documents and communications by the current HOA board at trial or shortly before trial in order to allow the individual defendants to present the evidence to support their advice of counsel defense without allowing plaintiffs to engage in any discovery on the matter.

The quandary is resolved by the court considering the circumstances presented at the time of waiver of the privilege by the corporate holder and whether the HOA is "blowing hot and cold"

"When a party asserting a claim invokes privilege to withhold crucial evidence, the policy favoring full disclosure of relevant evidence conflicts with the policy underlying the privilege. Courts have resolved this conflict by holding that the proponent of the claim must give up the privilege in order to pursue the claim. Where privileged information goes to the heart of the claim, fundamental fairness requires that it be disclosed for the litigation to proceed. (Wegner et al, Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 1999) ¶ 8:1930, p. 8E–21; *Merritt v. Superior Court* (1970) 9 Cal.App.3d 721, 730, 88 Cal.Rptr. 337 [plaintiff whose claim depended on his attorney's state of mind could not proceed and yet invoke the attorney-

client privilege]; *Fremont Indemnity Co. v. Superior Court* (1982) 137 Cal.App.3d 554, 560, 187 Cal.Rptr. 137 [court could order dismissal of suit against fire insurance company where plaintiff invoked Fifth Amendment privilege to preclude questioning as to whether he started fire].)" (Steiny & Co., Inc. v. California Electric Supply Co. (2000) 79 Cal.App.4th 285, 292.)

An appellate court found that a plaintiff could not rely on the fifth amendment privilege to avoid responding to discovery and then submit evidence to support or oppose designated claims or defenses to which the plaintiff's refusal to answer questions or produce documents whether by invoking the Fifth Amendment privilege or otherwise related. The appellate court held: "…the courts have never allowed a plaintiff to use, in the words of the trial judge in this case, Carlos E. Velarde, the self-incrimination privilege as a "shield and as a sword." The courts have prevented the plaintiff in such a situation from "blow[ing] hot and cold." (*A & M Records, Inc. v. Heilman* (1977) 75 Cal.App.3d 554, 566, 142 Cal.Rptr. 390.) ¶ Also, the courts have been quick to find a waiver of the privilege when a plaintiff seeks damages on the one hand and then attempts to inconvenience or hinder or delay the defense in the prosecution of its case by the imposition of a privilege. (*People v. Preyer* (1985) 164 Cal.App.3d 568, 572, 210 Cal.Rptr. 807.)" (Dwyer v. Crocker National Bank (1987) 194 Cal.App.3d 1418, 1432.)

Therefore, it logically follows, that should there be a later waiver of the attorney-client privilege by the defendant HOA in order to allow the individual defendants to present the evidence at trial in support of their advice of counsel defense the court could determine that the privilege can not be used as a shield and a sword and defendants should not be allowed to "blow hot and cold" on that privilege issue.

On the other hand, a reasonable resolution of those concerns would be if the parties stipulate to the defendant HOA filing a 1st amended answer to the complaint raising the advice

of counsel affirmative defense, the defendant HOA agrees to produce the documents sought, and the parties agree to a protective order.

Otherwise, the court is prepared to rule on the lack of waiver of the privilege by the holder of the privilege and leave the issue of admission of any advice of counsel evidence that had previously been withheld from discovery on a claim of privilege for the time of trial.

Appearances are required for the parties to advise the court whether they have reached a stipulation.

- Attorney Katherine Parks

There is evidence that attorney Katherine Parks was the HOA's insurer appointed defense counsel to only defend against the cross-complaint brought against cross-defendants Gold Country HOA, Randall Benton, Darlene Ott, and Robert Vannucci.in the underlying litigation. (See Declaration of Matthew Tang in Opposition to Motion, paragraph 2.)

For the same reasons as stated above, the holder of the attorney-client privilege is the insured corporation/HOA and not the individuals.

In addition, attorney Parks only defended the HOA and the individuals on the cross-complaint, which is not an action prosecuted against the Bowmans. It is prosecuted by the Bowmans against the HOA and the individuals, therefore, there is no claim than can be brought against the defendants for malicious prosecution of the cross-complaint and no such allegations are asserted. Therefore, the attorney-client privilege was not impliedly waived by the individual defendants asserting the advice of counsel defense against the malicious prosecution complaint. This provides an independent reason to deny the motion to compel disclosure of attorney-client privileged communications and documents related to attorney Parks' representation of the individual defendants in defense against the prior cross-complaint.

- Post-Judgment Communications

Considering the court's rulings above, the court need not and does not reach the post-judgment attorney communications issue.

- Request for Production Number 13, Propounded on Defendant Gold Country HOA

While the HOA attorney-client privilege concerning any privileged communications in the HOA minutes from January 1997 through October 2021 was not waived and the plaintiffs are not entitled to compel production of the documents listed in the Executive Minutes of the HOA privilege log (See Declaration of Plaintiffs' Counsel in Support of Motion, Exhibit 6.), that does not resolve the other objections asserted to production of the minutes.

Defendant Gold Country HOA objected that the production of documents violates the litigation privilege.

That objection lacks merit as the bar against lawsuits premised upon communications that fall within the litigation privilege does not apply to malicious prosecution actions. The objection is overruled.

"In furtherance of the public policy purposes it is designed to serve, the privilege prescribed by section 47(2) has been given broad application. Although originally enacted with reference to defamation (see *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1163, 232 Cal.Rptr. 567, 728 P.2d 1202), the privilege is now held applicable to any communication, whether or not it amounts to a publication (see e.g., *Rosenthal v. Irell & Manella* (1982) 135 Cal.App.3d 121, 126, 185 Cal.Rptr. 92; *Block v. Sacramento Clinical Labs, Inc.* (1982) 131 Cal.App.3d 386, 390, 182 Cal.Rptr. 438; *Lerette v. Dean Witter Organization, Inc.* (1976) 60 Cal.App.3d 573, 577, 131 Cal.Rptr. 592), and all torts except malicious prosecution. (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 382, 295 P.2d 405; *Kilgore v. Younger* (1982) 30 Cal.3d 770, 778, 180 Cal.Rptr. 657, 640 P.2d 793; *Block v.*

Sacramento Clinical Labs, Inc., supra, 131 Cal.App.3d 386, 390-392, 182 Cal.Rptr. 438; *Pettitt v. Levy* (1972) 28 Cal.App.3d 484, 489, 104 Cal.Rptr. 650.)" (Silberg v. Anderson (1990) 50 Cal.3d 205, 211-212.)

Defendant Gold Country HOA also objected: that the request lacks foundation and assumes facts not in evidence; the HOA minutes after entry of the judgment in the underlying Judgment on April 12, 2019 is not subject to discovery as it is irrelevant and not calculated to lead to the discovery of admissible evidence; the request is better directed at the individual defendants as former directors represented by counsel; and the request was unduly burdensome and harassing as it is overly broad as to subject matter and unlimited as to time and geographic location.

The request sought production of "Your minute books for the period commencing January 1997 through October 2021."

The request does not lack foundation or assume facts not in evidence. Those objections are overruled.

The objection that the HOA minutes after entry of the judgment in the underlying Judgment on April 12, 2019, is not subject to discovery as it is irrelevant and not calculated to lead to the discovery of admissible evidence lacks merit. The minutes post-judgment could conceivably reasonably lead to evidence of Board discussions about the HOA loss of the litigation and whether they had cause to initiate it in the first place. The relevancy objection is overruled.

In discovery proceedings, information is within the scope of discovery if it is relevant to the subject matter of the litigation and information is relevant if it might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement. It need not be admissible, provided it can reasonably lead to admissible evidence. (Gonzalez v. Superior Court (1995) 33 Cal.App.4th 1539, 1546.) "The test of relevancy in discovery proceedings is a broad one." (Sav-On Drugs, Inc. v. Superior Court (1975) 15 Cal.3d 1, 7.)

"The purpose of the discovery rules is to 'enhance the truth-seeking function of the litigation process and eliminate trial strategies that focus on gamesmanship and surprise.' (*Williams v. Volkswagenwerk Aktiengesellschaft* (1986) 180 Cal.App.3d 1244, 1254, 226 Cal.Rptr. 306.) In other words, the discovery process is designed to '"make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."' (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 376, 15 Cal.Rptr. 90, 364 P.2d 266.)" (Juarez v. Boy Scouts of America, Inc. (2000) 81 Cal.App.4th 377, 389.)

The request is not unlimited to time and geographic location and those objections are overruled.

The underlying litigation involved plaintiffs' claim to easements granted as part of an agreement between their predecessor in interest and the HOA, which was approved by the HOA Board in 2001. Therefore, it appears that the minute books commencing in January 2001 would be within a reasonable time frame for the purposes of discovery in this litigation.

The court will order further production related to Request Number 13 propounded upon defendant Gold Country HOA related to the HOA minute books for the period commencing January 2001 through October 2021, which the exception of those documents identified in the HOA's privilege log.

Production of Unredacted Election Tally Sheet

Plaintiff's counsel declares that defendant Erb produced a redacted election tally sheet concerning the early 2017 association membership's vote to determine if the Bowmans would become members of the association; and defendant Erb refused to produce a tally sheet identifying the persons who voted and how they voted on the ground of confidentiality. (Declaration of Plaintiffs' Counsel in Support of Motion, paragraph 5.)

Citing Civil Code, §§ 5100, et seq. and 5215, defendants Ott, Benton, Erb, and Vannucci argue in opposition that the Gold Country HOA members have a right to privacy in their member votes on Gold Country HOA issues and production of the information would be a

blatant violation of the rules protecting the long-established confidentiality of elections in homeowners' association elections and give plaintiffs the ability to harass all members about their vote.

Plaintiffs argue in reply: the defendants must produce the unredacted election tally sheet on the issue of whether the Bowmans should become members of the Association; that after being told by defendant HOA president Barbara Erb that there were 26 yes votes and 1 no vote, they lost the election after Ms. Erb discovered prior to the closing of the vote that Mr. Bowman was on Megan's list and the final vote tale only showed 19 yes votes; and plaintiffs are entitled to a clean copy in order to further investigate fraud in the election by vote manipulation.

"(a)(1) Notwithstanding any other law or provision of the governing documents, elections regarding assessments legally requiring a vote, election and removal of directors, amendments to the governing documents, or the grant of exclusive use of common area pursuant to Section 4600 shall be held by secret ballot in accordance with the procedures set forth in this article." (Civil Code, § 5100(a)(1).)

"(b) This article also governs an election on any topic that is expressly identified in the operating rules as being governed by this article." (Civil Code, § 5100(b).)

"(a) Except as provided in subdivision (b), the association may withhold or redact information from the association records if any of the following are true: ¶ * * * (3) The information is privileged under law. Examples include documents subject to attorney-client privilege or relating to litigation in which the association is or may become involved, and confidential settlement agreements. ¶ (4) The release of the information is reasonably likely to compromise the privacy of an individual member of the association…" (Civil Code, §§ 5215(a)(3) and 5215(a)(4).)

Plaintiffs argue that while Section 5100 spells out the types of elections that must be secret, an election to allow new members into the association is not listed in the statute.

Section 5100(b) expressly states that the secret election provision also governs an election on any topic that is expressly identified in the operating rules as being governed by this article. While inclusion of elections related to adding members to the HOA would appear to be the type of election that would be identified in the operating rules as being governed by the secret election provision, the court has no evidence before it that such an election is expressly identified in the operating rules as being governed by that article.

Defendant not having cited any other legal authority that bars disclosure of who voted for what in an HOA election concerning HOA membership and absent evidence the HOA operating rules provides that such elections are governed by the secret election article of the Civil Code, the court grants the motion to compel production of the unredacted vote results.

Defendant Gold Country HOA Filing 1st Amended Answer

The court is willing to allow Gold Country HOA to file an amended answer to assert the advice of counsel defense should the parties stipulate to the defendant HOA filing a 1st amended answer to the complaint raising the advice of counsel affirmative defense, the defendant HOA agrees to produce the documents sought, and the parties agree to a protective order.

Sanctions

Under the totality of the circumstances presented, the court finds that the parties acted with substantial justification or that other circumstances make the imposition of the sanction unjust. The court denies the request for sanctions.

TENTATIVE RULING # 12: THE MOTION IS GRANTED IN PART AND DENIED IN PART AS STATED IN THE TEXT OF THE RULING. THE COURT ORDERS DEFENDANT GOLD

COUNTRY HOMEOWNERS' ASSOCIATION TO PRODUCE THE DOCUMENTS REQUESTED IN REQUEST NUMBER 13 RELATED TO THE HOA MINUTE BOOKS FOR THE PERIOD COMMENCING JANUARY 2001 THROUGH OCTOBER 2021, WITH THE EXCEPTION OF THOSE DOCUMENTS IDENTIFIED IN THE HOA'S PRIVILEGE LOG, WITHIN TEN DAYS. ABSENT EVIDENCE THE HOA OPERATING RULES PROVIDE THAT HOA MEMBERSHIP ENTRY ELECTIONS ARE GOVERNED BY THE SECRET ELECTION ARTICLE OF THE CIVIL CODE, THE COURT ORDERS DEFENDANT ERB TO PRODUCE THE UNREDACTED VOTE RESULTS WITHIN TEN DAYS. THE COURT IS PREPARED TO SUSTAIN THE OBJECTION TO PRODUCTION OF ATTORNEY-CLIENT PRIVILEGED DOCUMENTS ON THE GROUND THAT THERE WAS NO EXPLICIT OR IMPLIED WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE BY THE HOLDER OF THE PRIVILEGE AND LEAVE THE ISSUE OF ADMISSION OF ANY ADVICE OF COUNSEL EVIDENCE FOR THE TIME OF TRIAL. ON THE OTHER HAND, THE PARTIES MAY RENDER THAT DECISION MOOT BY STIPULATING TO THE DEFENDANT HOA FILING A 1ST AMENDED ANSWER TO THE COMPLAINT RAISING THE ADVICE OF COUNSEL AFFIRMATIVE DEFENSE, THE DEFENDANT HOA AGREEING TO PRODUCE THE DOCUMENTS SOUGHT, AND THE PARTIES AGREEING TO A PROTECTIVE ORDER. THE SANCTION REQUESTS ARE DENIED. APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, MAY 6, 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.