1. RICH XIBERTA GLASS, INC. v. GOLDLINE BRANDS, INC. PC-20200048

Judgment Debtor Exam.

TENTATIVE RULING # 1: THE PERSONAL APPEARANCE OF THE DEBTOR IS REQUIRED AT 8:30 A.M., FRIDAY, DECEMBER 17, 2021 IN DEPARTMENT NINE.

2. MATTER OF MORRISON 21CV0107

OSC Re: Name Change.

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

The second portion of eh declaration at section 7.f. of the Judicial Council Form Petition NC-110 was not completed. This needs to be remedied.

TENTATIVE RULING # 2: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, DECEMBER 17, 2021 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 SAWYER 21CV0115

OSC Re: Name Change.

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

TENTATIVE RULING # 3: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, DECEMBER 17, 2021 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

4. MATTER OF SADE A. 21CV0072

OSC Re: Name Change.

TENTATIVE RULING # 4: THE PETITION IS GRANTED.

5. KWAN v. RIVERA PC-20200357

Plaintiff's Motion to Compel Arbitration.

On August 5, 2020 petitioners Kwan filed a petition for assignment of a case number in an uninsured motorist matter under Insurance Code, §11580.2(f). Case number PC-20200384 was assigned. On December 4, 2020 the court entered an order consolidating case number PC-2020357, the action brought against the parties involved in the motor vehicle accident, with case number PC-20200384.

Petitioners Kwan filed a petition to compel binding arbitration of the uninsured motorist claim together with the claim against the third party, defendant Rivera, in the personal injury action (Case Number PC-20200357.), which defendant Rivera and plaintiffs Kwan have agreed to arbitrate.

Respondent CSAA Insurance Exchange (CSAA) opposes the petition on the following grounds: this is an underinsured motorist case and, therefore, the uninsured motorist binding arbitration statute does not apply; CSAA's liability under the underinsured motorist policy coverage has not yet arisen, because the claim against defendant Rivera has not been resolved and defendant Rivera's insurance policy coverage has not yet been exhausted; and CSAA can never be liable to pay petitioners Kwan's underinsurance claim because defendant Rivera has rejected plaintiffs Kwan's Code of Civil Procedure, § 998 offer to compromise for defendant Rivera's insurance policy limits, thereby leaving defendant Rivera's insurer liable to pay plaintiffs all damages found in excess of the policy limits.

Petitioners Kwan replied to the opposition arguing that this is both an underinsured and uninsured policy claim as there were three vehicles involved in the subject accident, one of

which was an unknown second motorist who fled the scene, leading to an uninsured claim related to the extent the second motorist was at fault for the subject accident.

"(a)(1) No policy of bodily injury liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle, except for policies that provide insurance in the Republic of Mexico issued or delivered in this state by nonadmitted Mexican insurers, shall be issued or delivered in this state to the owner or operator of a motor vehicle, or shall be issued or delivered by any insurer licensed in this state upon any motor vehicle then principally used or principally garaged in this state, unless the policy contains, or has added to it by endorsement, a provision with coverage limits at least equal to the limits specified in subdivision (m) and in no case less than the financial responsibility requirements specified in Section 16056 of the Vehicle Code insuring the insured, the insured's heirs or legal representative for all sums within the limits that he, she, or they, as the case may be, shall be legally entitled to recover as damages for bodily injury or wrongful death from the owner or operator of an uninsured motor vehicle…" (Emphasis added.) (Insurance Code, § 11580.2(a)(1)

"(n) Underinsured motorist coverage shall be offered with limits equal to the limits of liability for the insured's uninsured motorist limits in the underlying policy, and may be offered with limits in excess of the uninsured motorist coverage. For the purposes of this section, uninsured and underinsured motorist coverage shall be offered as a single coverage. However, an insurer may offer coverage for damages for bodily injury or wrongful death from the owner or operator of an underinsured motor vehicle at greater limits than an uninsured motor vehicle." (Insurance Code, § 11580.2(n).)

"(p) This subdivision applies only when bodily injury, as defined in subdivision (b), is caused by an underinsured motor vehicle. If the provisions of this subdivision conflict with subdivisions

(a) through (*o*), the provisions of this subdivision shall prevail. ¶ (1) As used in this subdivision, "an insured motor vehicle" is one that is insured under a motor vehicle liability policy, or automobile liability insurance policy, self-insured, or for which a cash deposit or bond has been posted to satisfy a financial responsibility law. ¶ (2) "Underinsured motor vehicle" means a motor vehicle that is an insured motor vehicle but insured for an amount that is less than the uninsured motorist limits carried on the motor vehicle of the injured person. ¶ (3) This coverage does not apply to any bodily injury until the limits of bodily injury liability policies applicable to all insured motor vehicles causing the injury have been exhausted by payment of judgments or settlements, and proof of the payment is submitted to the insurer providing the underinsured motorist coverage. ¶ (4) When bodily injury is caused by one or more motor vehicles, whether insured, underinsured, or uninsured, the maximum liability of the insurer providing the underinsured motorist coverage shall not exceed the insured's underinsured motorist coverage limits, less the amount paid to the insured by or for any person or organization that may be held legally liable for the injury. ¶ (5) The insurer paying a claim under this subdivision shall, to the extent of the payment, be entitled to reimbursement or credit in the amount received by the insured from the owner or operator of the underinsured motor vehicle or the insurer of the owner or operator. ¶ (6) If the insured brings an action against the owner or operator of an underinsured motor vehicle, he or she shall forthwith give to the insurer providing the underinsured motorist coverage a copy of the complaint by personal service or certified mail. All pleadings and depositions shall be made available for copying or copies furnished the insurer, at the insurer's expense, within a reasonable time. ¶ (7) Underinsured motorist coverage shall be included in all policies of bodily injury liability insurance providing uninsured motorist coverage issued or renewed on or after July 1, 1985. Notwithstanding this section, an agreement to delete uninsured motorist coverage completely, or with respect to a person or

persons designated by name, executed prior to July 1, 1985, shall remain in full force and effect." (Emphasis added.) (Insurance Code, § 11580.2(p).)

Insurance Code, § 11580.2(f) requires that any auto policy include a provision requiring arbitration of uninsured motorist claims.

"(f) The policy or an endorsement added thereto shall provide that the determination as to whether the insured shall be legally entitled to recover damages, and if so entitled, the amount thereof, shall be made by agreement between the insured and the insurer or, in the event of disagreement, by arbitration. The arbitration shall be conducted by a single neutral arbitrator. An award or a judgment confirming an award shall not be conclusive on any party in any action or proceeding between (i) the insured, his or her insurer, his or her legal representative, or his or her heirs and (ii) the uninsured motorist to recover damages arising out of the accident upon which the award is based. If the insured has or may have rights to benefits, other than nonoccupational disability benefits, under any workers' compensation law, the arbitrator shall not proceed with the arbitration until the insured's physical condition is stationary and ratable. In those cases in which the insured claims a permanent disability, the claims shall, unless good cause be shown, be adjudicated by award or settled by compromise and release before the arbitration may proceed. Any demand or petition for arbitration shall contain a declaration, under penalty of perjury, stating whether (i) the insured has a workers' compensation claim; (ii) the claim has proceeded to findings and award or settlement on all issues reasonably contemplated to be determined in that claim; and (iii) if not, what reasons amounting to good cause are grounds for the arbitration to proceed immediately…" (Emphasis added.) (Insurance Code, § 11580.2(f).)

"Coverage provided under an uninsured motorist endorsement or coverage shall be offered with coverage limits equal to the limits of liability for bodily injury in the underlying policy of

insurance, but shall not be required to be offered with limits in excess of the following amounts: ¶ (1) A limit of thirty thousand dollars ($30,000) because of bodily injury to or death of one person in any one accident. ¶ (2) Subject to the limit for one person set forth in paragraph (1), a limit of sixty thousand dollars ($60,000) because of bodily injury to or death of two or more persons in any one accident." (Insurance Code, § 11580.2(m).)

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

"If the arbitration agreement provides a method of appointing an arbitrator, that method shall be followed. If the arbitration agreement does not provide a method for appointing an arbitrator, the parties to the agreement who seek arbitration and against whom arbitration is sought may agree on a method of appointing an arbitrator and that method shall be followed. In the absence of an agreed method, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails to act and his or her successor has not been appointed, the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator." (Code of Civil Procedure, § 1281.6.)

"California has a strong public policy in favor of arbitration and any doubts regarding the arbitrability of a dispute are resolved in favor of arbitration. (*Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 782, 191 Cal.Rptr. 8, 661 P.2d 1088 [(the court should " ' " 'indulge every intendment to give effect to' " ' " an arbitration agreement]; *Valsan Partners Limited Partnership v. Calcor Space Facility, Inc.*, supra, 25 Cal.App.4th at pp. 816-817, 30 Cal.Rptr.2d 785; *Titan Group, Inc. v. Sonoma Valley County Sanitation Dist.*, supra, 164 Cal.App.3d at p. 1127, 211 Cal.Rptr. 62.) As the Supreme Court recently noted, "... the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system and

thus avoid potential delays at the trial and appellate levels...." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 10, 10 Cal.Rptr.2d 183, 832 P.2d 899.) This strong policy has resulted in the general rule that arbitration should be upheld "unless it can be said with assurance that an arbitration clause is not susceptible to an interpretation covering the asserted dispute. (Citation.))" (*Bos Material Handling, Inc. v. Crown Controls Corp.* (1982) 137 Cal.App.3d 99, 105, 186 Cal.Rptr. 740 [a terminated dealer's tort causes of action against a manufacturer, including claims for breach of the covenant of good faith and fair dealing, were all required to be arbitrated under their dealership agreement].) ¶ It seems clear that the burden must fall upon the party opposing arbitration to demonstrate that an arbitration clause cannot be interpreted to require arbitration of the dispute. Thus, if there is any reasonable doubt as to whether Coast Plaza's claims come within the Service Agreement's arbitration clause, that doubt must be resolved in favor of arbitration, not against it. (*Hayes Children Leasing Co. v. NCR Corp.* (1995) 37 Cal.App.4th 775, 788, 43 Cal.Rptr.2d 650; *Vianna v. Doctors' Management Co.* (1994) 27 Cal.App.4th 1186, 1189, 33 Cal.Rptr.2d 188; *United Transportation Union v. Southern Cal. Rapid Transit Dist.* (1992) 7 Cal.App.4th 804, 808, 9 Cal.Rptr.2d 702.)" (Coast Plaza Doctors Hosp. v. Blue Cross of California (2000) 83 Cal.App.4th 677, 686-687.)

"A proceeding under this title in the courts of this State is commenced by filing a petition. Any person named as a respondent in a petition may file a response thereto. The allegations of a petition are deemed to be admitted by a respondent duly served therewith unless a response is duly served and filed. The allegations of a response are deemed controverted or avoided." (Code of Civil Procedure, § 1290.)

"A petition to compel arbitration or to stay proceedings pursuant to Code of Civil Procedure sections 1281.2 and 1281.4 shall set forth, in addition to other required allegations, the

provisions of the written agreement and the paragraph that provides for arbitration. The provisions shall be set forth verbatim or a copy shall be attached to the petition and incorporated by reference." (Rules of Court, Rule 3.1330.)

"A petition under this title shall be heard in a summary way in the manner and upon the notice provided by law for the making and hearing of motions, except that not less than 10 days' notice of the date set for the hearing on the petition shall be given." (Code of Civil Procedure, § 1290.2.)

Plaintiffs/Petitioners Kwan's counsel declares in support of the motion: after the parties engaged in settlement negotiations and failed to resolve the matters, he proposed a global binding arbitration involving all parties, on June 7, 2021 defendant Rivera's counsel replied stating he agreed to binding arbitration; it is presumed that CSAA does not object to arbitration; on response to defendant Rivera's counsel's email, he confirmed setting arbitration and requested suggestions for arbitrators; after two weeks, and not having received any further responses from the parties, he followed up by email. (Declaration of Hank Greenblatt in Support of Motion, paragraphs 3-6.)

CSAA's counsel declares in opposition: on November 13, 2020 defendant Rivera answered form interrogatory number 4 propounded by the Kwans, which stated that he had automobile insurance at the time of the subject accident with the State Farm Insurance Company; on March 23, 2021 the Kwans served defendant Rivera with Section 998 offers to compromise for the policy limits amounts listed in defendant's response to form interrogatory number 4.1; and counsel is informed and believes that defendant did not accept the offers to compromise and those offers have expired. (Declaration of John Beebe in Opposition to Petition, paragraphs 3 and 4.)

Applicability of Binding Arbitration Provision of Insurance Code, § 11580.2(f) to Claim under Underinsured Motorist Coverage

The sole authority for compelling arbitration of the claim being made on the Kwans' CSAA policy is Insurance Code, § 11580.2(f) and Code of Civil Procedure, § 1281.6.

There is no evidence before the court that in the Kwans' insurance policy agreement with CSAA expressly states that the parties agreed to binding arbitration of underinsured claims.

As stated earlier in this ruling, Section 11580.2 mandates that all insurance policies in California include a provision for mandatory arbitration of both uninsured and underinsured claims.

"…As used in this section, "uninsured motor vehicle" means a motor vehicle with respect to the ownership, maintenance or use of which there is no bodily injury liability insurance or bond applicable at the time of the accident, or there is the applicable insurance or bond but the company writing the insurance or bond denies coverage thereunder or refuses to admit coverage thereunder except conditionally or with reservation, or an "underinsured motor vehicle" as defined in subdivision (p)…" (Insurance Code, § 11580.2.)

"Uninsured and underinsured motorist policies are governed generally by section 11580.2, which requires automobile liability insurers to offer insurance for damages or wrongful death caused by both uninsured and underinsured motorists. (section 11580.2, subds. (a)(1) & (p)(7).) The provisions of the statute are deemed part of every uninsured and underinsured motorist policy. (*Hartford Fire Ins. Co. v. Macri* (1992) 4 Cal.4th 318, 324, 14 Cal.Rptr.2d 813, 842 P.2d 112 (hereafter *Macri*).) As used in section 11580.2, the term "uninsured motor vehicle" generally includes "underinsured motor vehicle." (§ 11580.2, subd. (b).)" (Quintano v. Mercury Casualty Co. (1995) 11 Cal.4th 1049, 1053.)

"The parties do not and cannot dispute that the policy and section 11580.2, subdivision (f) provide that arbitration is the appropriate forum in which to address whether the underinsured tortfeasor is liable to O'Hanesian for the injuries he sustained in the automobile accident between the two, and, if so, the amount of damages." (Bouton v. USAA Casualty Ins. Co. (2008) 43 Cal.4th 1190, 1201–1202)

The court rejects CSAA's contention that the uninsured motorist binding arbitration statute does not apply.

However, the insurer's liability to pay a claim for an underinsured vehicle only arises when the amount of damages recoverable by the underinsured coverage claimant by settlement or judgment exceeds the policy limits of the third party tortfeasor and the amount paid to the claimant has exhausted the third party's insurance coverage limits.

Whether Arbitration of Claim for Payment under Underinsured Motorist Coverage is Premature

"(3) This coverage does not apply to any bodily injury until the limits of bodily injury liability policies applicable to all insured motor vehicles causing the injury have been exhausted by payment of judgments or settlements, and proof of the payment is submitted to the insurer providing the underinsured motorist coverage." (Insurance Code, § 11580.2(p)(3).)

"A demand for arbitration under the policy before settlement with or judgment against the tortfeasor would be a meaningless exercise. As we have shown, the insured's right to claim coverage would not have accrued, so that any demand for arbitration would be premature. Further, as a practical matter, the insurer's liability cannot be determined by arbitration until settlement or judgment against the tortfeasor, as the insurer is only liable for the difference between the amount paid by the tortfeasor or his or her insurer and the insured's policy limits. (§ 11580.2(p)(4), (5).)" (Quintano v. Mercury Casualty Co. (1995) 11 Cal.4th 1049, 1053, 1059.)

A joint, binding arbitration of the claims against defendant Rivera and the underinsured motorist claim against CSAA would satisfy the underinsured claim accrual requirement in that the same arbitrator will determine the liability of defendant and the amount of damages recoverable and then could determine if the payment on the judgment will exhaust defendant Rivera's policy limits leaving a portion of the damages awarded unpaid.

Under these circumstances, the court rejects CSAA's contention that arbitration of the uninsured motorist claim is premature because the claim against defendant Rivera have not been resolved and defendant Rivera's insurance policy coverage has not yet been exhausted.

Whether the Rejection of the Statutory Offer to Compromise precludes Plaintiffs/Petitioners Kwan from Claiming any Coverage under the Underinsured Motorist Coverage of Their Policy as a Matter of Law

Citing Rappaport-Scott v. Interinsurance Exchange of the Automobile Club (2007) 146 Cal.App.4th 831, CSAA argues that it can never be liable to pay petitioners Kwan's underinsurance claim because defendant Rivera's insurer rejected plaintiffs Kwan's Code of Civil Procedure, § 998 offer to compromise for defendant Rivera's insurance policy limits, thereby leaving defendant Rivera's insurer liable to pay plaintiffs all damages found in excess of the policy limits as the rejection "lifted the lid" on defendant Rivera's liability coverage effectively converting defendant Rivera's policy coverage to a no limits policy due to the bad faith rejection of the policy limits offer to compromise.

The appellate court held in Rappaport-Scott, supra, as follows: "The covenant of good faith and fair dealing implied in every insurance policy obligates the insurer, among other things, to accept a reasonable offer to settle a lawsuit by a third party against the insured within policy limits whenever there is a substantial likelihood of a recovery in excess of those limits. (*Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 401, 97

Cal.Rptr.2d 151, 2 P.3d 1; *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658–659, 328 P.2d 198.) The insurer must evaluate the reasonableness of an offer to settle a lawsuit against the insured by considering the probable liability of the insured and the amount of that liability, without regard to any coverage defenses. (*Johansen v. California State Auto. Assn. Inter–Ins. Bureau* (1975) 15 Cal.3d 9, 16, 123 Cal.Rptr. 288, 538 P.2d 744.) An insurer that fails to accept a reasonable settlement offer within policy limits will be held liable in tort for the entire judgment against the insured, even if that amount exceeds the policy limits. (*Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718, 725, 117 Cal.Rptr.2d 318, 41 P.3d 128; *Comunale, supra,* at p. 661, 328 P.2d 198.) An insurer's duty to accept a reasonable settlement offer in these circumstances "is implied in law to protect the insured from exposure to liability in excess of coverage as a result of the insurer's gamble—on which only the insured might lose. [Citation.]" (*Murphy v. Allstate Ins. Co.* (1976) 17 Cal.3d 937, 941, 132 Cal.Rptr. 424, 553 P.2d 584.) ¶ Contrary to the argument advanced by Rappaport–Scott, it is well established that an insurer's tort liability for failure to accept a reasonable settlement offer can arise only with respect to third party, or liability, coverage. As explained in *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032: "[I]n *Comunale* and *Crisci* [*v. Security Ins. Co.* (1967) 66 Cal.2d 425, 58 Cal.Rptr. 13, 426 P.2d 173] we made it clear that '[l]iability is imposed [on the insurer] not for a bad faith breach of the contract but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing.' (*Crisci, supra,* at p. 430 [58 Cal.Rptr. 13, 426 P.2d 173].)" (Emphasis added.) (Rappaport-Scott v. Interinsurance Exchange of the Automobile Club (2007) 146 Cal.App.4th 831, 836.)

Rappaport-Scott, supra, only holds that a third party insurer may be held liable where it unreasonably withholds benefits due under the policy, which leaves open the possibility that

the insurer reasonably denied the Section 998 offer to compromise for policy limits. Under such a circumstance, there is no insurer liability to pay the entire judgment against the third party even where it exceeds iability policy limits. In other words, the case opinion does not hold that merely denying a full policy offer to compromise results in bad faith liability as a matter of law, which relieves the first party's insurer from covering the judgment or settlement amount in excess of the third party's insurance coverage.

The appellate court in Rappaport-Scott, supra, did not discuss and hold that as a matter of law every rejection of a section 998 offer to compromise for policy limits by the liability insurer for the third party underinsured motorist was a bad faith rejection making the insurer liable to pay the entire judgment or settlement even where the amount of the judgment or settlement exceeds the third party's insurance coverage limit.

"An opinion is not authority for a point not raised, considered, or resolved therein. (E.g., *People v. Castellanos* (1999) 21 Cal.4th 785, 799, fn. 9, 88 Cal.Rptr.2d 346, 982 P.2d 211; *San Diego Gas & Elec. Co. v. Superior Court* (1996) 13 Cal.4th 893, 943, 55 Cal.Rptr.2d 724, 920 P.2d 669.)" (Styne v. Stevens (2001) 26 Cal.4th 42, 57-58.)

Should CSAA pay the amounts recoverable in excess of the underinsured motorist's policy limits and CSAA's insured later recovers an additional amount from the underinsured motorist's insurance company, CSAA would be entitled to reimbursement from its insured the additional amount paid by the underinsured motorist's insurer up to the amount CSAA paid under the underinsured motorist coverage.

"(5) The insurer paying a claim under this subdivision shall, to the extent of the payment, be entitled to reimbursement or credit in the amount received by the insured from the owner or operator of the underinsured motor vehicle or the insurer of the owner or operator." (Insurance Code, § 11580.2(p)(5).)

The court rejects CSAA's argument that the petitioners have no right to arbitrate their underinsured insurance coverage claim, because defendant's insurer will be required to pay any judgment entered in excess of defendant Rivera's policy limits due to the insurer's rejection of the Section 998 offer to compromise the case in exchange for the policy limits.

The petition to compel arbitration is granted.

TENTATIVE RULING # 5: THE PETITION IS GRANTED. APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, DECEMBER 17, 2021 IN DEPARTMENT NINE TO DISCUSS THE SELECTION OF THE ARBITRATOR FROM THE LIST PROVIDED IN THE MOVING PAPERS. NO HEARING ON THE RULING GRANTING ARBITRATION WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT",

WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, DECEMBER 17, 2021 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

6. BELAND v. LAKE POINTE VIEW ROAD OWNERS PC-20200635

Plaintiffs' Motion to Strike Cross-Complaint.

On July 22, 2021 plaintiffs filed a 3rd amended complaint against defendants asserting causes of action for breach of fiduciary duties, violations of Civil Code,§§ 5510 and 5100, et seq., declaratory relief, and injunctive relief

On August 26, 2021 defendants/cross-complainants filed a cross-complaint against plaintiffs/cross-defendants asserting causes of action for breach of contract, unjust enrichment, quantum meruit, common counts, fraud, declaratory relief, and preliminary and permanent injunctive relief

Plaintiffs/Cross-Defendants move to strike paragraphs 54-56 of the cross-complaint on the grounds that the allegations are irrelevant, false, improper, or highly prejudicial.

Cross-Complainants oppose the motion on the following grounds: the allegations sought to be stricken are essential to the fraud cause of action as they allege the facts establishing that cross-defendants Brian Beland and Danae Beland engaged in fraud and deceit; and the allegations are proper, because proof of the allegations are admissible under Evidence Code, §§ 210 and 780 as impeachment evidence and to disprove the truthfulness of their testimony.

Cross-Defendants argue in reply that Evidence Code, § 1300 only allows admission if there are final judgments of conviction of a felony, the Belands have not been convicted of anything, and no final judgment has been entered; the allegations are merely intended to impugn the Belands and prejudice them in this action; and pursuant to Evidence Code, §1101(a) character evidence is inadmissible, making such allegations irrelevant and prejudicial.

Motion to Strike Principles

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

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

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

"We emphasize that such use of the motion to strike should be cautious and sparing. We have no intention of creating a procedural "line item veto" for the civil defendant. However, properly used and in the appropriate case, a motion to strike may lie for purposes discussed in this opinion." (PH II, Inc. v. Superior Court (1995) 33 Cal.App.4th 1680, 1683.)

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

- Irrelevant and Improper Matters

"A material allegation in a pleading is one essential to the claim or defense and which could not be stricken from the pleading without leaving it insufficient as to that claim or defense." (Code of Civil Procedure, § 431.10(a).)

"An immaterial allegation in a pleading is any of the following: ¶ (1) An allegation that is not essential to the statement of a claim or defense. ¶ (2) An allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense. ¶ (3) A demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint." (Code of Civil Procedure, § 431.10(b).)

"An "immaterial allegation" means "irrelevant matter" as that term is used in Section 436." (Code of Civil Procedure, § 431.10(c).)

With the above cited legal principles in mind, the court will rule on plaintiff's motion to strike portions of the cross-complaint.

Relevant, Proper, and Essential Allegations

The cross-complaint alleges the following in paragraphs 54-56: "54…while accusing Cross-Complainants herein of "illegal conduct", on January 24, 2019, a federal grand jury returned a four-count indictment against cross-Defendants Brian Beland and Denae Beland, charging them with obstructing an IRS investigation. Cross-Defendant Brian Beland was also charged with filing false tax returns, wherein Brian Beland allegedly filed tax returns in 2011, 2012, and 2013, in which he reported false business expenses. (A true and correct copy of the Indictment is attached hereto as Exhibit C.) ¶ 55. The 2019 indictment alleges that following the initiation of an audit in 2014, Cross-Defendants Brian Beland and Denae Beland allegedly made false statements to the IRS revenue agents and provided revenue agents with spreadsheets containing false business expenses in an attempt to obstruct and impede the audit. ¶ 56.

Based on information and belief, and based thereon Cross-Complainant alleges, the Beland's consistent with the 2019 indictment, intentionally misled the Association and others into believing they would comply with the 1986 C,C&R's pay the reimbursement fee prior to beginning grading and construction on their home at 75 Guadalupe Road."

The cross-complaint incorporates these allegations into the fraud cause of action asserted against cross-defendants Beland. The fraud cause of action also alleges: in 2018 cross-defendants Beland represented to cross-complainants that they were aware of the requirement to pay the $15,000 reimbursement fee set forth in the 1986 C,C&R's in order to use Guadalupe Road; cross-defendants Beland expressly agreed and represented they would pay the Association annual assessment or charges and special assessments for capital improvements; the foregoing representations were false and cross-defendants have now taken positions in this lawsuit in direct contravention of their representations all to the damage and detriment of cross-complainants, subject to proof at trial; and cross-complainants reasonably relied on the foregoing representations made by the cross-defendants and would not have allowed access to Guadalupe Road in the absence of such representations. (Cross-Complaint, paragraphs 104-107.)

The allegations concerning the purported indictment of cross-defendants Beland in paragraphs 54-56 are immaterial and irrelevant to the fraud claim asserted against them. The allegations of paragraphs 54-56 are not essential to the statement of fraud claim and are neither pertinent to nor supported by an otherwise sufficient claim for fraud against cross-defendants Beland. The fraud claimed in this action involves alleged misrepresentations related to the requirement to pay the $15,000 reimbursement fee set forth in the 1986 C,C&R's in order to use Guadalupe Road and that they would pay the Association annual assessment or charges and special assessments for capital improvements. These representations have no

logical connection to the indictment and alleged misconduct that cross-defendants Beland obstructed an IRS investigation, filed false tax returns, reported false business expenses, and made false statements to IRS revenue agents. The facts alleged are inadmissible facts that are alleged in an indictment that has not been reduced to a final judgment of conviction relating to purported specific instances of cross-defendants' bad acts and purported bad character with regards to making representations to the IRS as proof that they made false statements involving entirely different matters.

"(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. ¶ (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act. ¶ (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness." (Evidence Code, § 1101.)

The motion to strike paragraphs 54-56 from the cross-complaint is granted. The question becomes whether leave to amend is granted.

"Where the defect raised by a motion to strike or by demurrer is reasonably capable of cure, "leave to amend is routinely and liberally granted to give the plaintiff a chance to cure the defect in question." (*Price v. Dames & Moore* (2001) 92 Cal.App.4th 355, 360, 112 Cal.Rptr.2d 65; *Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 168, 203 Cal.Rptr. 556.) A pleading

may be stricken only upon terms the court deems proper (§ 436, subd. (b)), that is, terms that are just. (§ 472a, subd. (c); *Vaccaro v. Kaiman* (1998) 63 Cal.App.4th 761, 768, 73 Cal.Rptr.2d 829.) It is generally an abuse of discretion to deny leave to amend, because the drastic step of denial of the opportunity to correct the curable defect effectively terminates the pleader's action. (*Vaccaro v. Kaiman, supra,* at p. 768, 73 Cal.Rptr.2d 829.)" (CLD Const., Inc. v. City of San Ramon (2004) 120 Cal.App.4th 1141, 1146-1147.)

In the analogous situation regarding granting leave to amend after a demurrer is sustained, an appellate court has stated: "The burden is on the plaintiff to demonstrate how he or she can amend the complaint. It is not up to the judge to figure that out. (*Blank v. Kirwan*, supra, 39 Cal.3d 311, 318, 216 Cal.Rptr. 718, 703 P.2d 58.)" (Roman v. County of Los Angeles (2000) 85 Cal.App.4th 316, 322.) The same would appear to apply in instances where motions to strike portions of the complaint are sustained.

The defect raised in this motion does not appear to be reasonably capable of cure and cross-complainant has not advised the court how the defect could be cured by amendment.

The motion to strike is granted without leave to amend.

TENTATIVE RULING # 6: CROSS-DEFENDANTS' MOTION TO STRIKE PARAGRAPHS 54-56 FROM THE CROSS-COMPLAINT IS GRANTED WITHOUT LEAVE TO AMEND. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE

HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldoradocourt.org/onlineservices/vcourt.html. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, DECEMBER 17, 2021 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

7. SMITH v. KAMILOS PC-20190645

Motion to be Relieved as Counsel of Record for Plaintiffs Smith.

TENTATIVE RULING # 7: THE MOTION IS GRANTED. WITHDRAWAL WILL BE EFFECTIVE AS OF THE DATE OF FILING PROOF OF SERVICE OF THE FORMAL, SIGNED ORDER UPON THE CLIENT. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldoradocourt.org/onlineservices/vcourt.html. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON

THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, DECEMBER 17, 2021 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

8. DEWATER v. HOSOPO CORP. PC-20190143

Defendant Wilson's Motion to Compel Further Responses to Requests for Production.

Defendant Wilson moves to compel further responses and production of documents responsive to Requests for Production, Set Two, Numbers 43-54 asserting the following grounds: the subject requests relate to the plaintiff's claim of loss of earning capacity; request numbers 43-54 seek relevant tax records from plaintiff for the years 2017-2020; these forms are highly relevant to the issue of plaintiff's loss of earnings claim in that they would reveal plaintiff's earnings before and after the subject incident; plaintiff is self-employed and has owned multiple businesses, therefore an accurate representation of his earnings would be found in tax records, such as a Schedule K-1, Schedule C, and 1099 Form; plaintiff testified at his deposition that his business records and QuickBooks were not up to date and his counsel repeatedly instructed him not to answer questions about his tax filings and income, leaving no less invasive way of obtaining the necessary information to fully evaluate plaintiff's loss of earning capacity claim; defendant Wilson's right to discover the information on the tax forms outweighs plaintiff's right to privacy; a protective order will adequately protect plaintiff's privacy; plaintiff waived his privilege related to his tax records by voluntarily producing his W-2 forms, leaving him subject to discovery of his other tax records; the privilege related to his tax records was impliedly waived by his filing an action seeking recovery of damages for loss of earnings and earning capacity; and sanctions in the amount of $3,035 are warranted against plaintiff and his counsel.

Plaintiff opposes the motion on the following grounds: plaintiff's tax returns are protected by his right to privacy, which he has not waived by producing W-2 forms; some of the tax returns were filed jointly with plaintiff's ex-wife who has not waived her privilege, therefore those

returns are not subject to disclosure (Coate v. Superior Court (1978) 81 Cal.App.3d 113, 114.); plaintiff expressly withdraws the initial claim for loss of earnings and is only making a loss of earning capacity claim, which does not allow invasion of plaintiff's right to privacy in his tax documents (See Plaintiff' Opposition, page 4, lines 18-19 and lines 27-28.); plaintiff's tax returns are not required to prove his loss of earning capacity claim; and the court should award plaintiff monetary sanctions for the attorney fees incurred in opposing this motion.

Defendant Wilson replied: prior earnings are relevant to the claim for loss of earning capacity; while plaintiff is not required to present evidence of his prior earnings history to prove his loss of earnings capacity claim, that does not render plaintiff's prior earnings irrelevant as his prior earnings are a proper factor to consider in determining the loss of earning capacity damage claim and defendant should be permitted to discover such relevant information and documentation even if it is not required for plaintiff to prove the claim at trial as such records could undermine the lost earnings capacity claim and the defense is entitled to discover the records in order to defend against the claim; the public policies of defendant's right to a defense against plaintiff's claims and the discovery process and judicial system's ability to ensure a process deigned to uncover the truth outweighs plaintiff's tax return privilege; plaintiff's claim that the production of the documents invades his ex-wife's privacy are without merit; the plaintiff failed to object that the requests invaded the privacy rights of a third party on the responses, thereby waiving the right; plaintiff can redact his ex-wife's confidential information while producing the responsive documents; and the public policies of defendant's right to a defense against plaintiff's claims and the discovery process and judicial system's ability to ensure a process designed to uncover the truth outweighs plaintiff's ex-wife's tax return privilege.

Motion to Compel Further Responses and Production Principles

"(a) The party to whom an inspection demand has been directed shall respond separately to each item or category of item by any of the following: ¶ (1) A statement that the party will comply with the particular demand for inspection and any related activities. ¶ (2) A representation that the party lacks the ability to comply with the demand for inspection of a particular item or category of item. ¶ (3) An objection to the particular demand. ¶ (b) In the first paragraph of the response immediately below the title of the case, there shall appear the identity of the responding party, the set number, and the identity of the demanding party. ¶ (c) Each statement of compliance, each representation, and each objection in the response shall bear the same number and be in the same sequence as the corresponding item or category in the demand, but the text of that item or category need not be repeated. (Code of Civil Procedure, § 2031.210.) "A statement that the party to whom an inspection demand has been directed will comply with the particular demand shall state that the production, inspection, and related activity demanded will be allowed either in whole or in part, and that all documents or things in the demanded category that are in the possession, custody, or control of that party and to which no objection is being made will be included in the production." (Code of Civil Procedure, § 2031.220.) "(a) Any documents demanded shall either be produced as they are kept in the usual course of business, or be organized and labeled to correspond with the categories in the demand. ¶ (b) If necessary, the responding party at the reasonable expense of the demanding party shall, through detection devices, translate any data compilations included in the demand into reasonably usable form." (Code of Civil Procedure, § 2031.280.)

"A representation of inability to comply with the particular demand for inspection shall affirm that a diligent search and a reasonable inquiry has been made in an effort to comply with that demand. This statement shall also specify whether the inability to comply is because the

particular item or category has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody, or control of the responding party. The statement shall set forth the name and address of any natural person or organization known or believed by that party to have possession, custody, or control of that item or category of item." (Code of Civil Procedure, § 2031.230.)

"(a) If only part of an item or category of item in an inspection demand is objectionable, the response shall contain a statement of compliance, or a representation of inability to comply with respect to the remainder of that item or category." (Code of Civil Procedure, § 2031.240(a).)

"If the responding party objects to the demand for inspection, copying, testing, or sampling of an item or category of item, the response shall do both of the following: ¶ (1) Identify with particularity any document, tangible thing, land, or electronically stored information falling within any category of item in the demand to which an objection is being made. ¶ (2) Set forth clearly the extent of, and the specific ground for, the objection. If an objection is based on a claim of privilege, the particular privilege invoked shall be stated. If an objection is based on a claim that the information sought is protected work product under Chapter 4 (commencing with Section 2018.010), that claim shall be expressly asserted." (Code of Civil Procedure, § 2031.240(b).)

"On receipt of a response to an inspection demand, the party demanding an inspection may move for an order compelling further response to the demand if the demanding party deems that any of the following apply: ¶ (1) A statement of compliance with the demand is incomplete. ¶ (2) A representation of inability to comply is inadequate, incomplete, or evasive. ¶ (3) An objection in the response is without merit or too general." (Code of Civil Procedure, § 2031.310(a).)

With the above-cited principles in mind, the court will rule on defendant Wilson's motion to compel further responses to requests for production and production of document.

Right to Privacy

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

"There is no recognized federal or state constitutional right to maintain the privacy of tax returns. (See *Couch v. United States* (1973) 409 U.S. 322, 336–337, 93 S.Ct. 611, 34 L.Ed.2d 548; *Deary v. Superior Court* (2001) 87 Cal.App.4th 1072, 1075, fn. 2, 1077–1078, 105 Cal.Rptr.2d 132.) California courts, however, have interpreted state taxation statutes as creating a statutory privilege against disclosing tax returns. (*Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 718–721, 21 Cal.Rptr.2d 200, 854 P.2d 1117; *Webb v. Standard Oil Co.* (1957) 49 Cal.2d 509, 513, 319 P.2d 621.) The purpose of the privilege is to encourage voluntary filing of tax returns and truthful reporting of income, and thus to facilitate tax collection. (*Webb v. Standard Oil, supra,* 49 Cal.2d at p. 513, 319 P.2d 621.) ¶ But this statutory tax return privilege is not absolute. The privilege will not be upheld when (1) the circumstances indicate an intentional waiver of the privilege; (2) the gravamen of the lawsuit is inconsistent with the privilege; or (3) a public policy greater than that of the confidentiality of tax returns is involved.

(*Schnabel v. Superior Court, supra,* 5 Cal.4th at p. 721, 21 Cal.Rptr.2d 200, 854 P.2d 1117.) This latter exception is narrow and applies only "when warranted by a legislatively declared public policy." (*Ibid.*) A trial court has broad discretion in determining the applicability of a statutory privilege. (See *National Football League Properties, Inc. v. Superior Court* (1998) 65 Cal.App.4th 100, 106–107, 75 Cal.Rptr.2d 893.)" (Emphasis added.) (Weingarten v. Superior Court (2002) 102 Cal.App.4th 268, 274.)

"In determining whether one has waived the right of privacy by bringing suit, our Supreme Court has noted that although there may be an implicit partial waiver, the scope of such waiver must be narrowly, rather than expansively construed, so that plaintiffs will not be unduly deterred from instituting lawsuits by fear of exposure of private activities. (*Vinson v. Superior Court* (1987) 43 Cal.3d 833, 842, 239 Cal.Rptr. 292, 740 P.2d 404, quoting *Britt v. Superior Court* (1978) 20 Cal.3d 844, 859, 143 Cal.Rptr. 695, 574 P.2d 766.) An implicit waiver of a party's constitutional rights encompasses only discovery directly relevant to the plaintiff's claim and essential to the fair resolution of the lawsuit. (*Vinson v. Superior Court*, supra, 43 Cal.3d at p. 842, 239 Cal.Rptr. 292, 740 P.2d 404.) There must be a compelling and opposing state interest justifying the discovery. (*Britt v. Superior Court*, supra, 20 Cal.3d at p. 855, 143 Cal.Rptr. 695, 574 P.2d 766.) Even when discovery of private information is found directly relevant to the issues of ongoing litigation, it will not be automatically allowed; there must then be a careful balancing of the compelling public need for discovery against the fundamental right of privacy. (*Binder v. Superior Court* (1987) 196 Cal.App.3d 893, 900, 242 Cal.Rptr. 231.) The scope of any disclosure must be narrowly circumscribed, drawn with narrow specificity, and must proceed by the least intrusive manner. (Id. at pp. 900-901, 242 Cal.Rptr. 231.)" (Davis v. Superior Court (1992) 7 Cal.App.4th 1008, 1014.)

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

With the above-cited principles in mind, the court will rule on defendant Wilson's motion to compel further responses and production.

Requests for Production, Set Two, Numbers 43-54

Requests for Production, Set Two, Numbers 43-54 request that plaintiff produce the following documents: all Schedule K tax forms issued to plaintiff for the year 2017; all Schedule K tax forms issued to plaintiff for the year 2018; all Schedule K tax forms issued to plaintiff for the year 2019; all Schedule K tax forms issued to plaintiff for the year 2020; all Schedule C tax forms prepared by or for plaintiff for the year 2017; all Schedule C tax forms prepared by or for plaintiff for the yearn 2018; all Schedule C tax forms prepared by or for plaintiff for the year 2019; all Schedule C tax forms prepared by or for plaintiff for the year 2020; all 1099 tax forms prepared by or for plaintiff for the year 2017; all 1099 tax forms prepared by or for plaintiff for the year 2018; all 1099 tax forms prepared by or for plaintiff for the year 2019; and all 1099 tax forms prepared by or for plaintiff for the year 2020.

Plaintiff did not produce any documents related to these requests and responded to each of the requests by only asserting the following objection: the request violates plaintiff's Federal and State constitutional and statutory rights to privacy concerning financial privacy and specifically, the plaintiff's rights of financial privacy pursuant to the U.S. Revenue and Taxation Code (Webb v Standard Oil Co. (1957) 42 Cal.2d 509, 513-514; and Sav-On Drugs, Inc. v. Superior Court (1975) 15 Cal.3d 1, 6.)

- Waiver of Ex-Wife's Right to Financial Privacy Regarding the Financial Tax Forms Requested

Plaintiff's responses to the subject requests for production do not assert that the documents sought are privileged as the plaintiff's ex-wife has a right to privacy concerning those tax forms. The responses to those requests only assert that plaintiff's right to privacy is violated. (Emphasis the court's.)

It appears that the claim that some of the plaintiff's tax returns were filed jointly with his ex-wife and the ex-wife must waive disclosure was first raised in the opposition to the motion.(See Plaintiff's Opposition to Motion, page 4, lines 10-13.) The plaintiff has not directed the court to any evidence submitted that establishes that some of the tax returns were joint returns or that the subject tax forms were part of any joint return and the court has not found any such evidence having been submitted for consideration in this proceeding.

A failure to raise an objection in the initial response to discovery operates as a waiver of that objection, even if it is one based on privilege. (Scottsdale Ins. Co. v. Superior Court (1998) 59 Cal.App.4th 263, 273-274.)

"There is no doubt that the Legislature meant to provide that failure to assert the privilege in response to discovery proceedings is a waiver pursuant to section 912. For example, the Legislature has specifically designated failure to timely assert the privilege as waiver during various discovery modes: Section 2031, subdivision (k), the section at issue here; section 2030, subdivision (k), interrogatories; section 2028, subdivision (d)(2), deposition by written questions; section 2025, subdivision (m), oral deposition; section 2033, subdivision (k), requests for admission. ¶ Scottsdale recognizes these authorities and does not challenge the fact that waiver does occur when there is a *complete* failure to respond to discovery. It urges that section 2031, subdivision (k), must be read to preserve the attorney-client privilege

if *any* response is timely filed, even if no specific objection based on attorney-client privilege is asserted. In response, Spyglass argues that subdivision (k) must be read in connection with subdivision (f) which requires that an objection based on privilege must be made in the *original* response or waiver results. Spyglass's position is persuasive. ¶ "We begin with the fundamental rule that a court 'should ascertain the intent of the Legislature so as to effectuate the purpose of the law.' [Citation.] In determining such intent '[t]he court turns first to the words themselves for the answer.' [Citation.] We are required to give effect to statutes 'according to the usual, ordinary import of the language employed in framing them.' [Citations.] 'If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose.' [Citation.] '[A] construction making some words surplusage is to be avoided.' [Citation.] 'When used in a statute [words] must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear.' [Citations.] *Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole.* [Citations.]" (*Moyer v. Workmen's Compensation Appeals Bd.* (1973) 10 Cal.3d 222, 230–231, 110 Cal.Rptr. 144, 514 P.2d 1224, italics added.) ¶ In the context of the legislative intent exhibited in the Civil Discovery Act of 1986 (Act), Scottsdale's argument makes no sense. It would allow piecemeal and seriatim doling out of objections to legitimate discovery requests whenever a timely response, no matter how insubstantial, is served. It is clear from the Act that the Legislature intended that any and all objections are to be made at the earliest timely response. For example, section 2025, subdivision (m), dealing with oral depositions, states: "The protection of information from discovery on the ground that it is privileged or that it is protected work product under Section 2018 is waived unless a specific objection to its disclosure is made *during the deposition.*" (Italics added.) This clearly requires an immediate assertion of

the privilege at the earliest opportunity. ¶ Courts have concluded that the Legislature requires objections in the initial response to written interrogatories to avoid waiver of privilege. (*Coy v. Superior Court* (1962) 58 Cal.2d 210, 216–217, 23 Cal.Rptr. 393, 373 P.2d 457; *Leach v. Superior Court* (1980) 111 Cal.App.3d 902, 905, 169 Cal.Rptr. 42.) ¶ While *Coy* and *Leach* predate the Act, their holdings are grounded on requirements encompassed by section 2030, subdivision (k). (See Weil & Brown, Civil Procedure Before Trial, 2 ¶ 8:1101, p. 8F–45.) ¶ Turning to the language of section 2031, subdivision (f) requires that a response "shall respond separately *to each item or category of item* by a statement that the party will comply with the particular demand ... a representation that the party lacks the ability to comply ..., or an objection to the particular demand. [¶] ... [¶] (3) *If only part of an item or category of item* in an inspection demand is objectionable, the response shall contain a statement of compliance, or a representation of inability to comply with respect to the *remainder* of that item or category.... If an objection is based on a claim of privilege, *the particular privilege invoked shall be stated.* " (Italics added.) This language can be construed in only one way: to require a complete response to each and every requested item whether by agreement to produce the item, a statement that the item cannot be produced, or by objection which, if it relies upon privilege, sets forth the particular privilege. Failure to assert the privilege means that no timely response has been served to preserve the privilege. This conclusion is supported by the language of subdivision (k) granting the court authority to relieve the party of waiver based upon mistake, inadvertence, or excusable neglect when the party "has subsequently served a response that is in substantial compliance with subdivision (f)." ¶ Scottsdale relies upon *Korea Data Systems Co. v. Superior Court* (1997) 51 Cal.App.4th 1513, 59 Cal.Rptr.2d 925 for the proposition that the waiver provision of section 2031 is not absolute. Scottsdale's reliance on *Korea Data* is misplaced. There, a party to the litigation served a

timely but nonspecific response, which included "general objections based on the attorney/client privilege and the work product doctrine." (*Id.* at p. 1515, 59 Cal.Rptr.2d 925.) Despite the fact that the objections were general and nonspecific, the court concluded that because a reference to attorney-client privilege was asserted in the timely response, no waiver of the privilege occurred. The focus of the court was directed to a claim of waiver for failure to timely serve the privilege log, and it concluded: "[N]either section 2031, subdivision (k) nor Evidence Code section 912 authorizes a finding of waiver based on a failure to file a privilege log in a timely manner." (*Id.* at p. 1517, 59 Cal.Rptr.2d 925.) ¶ We conclude that failure to include an objection expressly based upon attorney-client privilege in the initial response results in waiver of the attorney-client privilege. ¶ 2. *Relief from waiver* ¶ At the outset, we note that Scottsdale is correct in concluding that its sole remedy for relief from waiver in the context of discovery is contained within the provisions of the Act and it cannot rely upon the provisions of section 473. (*Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1104, 1 Cal.Rptr.2d 222.) In that regard, there is no comparable language in the Act to that within section 473, which requires mandatory relief when fault is attributable solely to counsel for the party. However, the Legislature did intend that general principles developed in application of section 473 would be utilized in connection with the discretion to be exercised pursuant to the Act. (*City of Fresno v. Superior Court, supra*, 205 Cal.App.3d 1459, 253 Cal.Rptr. 296.) ¶ Turning now to subdivision (k), we note it allows relief from waiver to a party who has failed to file a timely response if two conditions are met: "(1) the party has subsequently served a response that is in substantial compliance with subdivision (f), and (2) the party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect." [FN 6] Here, Scottsdale first served a supplemental response in substantial compliance with subdivision (f) when it filed its ex parte application for relief on July 16, 1997. However, Scottsdale did so only after it had opposed the

original motion of Spyglass on its merits, and without conceding that it had waived the attorney-client privilege. This raises the inference that Scottsdale sought relief pursuant to subdivision (k) only as an afterthought. ¶ FN 6. Spyglass argues that Scottsdale does not qualify within the terms of subdivision (k) because it did timely file a response, albeit not a sufficient response to preserve the attorney-client privilege. We disagree. As we noted in the text, subdivisions (f) and (k) must be read together. Under their terms, no timely response relating to the attorney-client privilege was served, and the provisions of subdivision (k) are applicable. To construe these statutes otherwise would result in a forfeiture of the attorney-client privilege, not a waiver." (Emphasis added.) (Scottsdale Ins. Co. v. Superior Court (1997) 59 Cal.App.4th 263, 272–275.)

While plaintiff waived any right he had to raise his ex-wife's financial information privilege related to the subject tax forms by failing to object on that ground in his responses to the discovery seeking production of the tax forms, a spouse who has filed a joint tax return has an independent right to raise an objection to discovery of the joint tax returns.

"Real parties moved to compel further responses to the interrogatories, contending that decedent had waived the privilege by disclosing certain information with respect to partnership profits and losses to real party Joseph Woods. Petitioner opposed the motion, arguing that real parties had not demonstrated waiver by the decedent, and that, in any event, there was no showing by real parties that petitioner had waived the privilege. Respondent court granted the motion and thereafter denied petitioner's motion for reconsideration and for a protective order.

1 There is ample authority to the effect that the privilege against disclosure of tax returns may be waived. (*Sav-On-Drugs, Inc. v. Superior Court* (1975) 15 Cal.3d 1, 7, 123 Cal.Rptr. 283, 538 P.2d 739; *Crest Catering Co. v. Superior Court* (1965) 62 Cal.2d 274, 277-279, 42 Cal.Rptr. 110, 398 P.2d 150; *Wilson v. Superior Court* (1976) 63 Cal.App.3d 825, 828, 134

Cal.Rptr. 130; *Vogan v. McLaughlin* (1959) 172 Cal.App.2d 65, 72, 342 P.2d 18.) Nevertheless, we conclude that, in the absence of a waiver by each of the holders of the privilege, the court may not compel disclosure of joint federal or joint state income tax returns, or any information contained therein. Such a policy is in harmony with the declared purpose which underlies the privilege of tax returns, namely, "to facilitate tax enforcement by encouraging a taxpayer to make full and truthful declarations in his return, without fear that his statements will be revealed or used against him for other purposes." (Webb v. Standard Oil Co. (1957) 49 Cal.2d 509, 513, 319 P.2d 621, 624) "(F)orcing the taxpayer himself to produce a copy of his state or federal income tax returns . . . would effectively defeat this legislative purpose." (Sav-On-Drugs, Inc. v. Superior Court, supra, 15 Cal.3d at p. 6, 123 Cal.Rptr. at p. 286, 538 P.2d at p. 742; Webb v. Standard Oil Co.,supra, 49 Cal.2d at p. 513, 319 P.2d 621; Brown v. Superior Court, supra, 71 Cal.App.3d at p. 143, 139 Cal.Rptr. 327.) ¶ In this instance, the order compelling disclosure violates petitioner's rights as a nonwaiving joint holder of the privilege. Thus we need not decide whether decedent husband waived the privilege, for his waiver may not be imposed to deprive petitioner of her right to claim the privilege. Any other conclusion would effectively defeat the legislative purpose." (Coate v. Superior Court (1978) 81 Cal.App.3d 113, 115–116 [144 Cal.Rptr. 350, 351]

First, while plaintiff's ex-wife has a right to financial privacy in joint tax returns and her right can not be waived by plaintiff's conduct, plaintiff has not established with admissible evidence that any of the subject tax forms sought were part of any joint return with his ex-wife. (Emphasis the court's.) Therefore, it has not been established that the wife's financial privacy rights are implicated by discovery of the subject tax forms. This is an independent reason to find that the privilege does not bar discovery of the tax forms sought in this discovery proceeding.

Second, the ex-wife has not appeared in this action to assert her privilege and plaintiff can not raise his ex-wife's financial privacy privilege concerning the subject tax forms as any possible right of plaintiff right to assert that privilege was waived by plaintiff's failure to object to production in the responses to the requests for production on the specific ground that the documents are not subject to production due his ex-wife's right to financial privacy. (Emphasis the court's.) In addition, relief from that waiver has not been granted.

Under the circumstances presented, the objection on the ground that plaintiff's ex-spouse has a right to privacy can not form the basis for opposing the motion to compel further responses and production.

- Waiver by Asserting Claim for Loss of Earning Capacity Claim

"Loss of earning capacity damages are closely related to loss of future earnings damages in that they both compensate plaintiff for earnings the plaintiff would have received in the future but for the injury. Loss of earning capacity is simply a broader way of compensating for future earnings loss. (Haning et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2018) ¶ 3:582, p. 3-103.) Loss of earning capacity refers to the extent to which the injury interferes with plaintiff's ability to draw higher earnings in the future by advancing to a better paying position or an alternative career. *Id.* at ¶3:496, pp. 3-91 to 3-92, ¶3:582, p. 3-103; *see also Connolly v. Pre-Mixed Concrete Co.* (1957) 49 Cal. 2d. 483, 488–489, 319 P.2d 343 [loss of earning capacity damages awarded to a "champion tennis player" who had won the National Singles Title three times, won the "four major championships of the world" and been offered a professional tennis tour; permissible to look to salary for professional tennis players]. ¶ More specifically, loss of earning capacity is "the difference between what the plaintiff's earning capacity was *before* her injury and what it is *after* the injury." (*Licudine v. Cedars-Sinai Medical Center* (2016) 3 Cal.App.5th 881, 893, 208 Cal.Rptr.3d 170 (*Licudine I*).) "[T]he focus is not on

what the plaintiff *would* have earned in the future, but on what she *could* have earned." (*Ibid.* [internal quotations omitted].) Thus, "proof of the plaintiff's prior earnings, while relevant to demonstrate earning capacity, is not a prerequisite to the award of these damages [citations]." (*Ibid.*) Once the factfinder has determined which career options are reasonably probable for the plaintiff to achieve, it can value the earning capacity of that career in three ways: "(1) by the testimony of an expert witness; (2) by the testimony of lay witnesses, including the plaintiff; or (3) by proof of the plaintiff's prior earnings in that same career." (*Id.* at p. 897, 208 Cal.Rptr.3d 170, citations omitted.)" (Emphasis added.) (Lewis v. Ukran (2019) 36 Cal.App.5th 886, 891-892.)

"Consistent with the classification of loss of earning capacity as general damages, the jury may infer the reasonable certainty of such a loss from the nature of the injury. (E.g., *Storrs*, *supra*, 134 Cal. at p. 94, 66 P. 72 ["It needs no evidence to show that a plaintiff in full health and vigor, who has lost an arm or a hand by reason of the negligence of the defendant, has had his earning power greatly impaired"]; *Lindemann v. San Joaquin Cotton Oil Co.* (1936) 5 Cal.2d 480, 494, 55 P.2d 870 (*Lindemann*) [same].) But a jury is not required to draw this inference, and damages for the loss of earning capacity may not be awarded where the evidence demonstrates there was no such loss. (E.g., *Handelman v. Victor Equipment Co.* (1971) 21 Cal.App.3d 902, 905–909, 99 Cal.Rptr. 90 [no loss of earning capacity for deep sea diver who has undertaken his deepest dives *after* his injury]; *Hallinan v. Prindle* (1936) 17 Cal.App.2d 656, 673, 62 P.2d 1075 [no loss of earning capacity for "acute, but brief" pain at the time of an injection].) ¶ *b. Extent of damages for loss of earning capacity* ¶ The second question is a question of valuation. As its name suggests, a loss of earning capacity is the difference between what the plaintiff's earning capacity was *before* her injury and what it is *after* the injury. (Rest.2d Torts, § 924, com. d, p. 525 ["the difference, viewed as of the time

of trial, between the value of the plaintiff's services as they will be in view of the harm and as they would have been had there been no harm"]; *Fein*, *supra*, 38 Cal.3d at p. 153, fn. 10, 211 Cal.Rptr. 368, 695 P.2d 665 [adopting Restatement].) Because these damages turn on the plaintiff's earning *capacity*, the focus is "not [on] what the plaintiff *would* have earned in the future[,] but [on] what she *could* have earned." (*Hilliard*, *supra*, 148 Cal.App.3d at p. 412, 196 Cal.Rptr. 117, italics added; *Gargir v. B'Nei Akiva* (1998) 66 Cal.App.4th 1269, 1281, 78 Cal.Rptr.2d 557 (*Gargir*) [same]; *Storrs*, *supra*, 134 Cal. at p. 93, 66 P. 72 ["it is what [the plaintiff] was capable of earning, rather than what he was actually earning, that was to be considered by the jury"]; *Strosk v. Howard Terminal Co.* (1954) 129 Cal.App.2d 797, 799–800, 277 P.2d 828 [same]; *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 656, 151 Cal.Rptr. 399 (*Rodriguez*) [" '[one's] earning capacity is not a matter of actual earnings' "], disapproved on other grounds in *Coito v. Superior Court* (2012) 54 Cal.4th 480, 499, 142 Cal.Rptr.3d 607, 278 P.3d 860.) Consequently, proof of the plaintiff's prior earnings, while relevant to demonstrate earning capacity, is not a prerequisite to the award of these damages (e.g., *Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 462, 130 Cal.Rptr. 786 (*Neumann*) [no "proof of actual earnings or income either before or after the injury" required]; *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 348, fn. 6, 100 Cal.Rptr.2d 854 (*Heiner*) [same]), nor a cap on the amount of those damages (e.g., *Robison*, *supra*, 211 Cal.App.2d at p. 287, 27 Cal.Rptr. 260 [fact that plaintiff's actual earnings had not decreased prior to trial not a bar to loss of earning capacity damages]; *Paxton v. County of Alameda* (1953) 119 Cal.App.2d 393, 414–415, 259 P.2d 934 (*Paxton*) [same]). Indeed, proof that the plaintiff had *any* prior earnings is not required because the "vicissitudes of life might call upon [the plaintiff] to make avail of her capacity to work," even if she had not done so previously. (*Gotsch v. Market S. Railway* (1928) 89 Cal.App. 477, 483, 265 P. 268.) Thus, damages for loss of earning capacity may be

awarded to persons who, at the time of the injury, were homemakers (*Ibid.*; *Wilcox v. Sway* (1945) 69 Cal.App.2d 560, 160 P.2d 154, superseded on other grounds in Code Civ. Proc., § 634; *Davis v. Renton* (1931) 113 Cal.App. 561, 563–564, 298 P. 834), as well as persons who were retired or otherwise not working (*Storrs*, at p. 94–95, 66 P. 72 [75–year–old plaintiff serving in "positions of trust" in financial and other corporations]; *McCormack v. San Francisco* (1961) 193 Cal.App.2d 96, 98, 101–102, 14 Cal.Rptr. 79 [71–year–old widow not working]; *Bencich v. Market S.R. Co.* (1938) 29 Cal.App.2d 641, 647–648, 85 P.2d 556 [retired plaintiff]). ¶ A plaintiff's earning capacity without her injury is a function of two variables—the career(s) the plaintiff could have pursued and the salaries attendant to such career(s)." (Emphasis added.) (Licudine v. Cedars-Sinai Medical Center (2016) 3 Cal.App.5th 881,892-894.)

Therefore, while proof of actual earnings is not a prerequisite for the plaintiff to establish with the evidence presented he should be awarded loss of earning capacity damages, evidence of actual earnings remains relevant to the issue of earning capacity and discoverable as a matter of defense. In other words, merely because plaintiff does not need to submit evidence of prior and subsequent earnings in order to prove loss of earning capacity, that does not prohibit discovery of prior and subsequent earnings of the plaintiff to present in defense against the loss of earning capacity claim.

By maintaining a claim for loss of earning capacity claim in this litigation, plaintiff has waived any right to privacy concerning his financial information relating to his earnings prior to and after the subject accident as the records are directly relevant to the plaintiff's claim and essential to the fair resolution of the lawsuit, (Davis v. Superior Court (1992) 7 Cal.App.4th 1008, 1014.), the gravamen of the lawsuit is inconsistent with the privilege (Weingarten v. Superior Court (2002) 102 Cal.App.4th 268, 274.), and carefully balancing of the compelling

public need for discovery against the fundamental right of privacy the court finds that the balance tips in favor of discovery under the circumstances presented (Davis v. Superior Court (1992) 7 Cal.App.4th 1008, 1014.). The court overrules the objection that the subject requests for production violate the plaintiff's right to financial privacy.

In light of the court's overruling the objection as having been waived by the plaintiff's claim for loss of earning capacity, the court need not and does not reach the issue of waiver by production of some of plaintiff' W-2 forms and .

Sanctions

"…If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (Code of Civil Procedure, § 2023.030(a).)

"Except as provided in subdivision (j), the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel further response to an inspection demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust" (Code of Civil Procedure, § 2031.310(h).)

Under the circumstances presented, it appears appropriate to award defendant Wilson the amount of $3,035 in monetary sanctions

TENTATIVE RULING # 8: DEFENDANT WILSON'S MOTION TO COMPEL FURTHER RESPONSES TO REQUESTS FOR PRODUCTION IS GRANTED. PLAINTIFF IS ORDERED TO PROVIDE FURTHER RESPONSES TO REQUESTS FOR PRODUCTION, SET TWO, REQUEST NUMBERS 43-54 AND PRODUCE THE DOCUMENTS REQUESTED WITHIN

TEN DAYS. PLAINTIFF IS FURTHER ORDERED TO PAY DEFENDANT WILSON $3,035 IN MONETARY SANCTIONS WITHIN TEN DAYS. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldoradocourt.org/onlineservices/vcourt.html. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, DECEMBER 17, 2021 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

9. TATE v. FIESELER PC-20080086

Defendants/Cross-Complainants Fieseler's Motion to Enforce Judgment and Hold Plaintiffs/Cross-Defendants Tate in Contempt.

On March 3, 2010 the court entered judgment after court trial. Among the holdings of the judgment was that entry of judgment in favor of cross-complainants Fieseler and against cross-defendants Tate on the cross-complaint's claim for abatement of private nuisance and imposing a permanent injunction against cross-defendants Tate "from closing or locking the Parties' common gate to Highway 49 at any time that the Cross-Complainants Fieseler are at home."

The Tates appealed from the judgment. On January 24, 2012 the Third District Court of Appeal issued its decision on appeal affirming the judgment in full. On March 7, 2012 plaintiffs filed a petition for writ of review with the California Supreme Court. On April 11, 2012 the California Supreme Court denied the petition for writ of review. The remittitur was issued on April 19, 2012.

The Tates and the Fieselers later had OSCs re: contempt issued against each other for alleged conduct they contend violated the court's judgment. They contended each other's conduct was punishable by contempt proceedings. The matters were set for an evidentiary hearing to commence on January 30, 2015. At the conclusion of the hearing the court made the following findings: the judgment in place is applicable to the dispute regarding the gate from Highway 49 to the property; the roadway is partially blocked by ½ of the two part swinging gate being locked in a closed position; there is uncontroverted evidence that the Tates erected a gate with two sections; the Fieselers do not have a key to the locked section of the gate; and

the Tates claim they are in the right as they have opened one gate, as the gate is in two sections.

The court ruled as follows concerning the Fieseler OSC brought against the Tates: a reasonable and sensible reading of the injunction is that there can be no obstruction to the roadway; the gate is one gate with two sections and both sections are to be fixed open; to the extent that there is any post to which the gate attaches, it must be removed or must be level with the ground so as it does not impose any obstacle or hazard in the use of the road; the Tates are in civil contempt of the permanent injunction; the punishment for contempt can be jail time as well as the imposition of a fine; the court did not impose jail time, but did impose a joint fine of $1,000 against both Michael Tate and Linda Tate, which was stayed pending any further conduct that violates the injunction; and the court reserved the right to impose this fine together with other fines the court may impose as just and proper for any further contempt of the court's orders.

The court ruled as to the Tate OSC brought against the Fieselers: the Tate's OSC failed to state a cognizable claim of violation of the March 2010 judgment and restraining order; and the Tate's OSC was dismissed.

The Fieselers obtained issuance of a second OSC re: Contempt against the Tates asserting that the Tates and a "gang" of other family members installed a fence in the easement area that restricts and obstructs the use of the subject roadway. The court denied the motion to hold the Tates in contempt on August 7, 2015.

On November 4, 2021 defendants/cross-complainants Fieseler filed the instant motion to enforce judgment and hold plaintiffs/cross-defendants Tate in contempt. Cross-Complainants Fieseler contend that the cross-defendants Tate continue to lock the common gate while cross-complainants are at home in violation of the permanent injunction and the cross-defendants

Tate should be held in contempt of court, be further sanctioned by daily fines and costs against cross-defendants as long as they continue their wrongful conduct in violation of the injunction, that the court grant cross-complainants Fieseler immunity for cutting or removal of the locks, including forcing the gate open by reasonable means, when necessary; that the court specifically instruct the El Dorado County Sheriff' Department that the Sheriff is authorized to enforce the orders of the court, including peaceful cutting of locks and forcing open the gates; and the stay of the previously imposed sanction in the amount of $1,000 be lifted and cross-defendants Tate be ordered to pay that sanction

The Fieselers did not request an OSC Re: Contempt be issued and no OSC Re: Contempt was issued.

The proof of service declares that on October 21, 2021 notice of the hearing and the moving papers were served by mail to the Tates. The court notes that the notice of hearing filed on November 4, 2021 stated that the hearing would take place on December 3, 2021 and the clerk's office changed the date to December 17, 2021. This change in date occurred after the service of the notice on October 21, 2021 by mail and there is no proof of service of an amended notice of hearing specifying the hearing as taking place on December 17, 2021. Therefore, there is inadequate proof of service of notice of the hearing and the court can not reach the merit of the motion until adequate notice of the date, time and location of the hearing is filed.

Contempt Proceedings

"A judgment not otherwise enforceable pursuant to this title may be enforced by personally serving a certified copy of the judgment on the person required to obey it and invoking the power of the court to punish for contempt." (Code of Civil Procedure, § 717.010.) Disobedience

of any lawful judgment, order, or process of the court is contempt of the authority of the court. (Code of Civil Procedure, § 1209(a)(5).)

"(1) *Right to Hearing.* The party charged with contempt is entitled to a hearing at which, by affidavits or witnesses or both, that party may present defenses. (C.C.P. 1217; see *Hotaling v. Superior Court* (1923) 191 C. 501, 505, 217 P. 73 [competent evidence must be produced at hearing]; *Collins v. Superior Court* (1956) 145 C.A.2d 588, 594, 302 P.2d 805, 2 *Cal. Proc.* (5th), *Jurisdiction,* §308 [refusal to allow evidence of defenses is denial of due process]; C.J.E.R., Judges Benchbook: Civil Proceedings—After Trial §6.166; 73 Harv. L. Rev. 353 [procedures for trying contempts in federal courts]; on defenses, see infra, §349 et seq.; on disqualification and challenge of judge, see 2 *Cal. Proc.* (5th), *Courts,* §§97, 154.) ¶ (2) *Effect of Participation.* Even though the contempt proceeding is usually commenced by an affidavit filed in the main action, the contempt proceeding is separate and distinct. Hence, participation in a contempt proceeding is not a general appearance in the main action. (*Bank of America v. Carr* (1956) 138 C.A.2d 727, 733, 292 P.2d 587.) ¶ (3) *Affidavits as Complaint and Answer.* In a civil contempt proceeding, the affidavits on which the citation is issued constitute the complaint and the affidavits of the defendant constitute the answer or plea. The issues of fact are framed by the respective affidavits serving as pleadings, and the hearing must be had on these issues. (*Hotaling v. Superior Court*, supra; *Freeman v. Superior Court* (1955) 44 C.2d 533, 537, 282 P.2d 857; *In re Von Gerzabek* (1922) 58 C.A. 230, 232, 208 P. 318; *Groves v. Superior Court* (1944) 62 C.A.2d 559, 145 P.2d 355; for forms of counteraffidavits, see Cal. Civil Practice, 4 Procedure, §30:87 et seq.) ¶ (4) *Quasi-Criminal Proceeding.* Because the proceeding is criminal in nature (see 3 *Cal. Proc.* (5th), *Actions,* §69), the party charged may not be compelled to give testimony against himself or herself. (See *Oliver v. Superior Court* (1961) 197 C.A.2d 237, 240, 17 C.R. 474, infra, §350; 2 *Cal. Evidence* (4th), *Witnesses,* §367.)

And a verified answer to the affidavit is not a waiver of the right to refuse to testify; it is similar in effect to a plea of not guilty in a criminal case. (*In re Ferguson* (1954) 123 C.A.2d 799, 801, 268 P.2d 71.) The proceeding is governed by the criminal trial standard of proof beyond a reasonable doubt. But there is no requirement that the record show that the judge followed that standard; the presumption that an official duty has been performed applies. (*Ross v. Superior Court* (1977) 19 C.3d 899, 913, 141 C.R. 133, 569 P.2d 727.) ¶ (5) *No Right to Jury Trial.* There is no right to a jury trial in a civil contempt proceeding. (*United Farm Workers Organizing Committee, AFL-CIO v. Superior Court* (1968) 265 C.A.2d 212, 214, 71 C.R. 513; *Pacific Tel. & Tel. Co. v. Superior Court* (1968) 265 C.A.2d 370, 373, 72 C.R. 177.)…" (8 Witkin, California Procedure (5th ed. 2008) Enforcement of Judgment, § 348, pages 375-376.)

"It was formerly the rule that a sufficient affidavit was jurisdictional; if the affidavit was defective, it could not support an adjudication of indirect contempt, even though the facts proved and found would support it. (See *Warner v. Superior Court* (1954) 126 C.A.2d 821, 824, 273 P.2d 89.) Under C.C.P. 1211.5 (see 8 *Cal. Proc.* (5th), *Enforcement of Judgment,* §345), a sufficient affidavit is no longer jurisdictional; it may be amended to correct any defect or to conform to proof; and a contempt adjudication can be set aside for insufficiency of the affidavit only under the constitutional test of reversible error, i.e., prejudice amounting to a miscarriage of justice. ¶ The change in the law effected by C.C.P. 1211.5 was clarified by *In re Cowan* (1991) 230 C.A.3d 1281, 281 C.R. 740, a case in which *no* affidavit was filed: ¶ (a) An affidavit is a mandatory requirement, and satisfies the due process requirement of notice of the nature of the charge. Hence, the requirement is jurisdictional in the sense that the court cannot proceed in the complete absence of an affidavit. (230 C.A.3d 1286, 1288.) ¶ (b) However, if an affidavit is presented, the jurisdictional requirement is satisfied, even though the affidavit is seriously defective. It may be amended to correct the defect, and on review a contempt

adjudication can be set aside only under the constitutional test of reversible error. (230 C.A.3d 1288, footnote 9.)" (7 Witkin, California Procedure (5th ed. 2008) Trial, § 176(2), pages 214-215.)

- Service of the Order to Show Cause (OSC)

"The order to show cause acts as a summons to appear in court on a certain day and, as its name suggests, to show cause why a certain thing should not be done. (*Morelli v. Superior Court* (1968) 262 Cal.App.2d 262, 269, 68 Cal.Rptr. 572.) Unless the citee has concealed himself from the court, he must be personally served with the affidavit and the order to show cause; otherwise, the court lacks jurisdiction to proceed. (§ 1015 [in civil actions in which a party is represented by an attorney, 'the service of papers, when required, must be upon the attorney instead of the party, except service of subpoenas, of writs, and other process issued in the suit, and of papers to bring him into contempt']; see also § 1016; *Arthur v. Superior Court*, supra, 62 Cal.2d at p. 408, 42 Cal.Rptr. 441, 398 P.2d 777; and see Weil & Brown, supra, § 9:716, p. 9(11)-47.) [Footnote omitted.]" (Cedars-Sinai Imaging Medical Group v. Superior Court (2000) 83 Cal.App.4th 1281, 1286-1287.)

An OSC Re: Contempt has not been issued and not served. Therefore, the court can not hear this motion on its merits.

- Hearing

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

240 C.R. 131; *Board of Supervisors v. Superior Court*, supra, 33 C.A.4th 1737.)" (Emphasis added.) (8 Witkin, California Procedure (5th ed. 2008) Enforcement of Judgments, § 340(2), pages 365-366.)

The Fieselers request judicial notice of the March 3, 2010 judgment, the court's January 30, 2015 order holding the Tates in contempt, and the record of survey recorded in March 19, 2014.

The court notes that the underlying judgment entered on March 3, 2010 abated the nuisance claimed by the Fieselers and imposed a permanent injunction preventing the Tates from closing or locking the common gate to Highway 49 at any time that the Fieselers are at home.

The court further notes that in the final ruling and order issued in the OSC proceeding on January 30, 2015 the court expressly found that a reasonable and sensible reading of the permanent injunction was that there could not be an obstruction to the roadway.

Kristine Fieseler declares the following in support of the motion: the Tates continue to lock the gate and prevent the Fieselers from access to their property through the joint gate; the Tates continue to lock the gate when the Fieselers are present; Mr. Fieseler is always at home as he is handicapped; she runs a small horse ranch and has deliveries of food stuffs for the animals through the joint gate; she also has deliveries such as propane, Amazon, FedEx and U.S. mail delivered through the joint gate as it is their primary access to their property and it is their address; the dates of the new violations of the injunction are too numerous to list; and she has attached a representative list of dates and photos of the gate being locked as Exhibit A to the deration. (Declaration of Kristine Fieseler in Support of Motion, paragraphs 3, 5-7, and 9.)

The court notes that the permanent injunction only applies to leaving the gates open and unlocked when the Fieselers are at home and does not mandate the gates be opened and unlocked when the Fieselers are not home and they have deliveries scheduled or expected.

As stated earlier this ruling, the court can not hear this motion on its merits due to service defects.

Request for Immunity from Criminal Prosecution and Order Allowing Self-Help to Cut Locks and Force Open Gates

The Fieselers have not cited any legal authority for the court to grant them immunity from criminal liability for engaging in self-help by cutting locks on the gate and forcibly opening the gates.

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 were purportedly engaged in self-help conduct to remove a boundary fence they claimed was improperly placed as shown on a recent land survey, 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.

Issuing an order of immunity for engaging in self-help in the Fieseler's discretion related to the locks and gates would violate the public policy to have parties to a civil dispute resort to court when there is a dispute over land use and possession.

Instructions to the Sheriff's Department to Enforce a Civil Judgment

The Fieselers have not cited any legal authority for the court to grant a blanket order directing the Sheriff's Department to enforce a civil judgment.

Request for Fine for Potential Future Contempt by the Tates

Kristine Fieseler requests in paragraph 11 of her declaration that the Tates be fined an additional $1,000 for each time they violate the injunction as a contempt of court and imposition of that fine can be based solely upon observation of any Sheriff as submitted by official report to the Court.

Such an order would clearly violate the Tate's fundamental rights to due process by depriving them of the due process protections of the OSC quasi-criminal contempt proceedings.

The Fieselers requested a continuance of the hearing by letter received by the court on December 13, 2021 stating they needed additional time to have a process server serve the Tates.

TENTATIVE RULING # 9: THIS MATTER IS CONTINUED TO 8:30 A.M. ON FRIDAY, FEBRUARY 25, 2022 IN DEPARTMENT NINE.

10. AORAKI HOLDINGS PARTY v. LABMOR ENTERPRISES, INC. PC-20190488

(1) Plaintiff's Motion to Compel Discovery Propounded upon Defendant Labmor Enterprises, Inc.

(2) Plaintiff's Motion to Compel Discovery Propounded upon Defendant Constantly Growing, LLC.

(3) Plaintiff's Motion to Compel Discovery Propounded upon Defendant Constantly Growing Inc.

(4) Plaintiff's Motion to Compel Discovery Propounded upon Defendant Callarick Enterprises, LP.

Plaintiff filed four separate motions against defendants Labmor Enterprises, Inc., Constantly Growing, LLC, Constantly Growing Inc., and Callarick Enterprises, LP. Three of the motions seek a court order directing defendants Labmor Enterprises, Inc., Constantly Growing, LLC, and Constantly Growing Inc. to provide further responses to that Special Interrogatories, Set Two, corrected Inspection Demands, Set Two, and Inspection Demands, Set Three without objections. The fourth motion to compel seeks to compel Callarick Enterprises, LP to provide further responses to Inspection Demands, Set Three without objections.

Plaintiff asserts the following grounds in support of the motion: further responses by defendants Labmor Enterprises, Inc., Constantly Growing, LLC, and Constantly Growing Inc. are required, because the responses include objections and each defendant failed to timely respond to that Special Interrogatories, Set Two, corrected Inspection Demands, Set Two, and Inspection Demands, Set Three propounded on each of them; the Secretary of State suspension of defendants Labmor Enterprises, Inc. and Constantly Growing Inc. do not excuse their non-compliance with discovery statutes requiring timely responses; defendant Callarick

Enterprises, LP's objections to all 102 inspection demands have been waived as the responses were eight days late and must be removed from the responses to Inspection Demands, Set Three; even if the objections by defendant Callarick Enterprises, LP were timely, they are baseless nuisance objections; and the responses by defendant Callarick Enterprises, LP to request numbers 1 and 2 are inadequate as they are not substantive responses to the requests.

Only three of the four motions were opposed. Defendants Labmor Enterprises, Inc., Constantly Growing Inc., and Callarick Enterprises, LP oppose the motions asserted against them on the following grounds: plaintiffs failed to provide the tentative ruling language in its notice; defendants Labmor Enterprises, Inc. and Constantly Growing Inc. were suspended entities who were unable to respond to the discovery propounded until after they were revived on October 8, 2021 and their responses to the discovery propounded was timely, because they responded within 30 days of revival; defendant Callarick Enterprises, LP timely responded to the discovery based on an understanding in an email exchange that responses were due on or before October 11 2021.

There is no opposition from defendant Constantly Growing, LLC in the court's file.

Plaintiff objected to defendants' requests for judicial notice, replied to the oppositions of defendants Labmor Enterprises, Inc., Constantly Growing Inc., and Callarick Enterprises, LP, and filed a reply concerning the motion to compel defendant Constantly Growing, LLC to provide discovery without objections.

<u>Failure to Include Tentative Ruling Language in the Notices of Motion</u>

The tentative ruling notification language is contained in Local Rule 7.10.05 C. Defendants object that the notification language is not in the notices of hearing of each motion.

The court notes that it has long been held that noncompliance with court rules, to which no penalty was attached, does not prevent the court from hearing and disposing of motions. (See Johnson v. Sun Realty Co. (1934) 138 Cal.App. 296, 299.)

The failure to include the tentative ruling notification language is not grounds to deny the motions under the circumstances before the court.

Motion to Compel Discovery Principles

The party to whom interrogatories and requests for production have been served must serve responses upon the propounding party within 30 days after service or any other later date the propounding party stipulates to. (Code of Civil Procedure, §§ 2030.260, 2030.270, 2031.260, and 2031.270.)

The failure to timely respond waives all objections to the interrogatories and requests and the propounding party may move to compel answers to interrogatories and production of documents. (Code of Civil Procedure, §§ 2030.290 and 2031.300.)

The appellate court in Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants (2007) 148 Cal.App.4th 390, rejected an argument that where the responding party defendants served untimely responses to interrogatories before the propounding party filed its motion to compel responses under section 2030.290, subdivision (b), the trial court lacked the authority to grant the motion to compel responses to without objections. (Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants (2007) 148 Cal.App.4th 390, 405.)

The appellate court concluded: "…the trial court had the authority to grant Sinaiko's motion to compel interrogatory responses under section 2030.290, subdivision (b)." (Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants (2007) 148 Cal.App.4th 390, 411.)

The same holding logically applies to motions to compel responses to requests for production under the same circumstances as identical waiver of objection language where no timely responses are provided is found in the discovery statutes governing both those discovery methods. (See Code of Civil Procedure, §§ 2030.290 and 2031.300.)

With the above-cited legal principles in mind, the court will rule on the motions to compel further responses without objections.

Defendants Constantly Growing, LLC's and Callarick Enterprises, LP's Obligation to Timely Respond to the Discovery Propounded

It appears that the only suspended corporations were defendants Labmor Enterprises, Inc. and Constantly Growing Inc., therefore, defendants Constantly Growing, LLC and Callarick Enterprises, LP were not under any bar to participation in this litigation, including responding to discovery, during the pertinent time period.

In fact, the court notes that the cancellation of Constantly Growing, LLC on January 12, 2021 did not end the existence of the LLC for all purposes. The LLC continued to exist for the purposes of winding up its affairs and prosecuting and defending actions by and against it in order to collect and discharge its obligations. (Emphasis added.) (Corporations Code, § 17707.06(a); and DD Hair Lounge, LLC v. State Farm General Ins. Co. (2018) 20 Cal.App.5th 1238, 1243.)

Plaintiff's Motions to Compel Discovery Propounded upon Defendant Labmor Enterprises, Inc. and Constantly Growing Inc.

Effect of Suspension of Corporate Defendants Labmor Enterprises, Inc. and Constantly Growing Inc.

It is undisputed that California law prohibits a suspended corporation from appearing to defend itself. (Rev. & Tax. Code, § 23302.) A corporation that fails to pay its corporate

franchise tax lacks the capacity to sue and, if sued, to defend. (Reed v. Norman (1957) 48 Cal.2nd 338, 343)

"During the period that a corporation is suspended for failure to pay taxes, it may not prosecute or defend an action (*Reed v. Norman* (1957) 48 Cal.2d 338, 343, 309 P.2d 809), appeal from an adverse judgment (*Boyle v. Lakeview Creamery Co.* (1937) 9 Cal.2d 16, 20-21, 68 P.2d 968 (*Boyle*)), seek a writ of mandate (*Brown v. Superior Court* (1966) 242 Cal.App.2d 519, 522, 51 Cal.Rptr. 633), or renew a judgment obtained prior to suspension (*Timberline*, supra, 54 Cal.App.4th at p. 1367, 64 Cal.Rptr.2d 4). The purpose of Revenue and Taxation Code section 23301 is to "prohibit the delinquent corporation from enjoying the ordinary privileges of a going concern" (*Boyle* at p. 19, 68 P.2d 968), and to pressure it to pay its taxes (*Peacock Hill Assn. v. Peacock Lagoon Constr. Co.* (1972) 8 Cal.3d 369, 371, 105 Cal.Rptr. 29, 503 P.2d 285). ¶ Under Revenue and Taxation Code section 23301, the powers of a domestic corporation are "suspended," not dissolved, due to its failure to pay taxes. (*Graceland v. Peebler* (1942) 50 Cal.App.2d 545, 547, 123 P.2d 527.) A suspended corporation may be sued, and service of process upon a suspended corporation is effected in the same manner as service upon a corporation that is not suspended. (Code Civ.Proc., §§ 416.10, 416.20; *Boyle*, supra, 9 Cal.2d at p. 19, 68 P.2d 968; *Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 301-313, 78 Cal.Rptr.2d 892; 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 77, p. 133.) In addition, a suspended corporation is not protected against a judgment by default upon its failure to answer within the time allowed. (See 6 Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial, § 112, pp. 521-522.)" (Grell v. Laci Le Beau Corp. (1999) 73 Cal.App.4th 1300, 1306.)

"In view of the provisions of section 23301 of the Revenue and Taxation Code, and the authorities hereinbefore cited, we believe that there is no escape from the conclusion that

respondent corporation had no right to defend in the instant action, or even to participate therein during the time that its corporate rights were suspended." (Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp. (1957) 155 Cal.App.2d 46, 50.)

Plaintiff's counsel declares that the subject discovery was served by hand on defendants Labmor Enterprises, Inc. and Constantly Growing Inc. on August 18, 2021 with the responses due on September 1, 2021. (Declarations of Christopher Strunk in Support of the Motions, paragraph 2.)

The four motions were filed on October 27, 2021.

Defense counsel declares: defendants Labmor Enterprises, Inc. and Constantly Growing Inc. responded to the subject discovery on November 5, 2021, which was within 30 days of their corporate revival on October 8, 2021. (Declaration of Etan Rosen in Opposition to Motions, paragraph 5.)

Defendants Labmor Enterprises, Inc. and Constantly Growing Inc. concede that defense counsel was unable to find any legal support for the contention that upon revivor each of the corporate defendants were entitled to respond to discovery propounded during the period of suspension, including objections, within 30 days of revivor as a matter of judicial fairness due to those corporate defendants' inability to respond due to corporate suspensions. (See Defendants Labmor Enterprises, Inc.'s and Constantly Growing Inc.'s Oppositions to the Motions to Compel, page 5, lines 3-13.)

The court takes judicial notice that defendants Labmor Enterprises, Inc. and Constantly Growing Inc. were suspended at the time the discovery response were due and, therefore, they were prevented from responding to the discovery propounded.

The court further takes judicial notice that certificates of revivor relieved defendants Labmor Enterprises, Inc. and Constantly Growing Inc. from their suspensions effective October 7, 2021.

The court is unaware of any provision of law or case opinion holding that a suspended corporation being sued is granted an unlimited extension of time to respond to discovery propounded during a period of corporate suspension due to failure to pay taxes that are due and owing.

A suspended corporation is not able to file a response to the complaint and is subject to being defaulted prior to revivor, because the suspension does not excuse them from failing to timely respond after service of the complaint. The same would logically apply to analogous litigation circumstances where a corporation is suspended and can not timely respond to discovery due to the suspension. A corporate suspension does not excuse the corporation from their failure to timely respond to discovery and does not provide them with an automatic extension of time to respond to the discovery until after the corporation is eventually revived.

Defendants remedy is not an automatic, open extension of time to respond despite the suspension and inability to respond being incurred due to the defendant corporations' failure to pay their taxes that are due and owing. The remedy is a motion establishing that the circumstances surrounding the untimely responses meet the requirements of Sections 2030.290(a) and 2031.300(a).

"…The court, on motion, may relieve that party from this waiver on its determination that both of the following conditions are satisfied: ¶ (1) the party has subsequently served a response that is in substantial compliance with Sections 2030.210, 2030.220, 2030.230, and 2030.240. (2) the party's failure to serve a timely response was the result of mistake,

inadvertence, or excusable neglect." (Emphasis added.) (Code of Civil Procedure, § 2030.290(a).)

"…The court, on motion, may relieve that party from this waiver on its determination that both of the following conditions are satisfied: ¶ (1) The party has subsequently served a response that is in substantial compliance with Sections 2031.210, 2031.220, 2031.230, 2031.240, and 2031.280. ¶ (2) The party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect." (Emphasis added.) (Code of Civil Procedure, § 2031.300(a).)

Defendants Labmor Enterprises, Inc. and Constantly Growing Inc. having failed to timely respond to the subject discovery propounded upon them, they waived all objections to the discovery, they were not relieved of that waiver by motion and court order, and responding to the discovery with objections was improper. The motions to compel defendants Labmor Enterprises, Inc. and Constantly Growing Inc. to provide further responses to the discovery without objections are granted.

Plaintiff's Motion to Compel Discovery Propounded upon Defendant Constantly Growing, LLC.

Plaintiff's counsel declares that the subject discovery was served by hand on defendant Constantly Growing, LLC. on August 18, 2021 with the responses due on September 1, 2021; during meet and confer activities concerning the overdue responses on October 11, 2021, plaintiff's counsel advised defense counsel that the responses were outstanding and responses without object were expected; defense counsel indicated objections would be included in the responses; and as of the date the of the motion, responses are still outstanding. (Declaration of Christopher Strunk in Support of the Motion, paragraphs 2-5.)

The proof of service declares that notice of the motion and the moving papers concerning the motion to compel defendant Constantly Growing, LLC to respond to discovery were served by FedEx overnight to defense counsel on October 26, 2021. The court is unable to find an opposition to this motion in the file.

Plaintiff raised in the reply it filed concerning the motion to compel Constantly Growing, LLC to provide discovery without objections that on January 12, 2021 the LLC filed a statement of cancellation of the LLC and obtained from the Secretary of State a certificate of cancellation.

As stated earlier in this ruling, cancellation of Constantly Growing, LLC does not end the existence of the LLC for all purposes. The LLC continues to exist for the purposes of winding up its affairs and prosecuting and defending actions by and against it in order to collect and discharge its obligations. (Corporations Code, § 17707.06(a); and DD Hair Lounge, LLC v. State Farm General Ins. Co. (2018) 20 Cal.App.5th 1238, 1243.)

Defendant Constantly Growing, LLC having failed to timely respond to the subject discovery propounded upon it, they waived all objections to the discovery and defendant Constantly Growing, LLC must respond to the discovery without objections. The motion to compel defendant Constantly Growing, LLC to provide further responses to the discovery without objections is granted.

Plaintiff's Motion to Compel Discovery Propounded upon Defendant Callarick Enterprises, LP.

Plaintiff argues the following in support of the motion: defendant Callarick Enterprises, LP's objections to all 102 inspection demands have been waived as the responses were eight days late and must be removed from the responses to Inspection Demands, Set Three; even if the objections by defendant Callarick Enterprises, LP were timely, they are baseless nuisance

objections; and the responses by defendant Callarick Enterprises, LP to request numbers 1 and 2 are inadequate as they are not substantive responses to the requests.

Defendant Callarick Enterprises, LP argues in opposition that it timely responded to the discovery propounded on October 8, 2021 based on an understanding in an email exchange that responses were due on or before October 11 2021

Plaintiff's counsel declares: that inspection demand, set three was served by hand on defendant Callarick Enterprises, LP. on August 31, 2021 with the responses due on September 30, 2021; during meet and confer activities concerning the overdue responses on September 30, 2021, plaintiff's counsel granted an extension of time to respond to the Set Two discovery propounded and expressly clarified that the extension did not apply to the Set three discovery; on October 8, 2021, eight days late, defendant responded to the Set Three inspection demands that are the subject of the motion; on October 11, 2021 counsel discussed several late responses, including defendant Callarick's, noting that those responses were late; and on October 26, 2021 a detailed meet and confer letter was sent to defendant following up on earlier discussions and the issues to be raised in the instant motion. (Declaration of Christopher Strunk in Support of the Motion, paragraphs 2-5; and Exhibit B.)

Defense counsel declares: responses to the discovery were served on October 8, 2021; and it was counsel's belief that there was an extension of time to respond the subject discovery requests as reflected in an email exchange between defense counsel and plaintiff's counsel dated October 4, 2021. (Declaration of Etan Rosen n Opposition to Motion, paragraph 4 and Exhibit A.)

Plaintiff's Exhibit A, correspondence to defense counsel, dated September 30, 2021, states it was sent to defense counsel by email and 1st class mail. The defense Exhibit B email chain commencing with an email from plaintiff's counsel to defense counsel commences on

September 30, 2021 and appears to reference that letter regarding discovery issues. Although the emails between defense counsel and plaintiff's counsel in that email chain dated October 4, 2021 discuss an extension of time to respond, those statements only relate to set two discovery. Plaintiff's Exhibit A letter clearly states in paragraph C. on page two that the extension of time to October 11, 2021 to respond only applied to set two discovery and "does not extend to Set Three discovery." Therefore, the evidence before the court does not support a claim that there was an extension of time to respond to set three discovery.

The motion to compel defendant Callarick Enterprises, LP to provide further responses to Inspection Demands, Set Three and production of the requested documents without objections is granted.

Sanctions

"…If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (Code of Civil Procedure, § 2023.030(a).)

"The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a further response to interrogatories, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (Code of Civil Procedure, § 2030.300(d).)

"Except as provided in subdivision (j), the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel further response to an inspection demand, unless it finds that the one subject to the sanction acted with substantial justification

or that other circumstances make the imposition of the sanction unjust" (Code of Civil Procedure, § 2031.310(h).)

Plaintiff at first reserved the issue of an award of discovery sanctions. However, in the replies filed the plaintiff requests an award of $1,500 on monetary sanctions against defendants Labmor Enterprises, Inc., Constantly Growing, Inc. and Callarick Enterprises, LP. Plaintiff also requested a terminating sanction be imposed on defendant Constantly Growing, LLC, or, in the alternative, monetary sanctions.

The request for discovery sanctions shall be accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought. (Code of Civil Procedure, § 2023.040.)

The plaintiff filed declarations in support of the reply, which supports the amounts of $1,500 requested in monetary sanctions against defendants Labmor Enterprises, Inc., Constantly Growing, Inc., and Callarick Enterprises, LP for the attorney fees incurred by plaintiff to bring those motions. The court notes the plaintiff's counsel's reply declaration concerning defendant Constantly Growing, LLC only mentions the request for terminating sanctions and provides no evidence supporting an award of monetary sanctions.

The court denes the request for monetary sanctions to be imposed against defendant Constantly Growing, LLC due to lack of proof.

Requesting terminating sanctions for the first time in a reply filed and served by overnight mail five court days prior to the hearing does not provide sufficient advance notice that such a drastic, case ending sanction is being sought and it clearly deprives defendant Constantly Growing, LLC of its fundamental right to due process due to the short notice and no

opportunity to respond to the request with a memo of points and authorities in opposition. The request for terminating sanctions is denied.

The court grants the requests for monetary sanctions to be imposed on the other three defendants. The Court orders that defendants Labmor Enterprises, Inc., Constantly Growing, Inc., and Callarick Enterprises, LP are ordered to pay monetary sanctions to plaintiff in the amount of $1,500 each within ten days.

TENTATIVE RULING # 10: PLAINTIFF'S MOTIONS TO COMPEL DISCOVERY ARE GRANTED. DEFENDANT LABMOR ENTERPRISES, INC. IS ORDERED TO PROVIDE FURTHER RESPONSES TO SPECIAL INTERROGATORIES, SET TWO, CORRECTED INSPECTION DEMANDS, SET TWO AND INSPECTION DEMANDS, SET THREE AND PRODUCE THE DOCUMENTS REQUESTED WITHOUT OBJECTIONS WITHIN TEN DAYS. DEFENDANT CONSTANTLY GROWING, INC. IS ORDERED TO PROVIDE FURTHER RESPONSES TO SPECIAL INTERROGATORIES, SET TWO, CORRECTED INSPECTION DEMANDS, SET TWO AND INSPECTION DEMANDS, SET THREE AND PRODUCE THE DOCUMENTS REQUESTED WITHOUT OBJECTIONS WITHIN TEN DAYS. DEFENDANT CONSTANTLY GROWING, LLC IS ORDERED TO PROVIDE FURTHER RESPONSES TO SPECIAL INTERROGATORIES, SET TWO, CORRECTED INSPECTION DEMANDS, SET TWO AND INSPECTION DEMANDS, SET THREE AND PRODUCE THE DOCUMENTS REQUESTED WITHOUT OBJECTIONS WITHIN TEN DAYS. DEFENDANT CALLARICK ENTERPRISES, LP IS ORDERED TO PROVIDE FURTHER RESPONSES TO INSPECTION DEMANDS, SET THREE AND PRODUCE THE DOCUMENTS REQUESTED WITHOUT OBJECTIONS WITHIN TEN DAYS. DEFENDANTS LABMOR ENTERPRISES, INC., CONSTANTLY GROWING, INC., AND CALLARICK ENTERPRISES, LP ARE ORDERED TO PAY MONETARY SANCTIONS TO PLAINTIFF IN THE AMOUNT OF $1,500 EACH WITHIN

TEN DAYS. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldoradocourt.org/onlineservices/vcourt.html. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, DECEMBER 17, 2021 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

11. AUVINEN v. KRAMER 21UD0011

Defendants' Motion to Quash Service of Summons.

Plaintiff filed a complaint for unlawful detainer against defendants asserting Chandra Kramer and Robert Kramer were served a 60 day notice to quit on August 3, 2021 by posting on the premises on that date, leaving a copy of the notice with a person found on the property and by mailing a copy of the notice to defendants to the premises; the 60 day notice period expired on October 5, 2021; and defendants failed to comply with the requirement of the notice by that date.

Defendants specially appear to move to quash service of the summons and complaint on the following grounds: the court lacks personal jurisdiction over defendants, because they were never properly served with the summons and complaint; the purported service by leaving a copy of the summons and complaint on the door of the subject premises should be quashed; and plaintiffs have never filed a proof of service of the summons and complaint with the court.

One proof of service declares that on November 29 2021 notice of the hearing and the moving papers were served by mail on plaintiff's counsel. Another proof of service filed on December 8, 2021 declares that the amended notice of hearing was served by mail on December 8, 2021. There was no opposition to the motion in the court's file at the time the ruling was prepared.

Plaintiff filed an opposition to the motion asserting that a person who matches the description of defendant was found on the premises on November 9, 2021; he refused to identify himself and refused to accept the papers; and defendants served the summons and complaint by substitution at the premises on November 9, 2021 by "drop serve" after numerous

unsuccessful attempts at personal service. Plaintiff requests the court to take judicial notice of the registered process server's proof of service purportedly on file with the court.

"A defendant, on or before the last day of his or her time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion for one or more of the following purposes: ¶ (1) To quash service of summons on the ground of lack of jurisdiction of the court over him or her." (Code of Civil Procedure, § 418.10(a)(1).)

""[C]ompliance with the statutory procedures for service of process is essential to establish personal jurisdiction. [Citation.] Thus, a default judgment entered against a defendant who was not served with a summons in the manner prescribed by statute is void." (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1444, 29 Cal.Rptr.2d 746.) ¶ When a defendant argues that service of summons did not bring him or her within the trial court's jurisdiction, the plaintiff has "the burden of proving the facts that did give the court jurisdiction, that is the facts requisite to an effective service." (*Coulston v. Cooper* (1966) 245 Cal.App.2d 866, 868, 54 Cal.Rptr. 302.) ¶ "When an issue is tried on affidavits, the rule on appeal is that those affidavits favoring the contention of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and where there is a substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed." (*Griffith Co. v. San Diego Col. for Women* (1955) 45 Cal.2d 501, 508, 289 P.2d 476.) But we "independently review [the trial court's] statutory interpretations and legal conclusions [citations]." (*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1230, 113 Cal.Rptr.3d 147 (*Gorham*).)" (American Express Centurion Bank v. Zara (2011) 199 Cal.App.4th 383, 387.)

"On a motion to quash service of summons, the plaintiff bears the burden of proving by a preponderance of the evidence that all jurisdictional criteria are met. (*Mihlon v. Superior Court*

(1985) 169 Cal.App.3d 703, 710, 215 Cal.Rptr. 442; *Ziller Electronics Lab GmbH v. Superior Court* (1988) 206 Cal.App.3d 1222, 1232, 254 Cal.Rptr. 410 (Ziller).) The burden must be met by competent evidence in affidavits and authenticated documents; an unverified complaint may not be considered as supplying the necessary facts. (*Ziller*, supra, 206 Cal.App.3d at p. 1233, 254 Cal.Rptr. 410.)" (Nobel Floral, Inc. v. Pasero (2003) 106 Cal.App.4th 654, 657-658.)

"A summons in an action for unlawful detainer of real property may be served by posting if upon affidavit it appears to the satisfaction of the court in which the action is pending that the party to be served cannot with reasonable diligence be served in any manner specified in this article other than publication and that: ¶ (1) A cause of action exists against the party upon whom service is to be made or he is a necessary or proper party to the action; or ¶ (2) The party to be served has or claims an interest in real property in this state that is subject to the jurisdiction of the court or the relief demanded in the action consists wholly or in part in excluding such party from any interest in such property." (Code of Civil Procedure, § 415.45(a).)

"The court shall order the summons to be posted on the premises in a manner most likely to give actual notice to the party to be served and direct that a copy of the summons and of the complaint be forthwith mailed by certified mail to such party at his last known address." (Code of Civil Procedure, § 415.45(b).)

"Service of summons in this manner is deemed complete on the 10th day after posting and mailing." (Code of Civil Procedure, § 415.45(c).)

"Notwithstanding an order for posting of the summons, a summons may be served in any other manner authorized by this article, except publication, in which event such service shall supersede any posted summons." (Code of Civil Procedure, § 415.45(d).)

There is no court order in the file that authorizes service of the summons and complaint by posting.

"If a copy of the summons and complaint cannot with reasonable diligence be personally delivered to the person to be served, as specified in Section 416.60, 416.70, 416.80, or 416.90, a summons may be served by leaving a copy of the summons and complaint at the person's dwelling house, usual place of abode, usual place of business, or usual mailing address other than a United States Postal Service post office box, in the presence of a competent member of the household or a person apparently in charge of his or her office, place of business, or usual mailing address other than a United States Postal Service post office box, at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint by first-class mail, postage prepaid to the person to be served at the place where a copy of the summons and complaint were left. Service of a summons in this manner is deemed complete on the 10th day after the mailing." (Code of Civil Procedure, § 415.20(b).)

Defendant Chandra Kramer declares: on August 4, 2016 she entered into a one year lease agreement with plaintiff to rent the subject premises; to her knowledge, no one has attempted to personally serve her or her family the complaint, not at the subject premises, her usual place of business, or anywhere else; to her knowledge no one ever attempted to leave the complaint at the subject premises, her place of abode, with another competent member of her household; she has never been personally served the complaint; and she is readily able to be found during normal business hours and outside normal business hours at her place of abode. (Declaration of Defendant Chandra Kramer in Support of Motion, paragraphs 3-7.)

Defendant Robert Kramer declares: on August 4, 2016 he entered into a one year lease agreement with plaintiff to rent the subject premises; on August 4, 2021 he discovered a summons, complaint, a prejudgment claim of right to possession and civil cover sheet on the front door of the subject premises and later received a copy in the mail; there was no application to serve the summons and complaint by posting for unlawful detainer or similar documents accompanying the complaint, not at the subject premises residence, at any usual place of business, not anywhere ese; to his knowledge, no one has attempted to personally serve him or his family the complaint, not at the subject premises, his usual place of business, or anywhere else; to his knowledge no one ever attempted to leave the complaint at the subject premises, his place of abode, with another competent member of his household; he has never been personally served the complaint; and he is readily able to be found during normal business hours and outside normal business hours at his place of abode. (Declaration of Robert Kramer in Support of Motion, paragraphs 3-9.)

Attached to plaintiff's counsel's declaration in opposition to the motion is a copy of a proof of substituted service by a registered process server, which declares under penalty of perjury that defendants were served by leaving a copy of the summons and complaint at the person's dwelling house in the presence of a competent member of the household on November 9, 2021 after seven unsuccessful attempts to personally serve defendants.

Plaintiff's counsel states that the registered process server will appear at the hearing to authenticate the document.

Defendants have submitted evidence that they were not served the summons and complaint.

Plaintiff has submitted evidence that supports finding that a substituted service occurred on November 9, 2021 when a registered process server served a competent member of the

household at defendant's residence. Although there is no declaration that the summons and complaint were thereafter mailed to the residence address, defendant Robert Kramer's declaration admits in paragraph 4 that he later received a copy in the mail.

Appearances are required in order to receive the process server's testimony and allow for oral argument.

TENTATIVE RULING # 11: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, DECEMBER 17, 2021 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

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

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

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

The court issued an ex parte minute order on November 1, 2021 setting this hearing re: status of service, response, lodging of the administrative record, and setting of the briefing schedule. The minute order was only served by mail to the petitioner.

At the time that this ruling was prepared there was no proof of service of the summons, petition, and notice of this hearing on the respondent in the court's file.

TENTATIVE RULING # 12: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, DECEMBER 17, 2021 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

13. BANK OF AMERICA v MEYER PCL-20170346

Hearing Re: Claim of Exemption.

On January 26, 2018 a default judgment was entered against the judgment debtor in the amount of $6,775.61. The judgment creditor apparently executed on the judgment by wage garnishment.

The judgment debtor claims all of her earnings are exempt, because they are necessary for the support of herself. She is not willing to have anything withheld to pay on this judgment debt.

The judgment creditor opposes the claim on the following grounds: the earnings are not exempt from garnishment; and the judgment debtor must provide proof of her claimed monthly gross income, the amount claimed as being withheld from her income for federal and state taxes, FICA and SDI, monthly take home pay, CALPERS income, and amounts claimed as monthly expenses in addition to the verified financial statement filed with the claim of exemption

The public policy of the state's wage exemption statutes is to insure that the debtor and his or her family will retain enough money to maintain a basic standard of living. (Barnhill v. Robert Saunders & Co. (1981) 125 Cal.App.3d 1, 6.) The exemption claimant has the burden of proof. (Code of Civil Procedure, § 703.580(b).) Absent the judgment debtor establishing his entire monthly net income is necessary for support of himself and his family, the amount subject to garnishment is 25% of her net monthly income (See 15 U.S.C. § 1673; and Code of Civil Procedure, § 706.050.), which amounts to $737 per month.

The judgment debtor has submitted evidence in support of her claim of exemption from garnishment in the form of a financial statement verified under penalty of perjury which

provides details concerning her income, expenses, and assets. The financial statement indicates the judgment debtor has net monthly income in the sum of $2,948 and monthly expenses in the amount of $2,951.

The exemption claimant met her burden of proof that all wages are exempt. (Code of Civil Procedure, § 703.580(b).) The claim of exemption is granted.

TENTATIVE RULING # 13: THE CLAIM OF EXEMPTION IS GRANTED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE 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, DECEMBER 17, 2021 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

14. BAY FEDERAL CREDIT UNION v. CHAMBERS PCL-20190491

Plaintiff's/Judgment Creditor's Motion to Amend Judgment.

The parties settled the case. On April 9, 2021 the court granted plaintiff's ex parte application for entry of judgment pursuant to the settlement agreement after defendant breached the agreement by failure to make any payments on the settlement after April 30, 2021. The court entered judgment in the principal amount of $8,740.06, less a credit for $1,450 in payments, plus interest in the amount of $1,096.08, costs of $360, and attorney fees of $702 for total judgment in the amount of $9,088.14.

The judgment creditor moves to amend the judgment to deduct an additional credit of $1,300 for payments that had been made by defendants/judgment debtors prior to entry of the judgment, which was not correctly credited. The judgment creditor contends that this can be corrected as a clerical error in the judgment.

The proof of service declares that notice of the hearing and a copy of the moving papers were served by mail to the defendants/judgment debtors on September 30 and November 30, 2021. At the time this ruling was prepared there was no opposition in the court's file.

"When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code." (Code of Civil Procedure, § 187.)

"The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order

directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order." (Code of Civil Procedure, § 473(d).)

"It is not open to question that a court has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts. [Citations.] The power exists independently of statute and may be exercised in criminal as well as in civil cases. [Citation.] The power is unaffected by the pendency of an appeal or a habeas corpus proceeding. [Citation.] The court may correct such errors on its own motion or upon the application of the parties." (*In re Candelario* (1970) 3 Cal.3d 702, 705, 91 Cal.Rptr. 497, 477 P.2d 729.) Courts may correct clerical errors at any time, and appellate courts (including this one) that have properly assumed jurisdiction of cases have ordered correction of abstracts of judgment that did not accurately reflect the oral judgments of sentencing courts. (See, e.g., *People v. Boyde* (1988) 46 Cal.3d 212, 256, 250 Cal.Rptr. 83, 758 P.2d 25; *People v. Baines* (1981) 30 Cal.3d 143, 150, 177 Cal.Rptr. 861, 635 P.2d 455; *People v. Brown* (2000) 83 Cal.App.4th 1037, 1039, 1046–1047, 100 Cal.Rptr.2d 211; *People v. Avila* (1999) 75 Cal.App.4th 416, 424, 89 Cal.Rptr.2d 320; *People v. Kearns* (1997) 55 Cal.App.4th 1128, 1131, 1137, 64 Cal.Rptr.2d 654; *People v. Williams* (1992) 10 Cal.App.4th 827, 835, 13 Cal.Rptr.2d 107; *People v. Rowland* (1988) 206 Cal.App.3d 119, 123–124, 128, 253 Cal.Rptr. 190; *People v. Hartsell* (1973) 34 Cal.App.3d 8, 13–14, 109 Cal.Rptr. 627.)" (People v. Mitchell (2001) 26 Cal.4th 181, 185.)

"The law is clear on the point. 'Not only has the court power to remedy clerical errors, as distinguished from judicial errors, which may be corrected only through motion for new trial or by appeal, but it is a plain duty to remedy them, the performance of which will be enforced in the furtherance of justice.' *Chadwick v. Superior Court*, 205 Cal. 163, 270 P. 192, 193." (Boylan v. Marine (1951) 104 Cal.App.2d 321, 322.) "The power of the trial court in the premises is

inherent and is not abrogated or suspended by the pendency of an appeal*, Haynes v. Los Angeles R. R. Corp.*, 80 Cal.App. 776, 782, 252 P. 1072, nor is it lost through lapse of time. *Wilson v. Nichols*, 55 Cal.App.2d 678, 681, 131 P.2d 596. The duty of the trial court to make proper corrections of its own records, as distinguished from the record on appeal, is not dependent upon any order of a reviewing court, under the Rules of Appeal or otherwise." (Boylan v. Marine (1951) 104 Cal.App.2d 321, 322.)

The judgment creditor's counsel declares: on August 23 2021 counsel received a notice from plaintiff stating that defendants were not correctly credited in the judgment for the total sum of $2,750 in payments they made; and counsel subsequently reviewed the payment history and determined that the sum of $1,300 in payments were not listed in the judgment.

The court takes judicial notice that the court entered judgment pursuant to Code of Civil Procedure, § 664.6 to enforce the settlement agreement, which provided that in the event of defendant's default in payments defendants were entitled to credit for all payments plaintiff received. Consistent with that intent, the court entered judgment. However, there was a clerical error regarding the total amount of payments defendants were entitled to have credited against the amount due and owing under the judgment to be entered. Under the totality of the circumstances presented, it appears appropriate to grant the motion and order the judgment amended as requested.

TENTATIVE RULING # 14: PLAINTIFF'S/JUDGMENT CREDITOR'S MOTION TO AMEND JUDGMENT IS GRANTED AS PRAYED FOR. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS

ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, DECEMBER 17, 2021 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

15. MCDERMOTT v. TRINITY FINANCIAL SERVICES PC-20210522

Defendant Trinity Financial Services, LLC's Demurrer to Complaint.

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

Defendant Trinity Financial Services, LLC demurs to all causes of action on the following grounds: the Violation of Civil Code, § 2923.5 Cause of Action is fatally defective, because Section 2923.5 only applies to first priority mortgages and deeds of trust and matters of which the court can take judicial notice of establish that the note foreclosed on was a 2nd deed of trust (DOT); there is no private right of action for violation of Civil Code, § 2924(a)(1); even assuming there was a private right of action, plaintiffs have failed to state a cause of action for such violation, because defendant Trinity Financial Services, LLC was the beneficiary of the 2nd DOT at the time the notice of default was recorded and EDS was the trustee of the 2nd DOT at the time the subject notices and trustee's deed were executed by EDS as established by the recorded substitution of trustee naming EDS trustee; the violation of truth in lending act cause of action fails to allege that none of the six exemptions from the operation of 12 CFR 1026.41 set forth in 12 CFR 1026.41(e) apply, including the small servicer exemption (12 CFR 1026.41(e)(4)(I); the violation of truth in lending act cause of action only alleges the 2nd loan does not qualify under the bankruptcy and charge off exemptions; the violation of Section 1026.41 does not provide grounds to rescind the loan as established in 15 USC 1640(a); the alleged violation of 12 CFR 1026.41 has a one year statue of limitation from the date of occurrence as provided in 15 USC 1640(e), which renders all alleged failures to provide

statements of account more than one year prior to September 22, 2021 when the complaint was filed are barred by the statute of limitation; the allegations of the violation of the Rosenthal Fair Debt Collection Practices Act cause of action are deficient in that the allegations defendant Trinity Financial Services, LLC misrepresented the amount of debt by including interest and fees that it is federally prohibited on plaintiff's loan on the reinstatement calculation in the notice are vague and conclusory in that the federal law allegedly violated is not stated and the allegation that defendant Trinity Financial Services, LLC made other false statements to plaintiff related to the amount of their debt is conclusory and vague, because plaintiff failed to actually state the purported misrepresentation; the negligence cause of action fails to state a cause of action in that plaintiffs have failed to adequately allege violations of Civil Code, §§ 2923.5, 2924(a)(1), and 2934a(d), and failed to sufficiently allege the statutory and regulatory violations proximately caused the claimed damages from foreclosures, payment of foreclosure fees, and damage to credit reports; the wrongful foreclosure cause of action fails as the allegations do not rebut the Civil Code, § 2924 presumption of validity of the foreclosure sale as the causes of action for violations of Civil Code, §§ 2923.5, 2924, and 2934a and the Rosenthal Fair Debt Collection Practices Act are defective and 12 CFR 1026.41 is unrelated to the nonjudicial foreclosure process; the wrongful foreclosure cause of action fails to state a cause of action, because there is no allegation of full tender of the amount owed under the 2nd DOT; the unfair business practices cause of action is fatally defective, because it does not allege economic injury, there is no alleged causation between failure to send monthly statements and foreclosure on the property, plaintiffs have failed to sufficiently allege statutory violations related to the nonjudicial foreclosure laws, plaintiffs fail to explain how 15 USC 1641(g) caused the nonjudicial foreclosure or prevented plaintiffs from reinstating the 2nd loan, and the allegation that plaintiff was provided misleading information that was not consistent

with the loan modification and what they had to do to satisfy the lender's demands does not state which defendant provided the information, how it was misleading and how plaintiff relied on the alleged misinformation; the cancellation of written instruments cause of action fails to state a cause of action, because plaintiffs have not adequately alleged that any of the foreclosure documents are void or why they should be cancelled.

Plaintiffs oppose the demurrers on the following grounds: paragraphs 34-40 adequately allege a violation of 12 CFR 1026.41, which is actionable under 15 USC 1640 of the Truth in Lending Act, since defendant Trinity Financial Services, LLC failed to disclose they actually had continued to charge interest on the loan, the charge off exemption does not apply and renders that issue a factual dispute not cognizable in a demurrer proceeding, and inasmuch as plaintiff has adequately alleged the cause of action and defendant Trinity Financial Services, LLC only argues factual disputes, the demurrer to this cause of action is meritless; paragraphs 42-47 adequately allege a cause of action for violation of the Rosenthal Fair Debt Collection Practices Act under Civil Code, §1788.17 as acceleration of the debt after not collecting on the debt for a number of years where the borrowers did not know they owed on the 2nd loan any longer violates 15 USC 1692e(2); the statutory duties imposed by 12 CFR 1026.41 and Civil Code, § 1788.1(b) impose duties under law which gave rise to a duty if due care in tort that was breached by defendant Trinity Financial Services, LLC's violation of those laws proximately causing plaintiffs' alleged injuries; the unfair business practices cause of action sufficiently states a cause of action as plaintiffs have adequately alleged violations of statutes caused their damages; the cancellation of written instruments cause of action is sufficiently pled as the recorded notice of default, notice of trustee's sale, and trustee's deed upon sale are void or voidable resulting in the foreclosure being wrongful and in violation of 12 CFR 1026.41.

Defendant Trinity Financial Services, LLC in replied to the opposition.

Demurrer Principles

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

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

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

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

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

“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. While there are some uncertainties in counts II and III, they are largely matters which lie within the

knowledge of defendants. A demurrer does not lie to such matters. *Turner v. Milstein*, 103 Cal.App.2d 651, 658, 230 P.2d 25." (Gressley v. Williams (1961) 193 Cal.App.2d 636, 643-644.)

With the above-cited legal principles in mind the court will rule on defendant Trinity Financial Services, LLC's demurrers to the complaint.

Violation of Civil Code, § 2923.5 Cause of Action

Plaintiffs allege: they are rightful owners of the subject real property, which is their personal and principal residence; defendants were required by Civil Code, § 2923.5(a)(2) to complete certain acts prior to recording a notice of default; defendant Trinity Financial Services, LLC recorded a notice of default on the subject property on April 20, 2021; and defendant Trinity Financial Services, LLC failed to satisfy the requirements of Section 2923.5(a)(2) prior to recording the notice of default. (Complaint, paragraphs 1, and 21-23.)

The court takes judicial notice of the following: a second deed of trust (DOT) was recorded against the subject real property on December 30, 2005; MERS was the nominal trustee; MERS assigned the 2nd DOT to Summit Real Estate Partners, LP, which was recorded on April 28, 2010; Summit Real Estate Partners, LP assigned the 2nd DOT to Cerastes, LLC, which was recorded on February 17, 2021; and the assignment of the 2nd DOT by Cerastes, LLC to defendant Trinity Financial Services, LLC was immediately thereafter recorded on February 17, 2021. (Defendant Trinity Financial Services, LLC's Request for Judicial Notice, Exhibits 3 and 11-13.)

"(f) This section shall apply only to mortgages or deeds of trust described in Section 2924.15." (Civil Code, § 2923.5(f).)

""(a) Unless otherwise provided, paragraph (5) of subdivision (a) of Section 2924, and Sections 2923.5, 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, and 2924.18 shall apply

only to a first lien mortgage or deed of trust that meets either of the following criteria: ¶ (1)(A) The first lien mortgage or deed of trust is secured by owner-occupied residential real property containing no more than four dwelling units. ¶ (B) For purposes of this paragraph, "owner-occupied" means that the property is the principal residence of the borrower and is security for a loan made for personal, family, or household purposes…" (Civil Code, § 2924.15(a)(1)(A) and 2924.15(a)(1)(B).)

Civil Code, § 2923.5(a)(2) does not apply to defendant Trinity Financial Services, LLC's second DOT and matters of which the court takes judicial notice establish that plaintiff can never assert a violation of Civil Code, § 2923.5(a)(2) cause of action against defendant Trinity Financial Services, LLC. Plaintiffs have conceded as much as they have not addressed the demurrer to this cause of action in their opposition.

There does not appear to be a reasonable possibility that the pleading can be cured by amendment, the Violation of Civil Code, § 2823.5 Cause of Action of the complaint appears to be incapable of amendment to cure the defect, and plaintiff has not demonstrated how the that cause of action can be amended to cure the defect. (See Roman v. County of Los Angeles (2000) 85 Cal.App.4th 316, 322.) The demurrer to the violation of Civil Code, § 2823.5 cause of action is sustained without leave to amend.

Violation of Civil Code, § 2924(a)(1) Cause of Action

The complaint alleges: Civil Code, § 2924(a)(1) requires that the trust deed beneficiary or its agent be the one that authorizes the foreclosure proceeding by filing the notice of default and related procedures; defendant Trinity Financial Services, LLC failed to comply with these requirements, because the notice of default did not include the statutory requirements rendering the notice of default void or voidable; defendant EDS (Entra Default Solutions LLC) was not authorized to foreclose in violation of Section 2924(a)(6), rendering the foreclosure

sale void by operation of Civil Code, § 2934a(e); and the purported trustee, defendant EDS, failed to record a substitution of trustee with the El Dorado County Recorder in violation of Civil Code, § 2934a(d), thereby rendering the notice of default, notice of trustee's sale, and trustee's deed upon sale void pursuant to Civil Code, § 2934a(e). (Complaint, paragraphs 29, and 30.)

The court takes judicial notice of the following: 2nd DOT beneficiary defendant Trinity Financial Services, LLC executed a substitution of trustee naming EDS as trustee of the 2nd DOT on April 1, 2021 and filed the substitution on April 20, 2021; EDS executed the notice of default on the 2nd DOT as trustee April 19, 2021 and recorded the notice of default on April 20, 2021; EDS executed the notice of trustee's sale as trustee on July 21, 2021 and recorded the notice on July 22 2021; and EDS, acting as trustee, executed the trustee's deed upon sale and recorded it on September 9, 2021. (Defendant Trinity Financial Services, LLC's Request for Judicial Notice, Exhibits 14-17.)

A trustee, mortgagee, or beneficiary, or any of their authorized agents, may initiate the foreclosure process by recording a notice of default. (Emphasis the court's.) (Civil Code, § 2924(a)(1).)

"(a) Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is to be deemed a pledge. Where, by a mortgage created after July 27, 1917, of any estate in real property, other than an estate at will or for years, less than two, or in any transfer in trust made after July 27, 1917, of a like estate to secure the performance of an obligation, a power of sale is conferred upon the mortgagee, trustee, or any other person, to be exercised after a breach of the obligation for which that mortgage or transfer is a security, the power shall not be exercised except where the mortgage or transfer is made pursuant to an order, judgment, or

decree of a court of record, or to secure the payment of bonds or other evidences of indebtedness authorized or permitted to be issued by the Commissioner of Corporations, or is made by a public utility subject to the provisions of the Public Utilities Act, until all of the following apply: ¶ * * * (6) No entity shall record or cause a notice of default to be recorded or otherwise initiate the foreclosure process unless it is the holder of the beneficial interest under the mortgage or deed of trust, the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of the beneficial interest. No agent of the holder of the beneficial interest under the mortgage or deed of trust, original trustee or substituted trustee under the deed of trust may record a notice of default or otherwise commence the foreclosure process except when acting within the scope of authority designated by the holder of the beneficial interest…" (Civil Code, § 2924(a)(6).)

"A trustee named in a recorded substitution of trustee shall be deemed to be authorized to act as the trustee under the mortgage or deed of trust for all purposes from the date the substitution is executed by the mortgagee, beneficiaries, or by their authorized agents. Nothing herein requires that a trustee under a recorded substitution accept the substitution. Once recorded, the substitution shall constitute conclusive evidence of the authority of the substituted trustee or his or her agents to act pursuant to this section." (Emphasis added.)(Civil Code, § 2934a(d).)

"Notwithstanding any provision of this section or any provision in any deed of trust, unless a new notice of sale containing the name, street address, and telephone number of the substituted trustee is given pursuant to Section 2924f after execution of the substitution, any sale conducted by the substituted trustee shall be void." (Civil Code, § 2934a(e).)

Matters of which the court takes judicial notice establishes that defendant Trinity Financial Services, LLC executed and recorded a substitution of trustee naming EDS as trustee; and

EDS executed and recorded the notice of default, notice of trustee's sale and the trustee's deed upon sale after being designated the new trustee of the subject 2nd DOT. These matters conclusively establish that Sections 2924(a)(1) and 2924(a)(6) were not violated and the notices and trustee's deed are not void or voidable..

Plaintiffs have conceded as much as they have not addressed the demurrer to this cause of action in their opposition.

There does not appear to be a reasonable possibility that the pleading can be cured by amendment, the Violation of Civil Code, § 2824 Cause of Action of the complaint appears to be incapable of amendment to cure the defect, and plaintiff has not demonstrated how the that cause of action can be amended to cure the defect. (See Roman v. County of Los Angeles (2000) 85 Cal.App.4th 316, 322.) The demurrer to the violation of Civil Code, § 2823.5 cause of action is sustained without leave to amend.

Violation of the Truth in Lending Act Cause of Action

Defendant Trinity Financial Services, LLC contends: the violation of truth in lending act cause of action fails to allege that none of the six exemptions from the operation of 12 CFR 1026.41 set forth in 12 CFR 1026.41(e) apply, including the small servicer exemption (12 CFR 1026.41(e)(4)(i).); the violation of truth in lending act cause of action only alleges the 2nd loan does not qualify under the bankruptcy and charge off exemptions; the violation of Section 1026.41 does not provide grounds to rescind the loan as established in 15 USC 1640(a); the alleged violation of 12 CFR 1026.41 has a one year statute of limitation from the date of occurrence as provided in 15 USC 1640(e), which bars actions for all alleged failures to provide statements of account more than one year prior to September 22, 2021 when the complaint was filed.

Plaintiffs argue in opposition that paragraphs 34-40 adequately allege a violation of 12 CFR 1026.41, which is actionable under 15 USC 1640 of the Truth in Lending Act; since defendant Trinity Financial Services, LLC failed to disclose they actually had continued to charge interest on the loan, the charge off exemption does not apply and renders that issue a factual dispute not cognizable in a demurrer proceeding; and inasmuch as plaintiff has adequately alleged the cause of action and defendant Trinity Financial Services, LLC only argues factual disputes, the demurrer to this cause of action is meritless.

The complaint alleges: lenders/servicers are required by 12 CFR 1026.41 to provide monthly statements unless the loan is in active bankruptcy or charged off; plaintiffs have not received any statement on their loan until December 2020, which violates 12 CFR 1026.41(a)(b) and (c); defendant Trinity Financial Services, LLC failed to clearly provide accurate information using uncommon terminology that is commonly understood in violation of 12 CFR 1026.41(d)(3); defendant Trinity Financial Services, LLC failed to disclose the total sum of any fees or charges imposed since the last statement, the total of all payments received since the last statement, including a breakdown of how many payments were applied, and a list of all transaction activity since the last statement in violation of 12 USC 1026(d)(2)(ii),(d)(3)(i), and (d)(4); and defendant Trinity Financial Services, LLC violated 12 USC 1026.41 (b)(1), (2) and (3) by failing to provide periodic loan statements regarding existing loan amount, current interest rate and amount due. (Complaint, paragraphs 34-38 and 40.)

"(a) In general— ¶ (1) Scope. This section applies to a closed-end consumer credit transaction secured by a dwelling, unless an exemption in paragraph (e) of this section applies. A closed-end consumer credit transaction secured by a dwelling is referred to as a mortgage loan for purposes of this section. ¶ (2) Periodic statements. A servicer of a transaction subject

to this section shall provide the consumer, for each billing cycle, a periodic statement meeting the requirements of paragraphs (b), (c), and (d) of this section. If a mortgage loan has a billing cycle shorter than a period of 31 days (for example, a bi-weekly billing cycle), a periodic statement covering an entire month may be used. For the purposes of this section, servicer includes the creditor, assignee, or servicer, as applicable. A creditor or assignee that does not currently own the mortgage loan or the mortgage servicing rights is not subject to the requirement in this section to provide a periodic statement. ¶ (b) Timing of the periodic statement. The periodic statement must be delivered or placed in the mail within a reasonably prompt time after the payment due date or the end of any courtesy period provided for the previous billing cycle. ¶ (c) Form of the periodic statement. The servicer must make the disclosures required by this section clearly and conspicuously in writing, or electronically if the consumer agrees, and in a form that the consumer may keep. Sample forms for periodic statements are provided in appendix H–30. Proper use of these forms complies with the requirements of this paragraph (c) and the layout requirements in paragraph (d) of this section. ¶ (d) Content and layout of the periodic statement. The periodic statement required by this section shall include: ¶ (1) Amount due. Grouped together in close proximity to each other and located at the top of the first page of the statement: ¶ (i) The payment due date; ¶ (ii) The amount of any late payment fee, and the date on which that fee will be imposed if payment has not been received; and ¶ (iii) The amount due, shown more prominently than other disclosures on the page and, if the transaction has multiple payment options, the amount due under each of the payment options. ¶ (2) Explanation of amount due. The following items, grouped together in close proximity to each other and located on the first page of the statement: ¶ (i) The monthly payment amount, including a breakdown showing how much, if any, will be applied to principal, interest, and escrow and, if a mortgage loan has multiple payment options,

a breakdown of each of the payment options along with information on whether the principal balance will increase, decrease, or stay the same for each option listed; ¶ (ii) The total sum of any fees or charges imposed since the last statement; and ¶ (iii) Any payment amount past due. ¶ (3) Past Payment Breakdown. The following items, grouped together in close proximity to each other and located on the first page of the statement: ¶ (i) The total of all payments received since the last statement, including a breakdown showing the amount, if any, that was applied to principal, interest, escrow, fees and charges, and the amount, if any, sent to any suspense or unapplied funds account; and ¶ (ii) The total of all payments received since the beginning of the current calendar year, including a breakdown of that total showing the amount, if any, that was applied to principal, interest, escrow, fees and charges, and the amount, if any, currently held in any suspense or unapplied funds account. ¶ (4) Transaction activity. A list of all the transaction activity that occurred since the last statement. For purposes of this paragraph (d)(4), transaction activity means any activity that causes a credit or debit to the amount currently due. This list must include the date of the transaction, a brief description of the transaction, and the amount of the transaction for each activity on the list. ¶ (5) Partial payment information. If a statement reflects a partial payment that was placed in a suspense or unapplied funds account, information explaining what must be done for the funds to be applied. The information must be on the front page of the statement or, alternatively, may be included on a separate page enclosed with the periodic statement or in a separate letter. ¶ (6) Contact information. A toll-free telephone number and, if applicable, an electronic mailing address that may be used by the consumer to obtain information about the consumer's account, located on the front page of the statement. ¶ (7) Account information. The following information: ¶ (i) The amount of the outstanding principal balance; ¶ (ii) The current interest rate in effect for the mortgage loan; ¶ (iii) The date after which the interest rate may next change; ¶ (iv) The

existence of any prepayment penalty, as defined in § 1026.32(b)(6)(i), that may be charged; ¶ (v) The Web site to access either the Bureau list or the HUD list of homeownership counselors and counseling organizations and the HUD toll-free telephone number to access contact information for homeownership counselors or counseling organizations; and ¶ (8) Delinquency information. If the consumer is more than 45 days delinquent, the following items, grouped together in close proximity to each other and located on the first page of the statement or, alternatively, on a separate page enclosed with the periodic statement or in a separate letter: ¶ (i) The length of the consumer's delinquency; ¶ (ii) A notification of possible risks, such as foreclosure, and expenses, that may be incurred if the delinquency is not cured; ¶ (iii) An account history showing, for the previous six months or the period since the last time the account was current, whichever is shorter, the amount remaining past due from each billing cycle or, if any such payment was fully paid, the date on which it was credited as fully paid; ¶ (iv) A notice indicating any loss mitigation program to which the consumer has agreed, if applicable; ¶ (v) A notice of whether the servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, if applicable; ¶ (vi) The total payment amount needed to bring the account current; and ¶ (vii) A reference to the homeownership counselor information disclosed pursuant to paragraph (d)(7)(v) of this section. ¶ (e) Exemptions— ¶ (1) Reverse mortgages. Reverse mortgage transactions, as defined by § 1026.33(a), are exempt from the requirements of this section. ¶ (2) Timeshare plans. Transactions secured by consumers' interests in timeshare plans, as defined by 11 U.S.C. 101(53D), are exempt from the requirements of this section. ¶ (3) Coupon books. The requirements of paragraph (a) of this section do not apply to fixed-rate loans if the servicer:

(i) Provides the consumer with a coupon book that includes on each coupon the information listed in paragraph (d)(1) of this section; ¶ (ii) Provides the consumer with a coupon book that

includes anywhere in the coupon book: ¶ (A) The account information listed in paragraph (d)(7) of this section; ¶ (B) The contact information for the servicer, listed in paragraph (d)(6) of this section; and n¶ (C) Information on how the consumer can obtain the information listed in paragraph (e)(3)(iii) of this section; ¶ (iii) Makes available upon request to the consumer by telephone, in writing, in person, or electronically, if the consumer consents, the information listed in paragraph (d)(2) through (5) of this section; and ¶ (iv) Provides the consumer the information listed in paragraph (d)(8) of this section in writing, for any billing cycle during which the consumer is more than 45 days delinquent. ¶ (4) Small servicers— ¶ (i) Exemption. A creditor, assignee, or servicer is exempt from the requirements of this section for mortgage loans serviced by a small servicer. ¶ (ii) Small servicer defined. A small servicer is a servicer that: ¶ (A) Services, together with any affiliates, 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee; ¶ (B) Is a Housing Finance Agency, as defined in 24 CFR 266.5; or ¶ (C) Is a nonprofit entity that services 5,000 or fewer mortgage loans, including any mortgage loans serviced on behalf of associated nonprofit entities, for all of which the servicer or an associated nonprofit entity is the creditor. For purposes of this paragraph (e)(4)(ii)(C), the following definitions apply: ¶ (1) The term “nonprofit entity” means an entity having a tax exemption ruling or determination letter from the Internal Revenue Service under section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3); 26 CFR 1.501(c)(3)–1), and; ¶(2) The term “associated nonprofit entities” means nonprofit entities that by agreement operate using a common name, trademark, or servicemark to further and support a common charitable mission or purpose. ¶ (iii) Small servicer determination. In determining whether a servicer satisfies paragraph (e)(4)(ii)(A) of this section, the servicer is evaluated based on the mortgage loans serviced by the servicer and any affiliates as of January 1 and for the remainder of the calendar year. In determining whether a servicer

satisfies paragraph (e)(4)(ii)(C) of this section, the servicer is evaluated based on the mortgage loans serviced by the servicer as of January 1 and for the remainder of the calendar year. A servicer that ceases to qualify as a small servicer will have six months from the time it ceases to qualify or until the next January 1, whichever is later, to comply with any requirements from which the servicer is no longer exempt as a small servicer. The following mortgage loans are not considered in determining whether a servicer qualifies as a small servicer: ¶ (A) Mortgage loans voluntarily serviced by the servicer for a non-affiliate of the servicer and for which the servicer does not receive any compensation or fees. ¶ (B) Reverse mortgage transactions. ¶ (C) Mortgage loans secured by consumers' interests in timeshare plans. ¶ (D) Transactions serviced by the servicer for a seller financer that meets all of the criteria identified in § 1026.36(a)(5). ¶ (5) Certain consumers in bankruptcy— ¶ (i) Exemption. Except as provided in paragraph (e)(5)(ii) of this section, a servicer is exempt from the requirements of this section with regard to a mortgage loan if: ¶ (A) Any consumer on the mortgage loan is a debtor in bankruptcy under title 11 of the United States Code or has discharged personal liability for the mortgage loan pursuant to 11 U.S.C. 727, 1141, 1228, or 1328; and ¶ (B) With regard to any consumer on the mortgage loan: ¶ (1) The consumer requests in writing that the servicer cease providing a periodic statement or coupon book; ¶ (2) The consumer's bankruptcy plan provides that the consumer will surrender the dwelling securing the mortgage loan, provides for the avoidance of the lien securing the mortgage loan, or otherwise does not provide for, as applicable, the payment of pre-bankruptcy arrearage or the maintenance of payments due under the mortgage loan; ¶ (3) A court enters an order in the bankruptcy case providing for the avoidance of the lien securing the mortgage loan, lifting the automatic stay pursuant to 11 U.S.C. 362 with regard to the dwelling securing the mortgage loan, or requiring the servicer to cease providing a periodic statement or coupon book; or ¶ (4) The consumer files with the

court overseeing the bankruptcy case a statement of intention pursuant to 11 U.S.C. 521(a) identifying an intent to surrender the dwelling securing the mortgage loan and a consumer has not made any partial or periodic payment on the mortgage loan after the commencement of the consumer's bankruptcy case. ¶ (ii) Reaffirmation or consumer request to receive statement or coupon book. A servicer ceases to qualify for an exemption pursuant to paragraph (e)(5)(i) of this section with respect to a mortgage loan if the consumer reaffirms personal liability for the loan or any consumer on the loan requests in writing that the servicer provide a periodic statement or coupon book, unless a court enters an order in the bankruptcy case requiring the servicer to cease providing a periodic statement or coupon book. ¶ (iii) Exclusive address. A servicer may establish an address that a consumer must use to submit a written request under paragraph (e)(5)(i)(B)(1) or (e)(5)(ii) of this section, provided that the servicer notifies the consumer of the address in a manner that is reasonably designed to inform the consumer of the address. If a servicer designates a specific address for requests under paragraph (e)(5)(i)(B)(1) or (e)(5)(ii) of this section, the servicer shall designate the same address for purposes of both paragraphs (e)(5)(i)(B)(1) and (e)(5)(ii) of this section. (iv) Timing of compliance following transition— ¶ (A) Triggering events for transitioning to modified and unmodified periodic statements. A servicer transitions to providing a periodic statement or coupon book with the modifications set forth in paragraph (f) of this section or to providing a periodic statement or coupon book without such modifications when one of the following three events occurs: ¶ (1) A mortgage loan becomes subject to the requirements of paragraph (f) of this section; ¶ (2) A mortgage loan ceases to be subject to the requirements of paragraph (f) of this section; or ¶ (3) A servicer ceases to qualify for an exemption pursuant to paragraph (e)(5)(i) of this section with respect to a mortgage loan. ¶ (B) Single-statement exemption. As of the date on which one of the events listed in paragraph (e)(5)(iv)(A) of this section occurs, a

servicer is exempt from the requirements of this section with respect to the next periodic statement or coupon book that would otherwise be required but thereafter must provide modified or unmodified periodic statements or coupon books that comply with the requirements of this section. ¶ (6) Charged-off loans. ¶ (i) A servicer is exempt from the requirements of this section for a mortgage loan if the servicer: ¶ (A) Has charged off the loan in accordance with loan-loss provisions and will not charge any additional fees or interest on the account; and ¶ (B) Provides, within 30 days of charge-off or the most recent periodic statement, a periodic statement, clearly and conspicuously labeled "Suspension of Statements & Notice of Charge Off—Retain This Copy for Your Records." The periodic statement must clearly and conspicuously explain that, as applicable, the mortgage loan has been charged off and the servicer will not charge any additional fees or interest on the account; the servicer will no longer provide the consumer a periodic statement for each billing cycle; the lien on the property remains in place and the consumer remains liable for the mortgage loan obligation and any obligations arising from or related to the property, which may include property taxes; the consumer may be required to pay the balance on the account in the future, for example, upon sale of the property; the balance on the account is not being canceled or forgiven; and the loan may be purchased, assigned, or transferred. ¶ (ii) Resuming compliance. ¶ (A) If a servicer fails at any time to treat a mortgage loan that is exempt under paragraph (e)(6)(i) of this section as charged off or charges any additional fees or interest on the account, the obligation to provide a periodic statement pursuant to this section resumes. ¶ (B) Prohibition on retroactive fees. A servicer may not retroactively assess fees or interest on the account for the period of time during which the exemption in paragraph (e)(6)(i) of this section applied…" (12 CFR 1026.41(a)-(e).)

"(e) Jurisdiction of courts; limitations on actions; State attorney general enforcement ¶ Except as provided in the subsequent sentence, any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation…" (15 USC § 1640(e).)

The periodic statements that are not barred by the one year statute of limitation set forth in 15 USC 1640(e) are those sent on or after September 22, 2020 to the filing date of the complaint on September 22, 2021.

The court rejects defendant's argument that the plaintiff must affirmatively allege facts establishing that all exemptions to the operation of 12 CFR 1026.41 do not apply. The exemptions are in the form of an affirmative defense that are to be addressed in the answer to the complaint, not by demurrer.

Treating as true all of the complaint's material factual allegations and construing the complaint liberally to determine whether a truth in lending act 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 truth in lending act cause of action. The demurrer to the truth in lending act cause of action is overruled.

The court will address in its ruling on the demurrer to the cancellation of written instrument cause of action the issue of whether the remedy of rescission of the loan is available for a alleged violations of 12 CFR 1026.41.

Violation of the Rosenthal Fair Debt Collection Practices Act Cause of Action

Defendant Trinity Financial Services, LLC argues: the allegations of the violation of the Rosenthal Fair Debt Collection Practices Act cause of action are deficient in that the allegations defendant Trinity Financial Services, LLC misrepresented the amount of debt by

including interest and fees that it is federally prohibited on plaintiff's loan on the reinstatement calculation in the notice are vague and conclusory in that the federal law allegedly violated is not stated; and the allegation that defendant Trinity Financial Services, LLC made other false statements to plaintiff related to the amount of their debt is conclusory and vague, because plaintiff failed to actually state the purported misrepresentation.

Plaintiffs argue in opposition: paragraphs 42-47 adequately allege a cause of action for violation of the Rosenthal Unfair Debt Collection Practices Act under Civil Code, §1788.17 as acceleration of the debt after not collecting on the debt for a number of years where the borrowers did not know they owed on the 2nd loan any longer violates 15 USC 1692e(2).

The complaint alleges: defendant Trinity Financial Services, LLC is a debt collector within the meaning the both the Federal Fair Debt Collections Practices Act (FDCPA) and the California Rosenthal Fair Debt Collection Practices Act; 15 USC 1692e(2) of the FDCPA prohibits a debt collector from making a false representation of the amount, character, or status of a debt; defendant Trinity Financial Services, LLC misrepresented the amount of debt by including interest and fees that it is federally prohibited from collecting on the plaintiffs' loan in its reinstatement calculation, which was included in the notice of default; defendant Trinity Financial Services, LLC made other false statements to plaintiffs regarding the amount of their debt; the Rosenthal Fair Debt Collection Practices Act requires debt collectors to comply with FDCPA requirements; an defendant Trinity Financial Services, LLC violated the FDCPA and the California Rosenthal Fair debt Collection Practice Act. (Complaint, paragraphs 42-47.)

"Notwithstanding any other provision of this title, every debt collector collecting or attempting to collect a consumer debt shall comply with the provisions of Sections 1692b to 1692j, inclusive, of, and shall be subject to the remedies in Section 1692k of, Title 15 of the United States Code. However, subsection (11) of Section 1692e and Section 1692g shall not

apply to any person specified in paragraphs (A) and (B) of subsection (6) of Section 1692a of Title 15 of the United States Code or that person's principal. The references to federal codes in this section refer to those codes as they read January 1, 2001." (Civil Code, § 1788.17.)

"The RFDCPA requires all debt collectors attempting to collect a consumer debt to comply with the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692b through 1692j. Cal. Civ.Code § 1788.17. As such, a plaintiff may state a claim for violation of the Rosenthal Act simply by showing that a defendant violated any of several provisions of the FDCPA. *See Crockett v. Rash Curtis & Assocs.,* 929 F.Supp.2d 1030, 1033 (N.D.Cal.2013). A claim for violations of the RFDCPA must be brought "within one year from the date of the occurrence of the violation." Cal. Civ.Code § 1788.30(f)." (Langan v. United Services Automobile Association (N.D. Cal. 2014) 69 F.Supp.3d 965, 981.)

"A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: ¶ (2) The false representation of—¶ (A) the character, amount, or legal status of any debt; or ¶ (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt." (15 USC 1692e(2).)

The allegations that Defendant Trinity Financial Services, LLC demanded payment of interest and fees that were federally prohibited on plaintiff's loan on the reinstatement calculation in the notice are vague and conclusory as these federal laws are not alleged; and the allegation that defendant Trinity Financial Services, LLC made other false statements to plaintiff related to the amount of their debt is conclusory and vague, because plaintiff failed to actually state the purported misrepresentation. In other words, the allegations of the complaint are not sufficiently clear to apprise the defendant of the issues which it is to meet and the

complaint does not set forth the essential facts of plaintiff's Rosenthal Fair Debt Collection Practices Act cause of action with reasonable precision and with particularity sufficiently specific to acquaint defendant of the nature, source, and extent of the cause of action. (Gressley v. Williams (1961) 193 Cal.App.2d 636, 643-644.)

The demurrer to the Rosenthal Fair Debt Collection Practices Act cause of action is sustained. In an abundance of caution, the court grants ten days leave to amend.

Negligence Cause of Action

Defendant Trinity Financial Services, LLC argues: the negligence cause of action fails to state a cause of action in that plaintiffs have failed to adequately allege violations of Civil Code, §§ 2923.5, 2924(a)(1), and 2934a(d), and failed to sufficiently allege the statutory and regulatory violations proximately caused the claimed damages from foreclosure, payment of foreclosure fees, and damage to credit reports.

Citing Lueras v. BAC Home Loans Servicing LP (2013) 221 Cal.App.4th 49, 62, which holds that a bank or lender may owe a duty of due care not to negligently handle a loan modification application once it has undertaken to review the application, plaintiffs assert that violations of statutes by a lender or beneficiary of a DOT generally raises a duty of due care.

The complaint alleges: defendant Trinity Financial Services, LLC breached its duty of due care and good faith to plaintiffs when it failed to notify them about the possible foreclosure and waited thirty days after notice to record a notice of default in violation of Civil Code, § 2923.5, used a trustee, servicer, or beneficiary that lacked legal authority to conduct the trustee's sale in violation of Civil Code, §§ 2924(a)(1), 2934a(d), and/or 2924(a)(6), violated 12 CFR 1026.41 by failing to send monthly loan statements with accurate information, and violated 15 USC 1641(g) by failing to contact plaintiff after recording an assignment of the deed of trust and notifying the plaintiffs that defendant Trinity Financial Services, LLC was the new beneficiary of

the DOT; defendant Trinity Financial Services, LLC's activities exceeded the traditional scope of conventional money lending; and plaintiffs suffered damages of the cost to defend against the illegal foreclosure, additional and unnecessary late penalties were incurred on top of default service, their credit reports were damaged, and the conduct resulted in higher arrears that is no longer affordable to plaintiffs. (Complaint, paragraphs 53, 55, and 56.)

The Third District held: "As a "general rule," lenders do not owe borrowers a duty of care unless their involvement in a transaction goes beyond their "conventional role as a mere lender of money." (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096, 283 Cal.Rptr. 53 (*Nymark*).) "Even when the lender is acting as a conventional lender," however, "the no-duty rule is only a general rule." (*Jolley, supra,* 213 Cal.App.4th at p. 901, 153 Cal.Rptr.3d 546.) Thus, " '*Nymark* does not support the sweeping conclusion that a lender never owes a duty of care to a borrower.' " (*Ibid.*) ¶ In order to determine whether a duty of care exists, courts balance the *Biakanja* [Footnote omitted.] factors, "among which are [(1)] the extent to which the transaction was intended to affect the plaintiff, [(2)] the foreseeability of harm to him, [(3)] the degree of certainty that the plaintiff suffered injury, [(4)] the closeness of the connection between the defendant's conduct and the injury suffered, [(5)] the moral blame attached to the defendant's conduct, and [(6)] the policy of preventing future harm." (*Nymark, supra,* 231 Cal.App.3d at p. 1098, 283 Cal.Rptr. 53, citing *Biakanja, supra,* 49 Cal.2d at p. 650, 320 P.2d 16.)" (Rossetta v. CitiMortgage, Inc. (2017) 18 Cal.App.5th 628, 637.)

Plaintiffs have not cited any case law that the statutory and regulatory provisions set forth in the Truth in Lending Act or the Rosenthal Fair Debt Collection Practices Act give rise to lender liability in negligence for failure to comply with any of those provisions. Plaintiffs essentially contend that every statute or regulation imposes a duty of due care on lenders when dealing

with borrowers, which leads to liability in negligence for transactions within their conventional role as a mere lender of money.

The conclusory allegations that defendant Trinity Financial Services, LLC's conduct related to the loan and nonjudicial foreclosure proceedings exceeded the traditional scope of conventional money lending is not supported by the facts alleged and matters of which the court takes judicial notice of.

The court is not convinced that the alleged violations of failing to send monthly loan statements with accurate information and failing to contact plaintiff after recording and assignment of the deed of trust and notifying the plaintiffs that defendant Trinity Financial Services, LLC was the new beneficiary of the DOT is conduct that is closely connected with plaintiffs' nonjudicial foreclosure for failure to pay on the 2nd loan as there is no allegations that plaintiffs made all the required payments to the wrong beneficiary or the plaintiffs made loan payments that were deficient due to the defendant's failure to send monthly loan statements with accurate information. The court further finds that there does not appear that there is any reasonable degree of certainty that the plaintiff suffered injury from the alleged violations in light of the allegations of the complaint.

Even assuming for the sake of argument that there arises a lender duty of due care under Civil Code, §§ 2923.5, 2924(a)(1), 2934a(d), and/or 2924(a)(6), earlier in the ruling the court found that allegations of violations of Civil Code, §§ 2923.5, 2924(a)(1), 2934a(d), and/or 2924(a)(6) were controverted by matters of which the court took judicial notice and the court sustained the demurrers to those causes of action alleging such violations without leave to amend. Therefore, the conclusory allegations in paragraph 53 that the duties imposed by these statutes were violated leading to liability in negligence are unsupported and can not be cured by amendment.

Even assuming for the sake of argument that there arises a lender duty of due care under 15 USC 1641(g) and 12 CFR 1026.4, plaintiffs have failed to allege fact that when taken as true establish that the foreclosure on the 2nd DOT was proximately caused by failure to send out monthly loan statements with accurate information and the alleged failure to communicate to plaintiffs after recording the assignment of the 2nd DOT on February 17, 2021 that defendant Trinity Financial Services, LLC was the new beneficiary of the 2nd DOT.

Inasmuch as the court is not convinced that under the facts alleged that a duty of due care in negligence should arise for violation of the cited statutes, there does not appear to be a reasonable possibility that the pleading can be cured by amendment and plaintiff has not demonstrated how the negligence cause of action can be amended to cure the defect. (See Roman v. County of Los Angeles (2000) 85 Cal.App.4th 316, 322.) The demurrer to the negligence cause of action is sustained without leave to amend.

Wrongful Foreclosure Cause of Action

Defendant Trinity Financial Services, LLC asserts that the wrongful foreclosure cause of action fails as the allegations do not rebut the Civil Code, § 2924 presumption of validity of the foreclosure sale as the causes of action for violations of Civil Code, §§ 2923.5, 2924 2934a and the Rosenthal Fair Debt Collection Practices Act are defective and 12 CFR 1026.41 is unrelated to the nonjudicial foreclosure process; and plaintiffs hve not alleged they made a full tender of the amount due and owing on the loan.

Plaintiffs have effectively conceded the demurrer to the wrongful foreclosure cause of action by failing to oppose it.

The complaint alleges: on August 24, 2021 defendant Trinity Financial Services, LLC wrongfully foreclosed on the property by violating Civil Code, §§ 2923.5, 2924(a)(1), 2934a(d), and/or 2924(a)(6); defendant caused an illegal, fraudulent, or willfully oppressive sale of the

property under a power of sale in the 2nd DOT; plaintiff suffered prejudice or harm as a result of the wrongful foreclosure sale; and plaintiffs are excused from the tender requirement, because defendant violated Civil Code, §§ 2923.5, 2924(a)(1), 2934a(d), and/or 2924(a)(6), 12 CFR 1026.41, and Civil Code, § 1788.30. (Complaint paragraphs 59-62.)

"After a nonjudicial foreclosure sale has been completed, the traditional method by which the sale is challenged is a suit in equity to set aside the trustee's sale. (*Anderson v. Heart Federal Sav. & Loan Assn.* (1989) 208 Cal.App.3d 202, 209–210, 256 Cal.Rptr. 180.) Generally, a challenge to the validity of a trustee's sale is an attempt to have the sale set aside and to have the title restored. (*Onofrio v. Rice* (1997) 55 Cal.App.4th 413, 424, 64 Cal.Rptr.2d 74 (*Onofrio*), citing 4 Miller & Starr, Cal. Real Estate (2d ed. 1989) Deeds of Trusts & Mortgages, § 9.154, pp. 507–508.)" (Lona v. Citibank, N.A. (2011) 202 Cal.App.4th 89, 103.)

"" 'It is the general rule that courts have power to vacate a foreclosure sale where there has been fraud in the procurement of the foreclosure decree or where the sale has been improperly, unfairly or unlawfully conducted, or is tainted by fraud, or where there has been such a mistake that to allow it to stand would be inequitable to purchaser and parties.' " (*Lo v. Jensen* (2001) 88 Cal.App.4th 1093, 1097–1098, 106 Cal.Rptr.2d 443 (*Lo*), quoting *Bank of America etc. Assn. v. Reidy* (1940) 15 Cal.2d 243, 248, 101 P.2d 77; see also *Angell v. Superior Court* (1999) 73 Cal.App.4th 691, 700, 86 Cal.Rptr.2d 657.)" (Lona v. Citibank, N.A. (2011) 202 Cal.App.4th 89, 103.)

"Case law instructs that the elements of an equitable cause of action to set aside a foreclosure sale are: (1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or

mortgagor tendered the amount of the secured indebtedness or was excused from tendering. (*Bank of America etc. Assn. v. Reidy, supra,* 15 Cal.2d at p. 248, 101 P.2d 77; *Saterstrom v. Glick Bros. Sash, Door & Mill Co.* (1931) 118 Cal.App. 379, 383, 5 P.2d 21 (*Saterstrom*) [trustee's sale set aside where deed of trust was void because it failed to adequately describe property]; *Stockton v. Newman* (1957) 148 Cal.App.2d 558, 564, 307 P.2d 56 (*Stockton*) [trustor sought rescission of the contract to purchase the property and the promissory note on grounds of fraud]; *Sierra–Bay Fed. Land Bank Ass'n v. Superior Court* (1991) 227 Cal.App.3d 318, 337, 277 Cal.Rptr. 753 (*Sierra–Bay*) [to set aside sale, "debtor must allege such unfairness or irregularity that, when coupled with the inadequacy of price obtained at the sale, it is appropriate to invalidate the sale"; "debtor must offer to do equity by making a tender or otherwise offering to pay his debt"]; *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109, 51 Cal.Rptr.2d 286 (*Abdallah*) [tender element]; *Munger v. Moore* (1970) 11 Cal.App.3d 1, 7, 89 Cal.Rptr. 323 [damages action for wrongful foreclosure]; see also 1 Bernhardt, Mortgages, Deeds of Trust and Foreclosure Litigation (Cont.Ed.Bar 4th ed. 2011 supp.) § 7.67, pp. 580–581 and cases cited therein summarizing grounds for setting aside trustee sale.) ¶ Justifications for setting aside a trustee's sale from the reported cases, which satisfy the first element, include the trustee's or the beneficiary's failure to comply with the statutory procedural requirements for the notice or conduct of the sale. (*Knapp, supra,* 123 Cal.App.4th at pp. 96–99, 20 Cal.Rptr.3d 1 [alleged irregularity in default notice and sale notice]; *Sierra–Bay Fed. Land Bank Ass'n v. Superior Court, supra,* 227 Cal.App.3d at p. 337, 277 Cal.Rptr. 753 [to set aside sale, "debtor must allege such unfairness or irregularity that, when coupled with the inadequacy of price obtained at the sale, it is appropriate to invalidate the sale"]; *6 Angels, Inc. v. Stuart–Wright Mortgage, Inc.* (2001) 85 Cal.App.4th 1279, 1284, 102 Cal.Rptr.2d 711 ["mere inadequacy of price, absent some procedural irregularity that

contributed to the inadequacy of price or otherwise injured the trustor, is insufficient to set aside a nonjudicial foreclosure sale"].) Other grounds include proof that: (1) the trustee did not have the power to foreclose (*Bank of America v. La Jolla Group II* (2005) 129 Cal.App.4th 706, 28 Cal.Rptr.3d 825 [trustee's sale invalid because borrower and lender had entered into agreement to cure default; loan was therefore current and lender did not have right to foreclose]; *Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868, 878, 97 Cal.Rptr.2d 255 (*Dimock*) [where original trustee completed trustee's sale after being replaced by new trustee, sale was void because original trustee no longer had power to convey property]); (2) the trustor was not in default, no breach had occurred, or the lender had waived the breach (*System Inv. Corp. v. Union Bank* (1971) 21 Cal.App.3d 137, 154, 98 Cal.Rptr. 735 (*System*) [borrower was not in default because it was excused from performance by lender's prior breach of contract; bank waived amount allegedly due]; *Van Noy v. Goldberg* (1929) 98 Cal.App. 604, 277 P. 538 [debt had not matured]); or (3) the deed of trust was void (*Saterstrom, supra,* 118 Cal.App. at p. 383, 5 P.2d 21 [trustee's sale set aside where deed of trust was void because it failed to adequately describe property]; *Stockton, supra,* 148 Cal.App.2d at p. 564, 307 P.2d 56 [trustor sought rescission of promissory note on grounds of fraud]; see also 1 Bernhardt, Mortgages, Deeds of Trust and Foreclosure Litigation, *supra,* § 7.67, pp. 580–581). We shall discuss this element further in section V.B. of this opinion." (Lona v. Citibank, N.A. (2011) 202 Cal.App.4th 89, 104-105.)

"The statutory scheme authorizing nonjudicial foreclosures " ' "cover[s] every aspect of [the] exercise of [a] power of sale contained in a deed of trust." [Citation.] ...' [Citation.]" (*Jenkins, supra,* 216 Cal.App.4th at p. 509, 156 Cal.Rptr.3d 912.) " 'Because of the exhaustive nature of this scheme, California appellate courts have refused to read any additional requirements into the non-judicial foreclosure statute.' [Citations.]" (*Debrunner v. Deutsche Bank National Trust*

Co. (2012) 204 Cal.App.4th 433, 441, 138 Cal.Rptr.3d 830 (*Debrunner*).) ¶ " ' "The purposes of this comprehensive scheme are threefold: (1) to provide the [beneficiary-creditor] with a quick, inexpensive and efficient remedy against a defaulting [trustor-debtor]; (2) to protect the [trustor-debtor] from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser." [Citation.]' [Citation.] 'Significantly, "[n]onjudicial foreclosure is less expensive and more quickly concluded than judicial foreclosure, since there is no oversight by a court, '[n]either appraisal nor judicial determination of fair value is required,' and the debtor has no postsale right of redemption." [Citation.]' [Citation.]" (*Jenkins, supra,* 216 Cal.App.4th at pp. 509–510, 156 Cal.Rptr.3d 912.) ¶ A nonjudicial foreclosure is "presumed to have been conducted regularly, and the burden of proof rests with the party attempting to rebut this presumption." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 270, 129 Cal.Rptr.3d 467 (*Fontenot*) [applying presumption in action for wrongful foreclosure brought after sale conducted]; *Debrunner, supra,* 204 Cal.App.4th at p. 443, 138 Cal.Rptr.3d 830 [applying presumption in action to prevent nonjudicial foreclosure sale from occurring].)" (Rossberg v. Bank of America, N.A. (2013) 219 Cal.App.4th 1481, 1492-1493.)

Therefore, the court should not read into the nonjudicial foreclosure proceedings requirements the statutory requirements in the Federal Truth in Lending Act or California's Rosenthal Fair Debt Collection Practices Act concerning whether the nonjudicial foreclosure proceedings were valid. The allegations that violation of 12 CFR 1026.41 and Civil Code, § 1788.30 do not and can not form the basis for an action to set aside a non-judicial foreclosure sale.

In addition, earlier in the ruling the court found that allegations of violations of Civil Code, §§ 2923.5, 2924(a)(1), 2934a(d), and/or 2924(a)(6) were controverted by matters of which the

court took judicial notice and the court sustained the demurrers to the causes of action alleging such violations without leave to amend.

The above-cited defects in the allegations of the wrongful foreclosure cause of action alone justifies sustaining defendant's demurrer to this cause of action.

The allegation of being excused from the tender requirement and failure to allege tender is also fatally defective to this cause of action.

- Tender of Amount Owed on 2nd DOT

"A full tender must be *made* to set aside a foreclosure sale, based on equitable principles. (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109, 51 Cal.Rptr.2d 286; see *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 439, 129 Cal.Rptr.2d 436.) *Mabry* held tender was not required to *delay* a sale (*Mabry, supra,* 185 Cal.App.4th at pp. 225–226, 110 Cal.Rptr.3d 201) but did not suggest a tender is not required *post*-sale. Nor do plaintiffs propose any facts showing it would be inequitable to require a full tender. Allowing plaintiffs to recoup the property without full tender would give them an inequitable windfall, allowing them to evade their lawful debt. ¶ Accordingly, plaintiffs have failed to show they can plead a viable claim under Civil Code section 2923.5." (Stebley v. Litton Loan Servicing, LLP (2011) 202 Cal.App.4th 522, 526-527.) "…[I]n the context of overcoming a voidable sale, the debtor must tender any amounts due under the deed of trust. (See *Karlsen v. American Sav. & Loan Assn.* (1971) 15 Cal.App.3d 112, 117, 92 Cal.Rptr. 851; *Py v. Pleitner* (1945) 70 Cal.App.2d 576, 582, 161 P.2d 393.) This requirement is based on the theory that one who is relying upon equity in overcoming a voidable sale must show that he is able to perform his obligations under the contract so that equity will not have been employed for an idle purpose. (*Karlsen v. American Sav. & Loan Assn.*, supra, 15 Cal.App.3d at p. 118, 92 Cal.Rptr. 851.)" (Dimock v. Emerald Properties LLC (2001) 81 Cal.App.4th 868, 877-878.)

The appellate court in Lona v. Citibank, N.A. (2011) 202 Cal.App.4th 89 set forth the four recognized exceptions to the tender requirement: "D. Exceptions to the Tender Requirement ¶ There are, however, exceptions to the tender requirement. Our review of the case law discloses four exceptions. ¶ * * * Fourth, no tender will be required when the trustor is not required to rely on equity to attack the deed because the trustee's deed is void on its face. (*Dimock, supra,* 81 Cal.App.4th at p. 878, 97 Cal.Rptr.2d 255 [beneficiary substituted trustees; trustee's sale void where original trustee completed trustee's sale after being replaced by new trustee because original trustee no longer had power to convey property].)…" (Lona v. Citibank, N.A. (2011) 202 Cal.App.4th 89, 113.) The appellate court in Dimock v. Emerald Properties (2000) 81 Cal.App.4th 868 was faced with a situation wherein there was a statutory nonjudicial foreclosure and the recorded documents established that the trustee of the deed of trust was substituted by the beneficiary under the deed of trust prior to the original trustee's completion of the sale and execution of the trustee's deed upon sale. The trustee's deed was void on its face due to the state of the recorded documents. The case did not involve transfer of the note at all. It only dealt with the state of the recorded nonjudicial foreclosure documents. Since it is the trustee of the deed of trust who holds the power of sale, for the purposes of a sale and transfer of title under that power, it is immaterial who held the note. (See Calvo v. HSBC Bank USA, N.A. (2011) 199 Cal.App.4th 118, 122-123.) In addition, plaintiff is required to allege that the party seeking to foreclose on the deed of trust did not receive a valid assignment of the debt *in any manner*, even where the assignment was unrecorded. (Emphasis the appellate court's.) (Fontenot v. Wells Fargo Bank, N.A. (2011) 198 Cal.App.4th 256, 271-272, disapproved of on another ground in Yvanova v. New Century Mortg. Corp. (2016) 62 Cal.4th 919, 939.)

As stated earlier in this ruling, matters of which the court takes judicial notice establishes that the notice of default, notice of trustee's sale and trustee's deed upon sale were all valid as the substitution of trustee was executed and recorded before such documents were executed and recorded by EDS. Therefore, the foreclosure proceedings and deed are not void on their face. Plaintiffs were not excused from the tender requirement. There were required to allege full tender of the amount due and owing on the 2nd loan and have failed to make such an allegation.

While the tender allegation requirement appears to be capable of curing by amendment to allege such tender, if true, the other allegations do not appear to be capable of amendment to cure the fatal defect that the under the circumstances alleged plaintiff does not rebut the presumption of validity of the foreclosure sale proceedings.

There does not appear to be a reasonable possibility that the pleading can be cured by amendment, the Wrongful Foreclosure Cause of Action of the complaint appears to be incapable of amendment to cure the defect, and plaintiff has not demonstrated how that cause of action can be amended to cure the defect. (See Roman v. County of Los Angeles (2000) 85 Cal.App.4th 316, 322.) The demurrer to the wrongful foreclosure cause of action is sustained without leave to amend.

Unfair Business Practices Cause of Action

Plaintiffs argue: the unfair business practices cause of action sufficiently states a cause of action as plaintiffs have adequately alleged violations of statutes that caused their damages.

The complaint alleges: defendant Trinity Financial Services, LLC violated the unfair competition law resulting in injury and economic loss to plaintiffs when defendant purposely violated Civil Code, §§ 2923.5, 2924(a)(1), 2934a(d), and/or 2924(a)(6) and 12 CFR 1026.41.; these acts and more are unlawful and unfair conduct that caused plaintiffs substantial harm; a

borrower may bring an unfair claim per the statute where a servicer's statements or conduct was misleading; the information provided to plaintiffs was misleading and not consistent as to the status of the loan modification and what they were supposed to do to satisfy the lender's demands; plaintiffs suffered actual, pecuniary damage in the form of loss of the equity in their home and costs incurred to seek a remedy for defendant's wrongful actions. (Complaint, paragraphs 69 and 71-74.)

"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.)

"Prior to the enactment of Proposition 64 in November 2004, the UCL "did not predicate standing 'on a showing of injury or damage' " and was thus "subject to abuse by attorneys who used it as the basis for legal ' "shakedown" ' schemes" and frivolous lawsuits. (*Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, 812, 66 Cal.Rptr.3d 543 (*Buckland*); *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 228, 46 Cal.Rptr.3d

57, 138 P.3d 207.) To address this problem, Proposition 64 amended section 17204 to accord standing only to certain specified public officials and to any person who " ' "has suffered injury in fact and has lost money or property as a result of such unfair competition." ' " (*Buckland,* at p. 812, 66 Cal.Rptr.3d 543; § 17204.) Thus, in the aftermath of Proposition 64, only plaintiffs who have suffered actual damage may pursue a private UCL action. A private plaintiff must make a twofold showing: he or she must demonstrate injury in fact *and* a loss of money or property caused by unfair competition. (§ 17204; *Buckland,* at p. 817, 66 Cal.Rptr.3d 543.)" (Emphasis added.) (Peterson v. Cellco Partnership (2008) 164 Cal.App.4th 1583, 1590.)

Allegations of loss of real property through foreclosure sale is a sufficient injury to establish standing where there are additional allegations of fact that establish the conduct of the lender or loan servicer caused the foreclosure sale as a result of alleged misrepresentations about the loan modification and the status of the foreclosure sale, or the lender or servicer failed to work with the borrower in good faith to identify and to try to implement a permanent solution. (See Lueras v. BAC Home Loans Servicing, LP (2013) 221 Cal.App.4th 49, 82-83.)

Earlier in this ruling the court found that allegations of violations of Civil Code, §§ 2923.5, 2924(a)(1), 2934a(d), and/or 2924(a)(6) were controverted by matters of which the court took judicial notice and the court sustained the demurrers to the causes of action alleging such violations without leave to amend. Therefore, allegations that such violations occurred can not support a cause of action for unfair business practices.

However, the court overruled the demurrer to the truth in lending act cause of action that alleges violation of 12 CFR 1026.41. The allegations asserted in the complaint adequately allege an unfair business practices cause of action for violation of 12 CFR 1026.41.

The demurrer to the Unfair Business Practices cause of action is overruled.

Cancellation of Written Instruments Cause of Action

Plaintiffs argue in opposition: the cancellation of written instruments cause of action is sufficiently pled as the recorded notice of default, notice of trustee's sale, and trustee's deed upon sale are void or voidable as the foreclosure was wrongful and in violation of 12 CFR 1026.41

The complaint alleges: the plaintiffs reasonably believe that the notice of default and notice of trustee's sale are void or voidable; plaintiffs have a reasonable apprehension that if these void or voidable recorded written instruments are left outstanding, they may cause plaintiffs serious injury because of their violations of Civil Code, §§ 2923.5, 2924(a)(1), 2934a(d), and/or 2924(a)(6) and 12 USC 1026.41 f. (Complaint, paragraphs 78-80.)

"A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." (Civil Code, § 3412.)

""Under Civil Code section 3412, '[a] written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled.' To prevail on a claim to cancel an instrument, a plaintiff must prove (1) the instrument is void or voidable due to, for example, fraud; and (2) there is a reasonable apprehension of serious injury including pecuniary loss or the prejudicial alteration of one's position. [Citation.]" (*U.S. Bank National Assn. v. Naifeh* (2016) 1 Cal.App.5th 767, 778, 205 Cal.Rptr.3d 120.)" (Thompson v. Ioane (2017) 11 Cal.App.5th 1180, 1193–1194.)

"The Court may order cancellation of an invalid written instrument that is void or voidable. *Compass Bank v. Petersen,* 886 F.Supp.2d 1186, 1194 (C.D.Cal.2012) (citing Cal. Civ.Code § 3412 *et seq.*). Courts have applied the tender rule to causes of action for cancellation of instruments pertaining to the foreclosure process. *See Kimball v. Flagstar Bank F.S.B.,* 881 F.Supp.2d 1209, 1225–1226 (S.D.Cal.2012); *Adesokan v. U.S. Bank, N.A.,* 2012 WL 395969, at *4 (E.D.Cal. Feb. 7, 2012). In *Adesokan,* the court reasoned that "[w]ithout a meaningful tender of the amount due, cancellation of the instruments is an empty remedy which the Court cannot convey." *Adesokan,* 2012 WL 395969, at *4." (Rockridge Trust v. Wells Fargo, N.A. (N.D. Cal. 2013) 985 F.Supp.2d 1110, 1159.)

There is no allegation of tender in the complaint.

The also court notes that earlier in the ruling the court found that allegations of violations of Civil Code, §§ 2923.5, 2924(a)(1), 2934a(d), and/or 2924(a)(6) were controverted by matters of which he court took judicial notice and the court sustained the demurrers to the causes of action alleging such violations without leave to amend. Therefore, the contention that they were violated thereby making the notice of default and notice of trustee's sale void or viable lacks merit as the alleged violations are inconsistent with the judicially noticed matters.

- Remedy of Rescission of Loan under Federal Truth in Lending Act

"Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement

containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Bureau, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Bureau, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section." (Emphasis added.) (15 USC § 1635(a).)

"An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor, except that if (1) any agency empowered to enforce the provisions of this subchapter institutes a proceeding to enforce the provisions of this section within three years after the date of consummation of the transaction, (2) such agency finds a violation of this section, and (3) the obligor's right to rescind is based in whole or in part on any matter involved in such proceeding, then the obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the earlier sale of the property, or upon the expiration of one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof, whichever is later." (Emphasis added.) (15 USC § 1635(f).)

"Notwithstanding section 1649 of this title, and subject to the time period provided in subsection (f), in addition to any other right of rescission available under this section for a transaction, after the initiation of any judicial or nonjudicial foreclosure process on the primary dwelling of an obligor securing an extension of credit, the obligor shall have a right to rescind the transaction equivalent to other rescission rights provided by this section, if-- ¶ (A) a

mortgage broker fee is not included in the finance charge in accordance with the laws and regulations in effect at the time the consumer credit transaction was consummated; or ¶ (B) the form of notice of rescission for the transaction is not the appropriate form of written notice published and adopted by the Bureau or a comparable written notice, and otherwise complied with all the requirements of this section regarding notice." (15 USC 1635(i)(1).)

The Section 1635 rescission remedy only applies to failure to make the disclosures required at the time the credit transaction is entered. (See 15 USC 1631 and 1632.) The alleged violations of 12 CFR 1026.41 are failures to provide periodic loan statements and alleged defects in the disclosures made in the periodic payments that were sent. Therefore, the Section 1635 remedy does not apply.

In addition, even assuming the Section 1635 rescission remedy does apply, the remedy is barred by the statutes of limitation set forth in 15 USC 1635(a) and (f). The court takes judicial notice that more than three years have passed since the 2nd loan transaction was consummated. (See Defendant Trinity Financial Services, LLC's Request for Judicial Notice, Exhibit 3 – 2nd Deed of Trust Recorded December 30, 2005.)

In addition, there does not appear to be any right of rescission arising from violation of any other provisions of the Truth in Lending Act.

"Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, subsection (f) or (g) of section 1641 of this title, or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of-- ¶ (1) any actual damage sustained by such person as a result of the failure; ¶ (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of

the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $200 nor greater than $2,000, (iii) in the case of an individual action relating to an open end consumer credit plan that is not secured by real property or a dwelling, twice the amount of any finance charge in connection with the transaction, with a minimum of $500 and a maximum of $5,000, or such higher amount as may be appropriate in the case of an established pattern or practice of such failures;[1] or (iv) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $400 or greater than $4,000; or ¶ (B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $1,000,000 or 1 per centum of the net worth of the creditor; ¶ (3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 1635 or 1638(e)(7) of this title, the costs of the action, together with a reasonable attorney's fee as determined by the court; and ¶ (4) in the case of a failure to comply with any requirement under section 1639 of this title, paragraph (1) or (2) of section 1639b(c) of this title, or section 1639c(a) of this title, an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material…" (15 USC 1640(a)(1) through 1640(a)(4).)

15 USC 1640(a)(1) through 1640(a)(4) of the Federal Truth in Lending Act does not provide for any remedy of rescission of the underlying loan for violation of any provisions of the Truth in Lending Act statutes or regulations.

In summary, there is no statutory authority to support a cancellation of the recorded foreclosure documents cause of action for violation of that Act.

Furthermore, the court previously found that it should not read into the nonjudicial foreclosure proceedings requirements the requirements in the Federal Truth in Lending Act or California's Rosenthal Fair Debt Collection Practices Act concerning whether the nonjudicial foreclosure proceedings were valid. (See Rossberg v. Bank of America, N.A. (2013) 219 Cal.App.4th 1481, 1492-1493.)

The alleged violation of 12 CFR 1026.41 does not and can not form the basis for an action to cancel the recorded Notice of Default and Deed of Trust.

There does not appear to be a reasonable possibility that the pleading can be cured by amendment, in light of the current allegations of the complaint the cancellation of written instrument cause of action appears to be incapable of amendment to cure the defect, and plaintiff has not demonstrated how that cause of action can be amended to cure the defect. (See Roman v. County of Los Angeles (2000) 85 Cal.App.4th 316, 322.) The demurrer to the cancellation of written instruments cause of action is sustained without leave to amend.

TENTATIVE RULING # 15: DEFENDANT TRINITY FINANCIAL SERVICES, LLC'S DEMURRERS TO THE TRUTH IN LENDING ACT AND UNFAIR BUSINESS PRACTICES CAUSES OF ACTION CAUSES OF ACTION ARE OVERRULED. DEFENDANT TRINITY FINANCIAL SERVICES, LLC'S DEMURRER TO THE ROSENTHAL FAIR DEBT COLLECTION PRACTICES ACT IS SUSTAINED WITH TEN DAYS LEAVE TO AMEND. DEFENDANT TRINITY FINANCIAL SERVICES, LLC'S DEMURRERS TO THE VIOLATION OF CIVIL CODE, § 2923.5, VIOLATION OF CIVIL CODE, § 2924(a)(1), NEGLIGENCE, WRONGFUL FORECLOSURE, AND CANCELLATION OF WRITTEN INSTRUMENTS CAUSES OF ACTION ARE SUSTAINED WITHOUT LEAVE TO AMEND. NO HEARING ON

THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, DECEMBER 17, 2021 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.