**1. AURORA HOLDINGS PARTY, LTD 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.**

The court previously prepared a tentative ruling addressing all four discovery motions, which was set for hearing on December 17, 2021. A Superior Court Commissioner/Temporary Judge was hearing the law and motion calendar on that date. The hearing was continued to January 14, 2022 to allow for the matters to be heard by a Superior Court Judge.

On January 12, 2022 the court received a stipulation and proposed order executed by the parties, which requested entry of an order adopting the court's tentative ruling on the motions as the ruling by the court, with the exception of the portion imposing monetary sanctions, which were agreed to be deemed to be paid without the need for actual payment. .

**TENTATIVE RULING # 1: THE PARTIES' STIPULATION AND PROPOSED ORDER HAVING RESOLVED THESE MOTIONS WITHOUT THE NEED FOR HEARING, THE HEARING IS DROPPED FROM THE CALENDAR.**

**2. DIVINE LANDSCAPING v. FODGE PC-20210188**

**(1) Plaintiff's Motion to Compel Responses to Form Interrogatories without Objections.**

**(2) Plaintiff's Motion to Compel Responses to Requests for Production and Production of Documents without Objections.**

**TENTATIVE RULING # 2: UPON REQUEST OF THE MOVING PARTY, THESE MATTERS ARE DROPPED FROM THE CALENDAR.**

**3. AUVINEN v. KRAMER 21UD0011**

**(1) Defendants' First Motion to Quash Service of the Summons and Complaint.**

**(2) Defendants' Second Motion to Quash Service of the Summons and Complaint.**

**Defendants' First Motion to Quash Service of the Summons and Complaint.**

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.

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.

Defendants replied to the opposition.

"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 at 5:14 p.m. on November 9, 2021 after seven unsuccessful attempts to personally serve defendants during the period of November 2-5, 2021..

John Lindquist declares in reply: he is not party to the action; he resides at Taxi Lane in Placerville; at 4:45 p.m. on November 9, 2021 he visited the subject premises in El Dorado Hills; he was on the property to load and remove firewood on the property by prior agreement

with defendant Chandra Kramer, who offered free firewood on Facebook; at that time he texted Chandra Kramer's cell phone to notify her he had arrived; she promptly greeted him and shortly thereafter left the property for the evening; about a half hour later, while still loading his trailer with firewood, a vehicle pulled up with two occupants; they asked if he was Robert Kramer; he told them he was not and explained he was only briefly on the property to load firewood; in the brief exchange he made clear he was not a member of the household at the subject premises; the vehicle pulled up the driveway toward the house and out of his sight; it remained for several minutes as he continued to load firewood; the vehicle then drove back down the driveway; and during the exchange with the vehicle occupants, one of them positioned his cell phone in a manner that indicated he took a picture of the declarant or filmed him while he was looking in the direction of the phone. (Declaration of John Lundquist in Reply to Opposition, paragraphs 1-8.)

Chandra Kramer declares in reply: she resides at the subject property; in the days prior to November 9, 2021 she had arranged for John Lundquist to pick up and remove firewood from the subject premises; at 4.44 p.m. Mr. Lundquist advised her he had arrived at the subject premises; at approximately 4:49 p.m. she walked to the pile of wood, spoke with Mr. Lundquist, then left the premises to drive to her daughter's soccer practice in Folsom; when she left, Mr. Lundquist was still loading wood; defendants have a door camera permanently affixed at the front door directed away from the door to record porch access to the front door; the video surveillance recordings are password protected, only she and defendant Robert Kramer have the password; she has not altered the video recording or log for the period of November 2-10, 2021; a thorough review of every recording shows that no persons other than defendants and their invitees were identified in the video recordings during the subject period, except a person she does not know was recorded by the door camera twice during the period of November 2-

20, 2021, with none of those recordings falling within the range of November 2-5, 2021; those two recordings happened after November 6, which falls after the alleged seven attempted services; through the morning and afternoon of November 5, 2021 she made numerous trips from the house to the RV parked on the premises and did not see any persons or vehicles entering or leaving the premises; at 5:20 p.m. on November 5, 2021 she loaded their vehicle and camper and left the property; and they did not return until November 7, 2021. (Declaration of Chandra Kramer in Reply, paragraphs 2-17.)

Plaintiff's counsel previously stated that the registered process server will appear at the hearing.

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

Plaintiff has submitted evidence to support 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.

At the hearing on December 17, 2021 defendant objected to a Court Commissioner hearing the matter and the hearing was continued to January 7, 2022. On January 7, 2022 the court continued the hearing to January 14, 2022.

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

**Defendants' Second Motion to Quash Service of the Summons and Complaint.**

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.

On December 22, 2021 defendants specially appeared and filed a second motion to quash service on the ground that they were improperly served by service on defense counsel specially appearing at the first motion to quash service on December 17, 2021.

Plaintiff opposes the motion on the following grounds: on December 17, 2021 defendant Robert Kramer appeared in court on his own behalf and as attorney on behalf of defendant Chandra Kramer; defendants were served by a registered process server in open court before the Commissioner and entire gallery; follow-up mailing of the summons and complaint was mailed by first class registered mail to defendant Chandra Kramer to the address of her counsel's office; there is a statutory evidentiary presumption of the truth of the facts set forth in the registered processer servicer's declaration of service; defendant Robert Kramer's claim of a public policy prohibiting personal service of parties who specially appear in court is unsupported by any legal authority, because there is none; the motion as improperly filed and served as Code of Civil Procedure, § 1164.7 requires such motions to be heard not less than three days, or more than seven days of the filing of the notice, while the moving papers were filed three weeks prior to the hearing date and service of the notice and moving papers were delayed until nearly two weeks after it was filed; and the court should impose sanctions in the amount of $1,275 against defendants pursuant to Code Of Civil Procedure, § 128.5 payable to plaintiff.

Defendants replied to the opposition.

"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.)

"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).)

"A summons may be served by personal delivery of a copy of the summons and of the complaint to the person to be served. Service of a summons in this manner is deemed complete at the time of such delivery…" (Code of Civil Procedure, § 415.10.)

"'Personal service' means the actual delivery of the papers to the defendant in person. *Holiness Church of San Jose v. Metropolitan Church Ass'n*, 12 Cal.App. 445, 448, 107 P. 633; *Hunstock v. Estate Development Corporation*, 22 Cal.2d 205, 138 P.2d 1, 4, 148 A.L.R. 968." (Sternbeck v. Buck (1957) 148 Cal.App.2d 829, 832-833.)

Defendant Robert Kramer declares in support of the motion: he resides at the subject premises; he entered into a one year lease of the property on August 4, 2016; as attorney for defendants he appeared in court at the hearing of the first motion to quash service; during the hearing, plaintiff's counsel indicated his intent to have his registered process server serve defendant a copy of the summons and complaint; defendant told plaintiff's counsel such service was improper as he was specially appearing; and prior to leaving the courtroom defendant was given a copy of the summons and complaint by the process server. (Declaration of Robert Kramer in Support of Motion, paragraphs 2, 3, and 5-8.)

Defendant argues that attempted personal service in a courtroom on the party to the litigation while the party to litigation is specially appearing is akin to qualifying the party's appearance as a general appearance and public policy alone dictates that such service is

invalid as every time a party makes a personal special appearance it would render the party's motion to quash ineffectual. (See Motion, page 4, line 26 to page 5, line 1.)

Defendant cites no legal authority whatsoever to support that assertion.

Defendant was free to retain counsel to represent him in this action and specially appear on his behalf without him being personally present in court, thereby not exposing himself to being served while out in public, provided he did not authorize counsel to accept service on his behalf.

Merely because defendant Robert Kramer is an attorney admitted to practice law in California and he was specially appearing for himself in this action does not create a bubble of immunity from being served the summons and complaint in a public place by a registered process server and does not render such personal service invalid.

Defendant has explicitly admitted under oath that he was actually delivered the summons and complaint in person. This strictly complies with the statutory requirements for personal service and is deemed complete at the time of such delivery. The second motion to quash service of the summons and complaint on December 17, 2021 as it relates to defendant Robert Kramer is denied. The court also finds that there is no evidence before it that Robert Kramer accepted service on behalf of defendant Chandra Kramer, he was authorized to accept service on her behalf, or that she was personally served on December 17, 2021. Therefore, to the extent that it seeks to quash service on defendant Chandra Kramer, the motion is granted.

**TENTATIVE RULING # 3: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, JANUARY 14, 2022 IN DEPARTMENT NINE CONCERNING DEFENDANTS' FIRST MOTION TO QUASH SERVICE OF THE SUMMONS AND COMPLAINT. 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. THE COURT DENIES DEFENDANTS' SECOND MOTION TO QUASH SERVICE OF THE SUMMONS AND COMPLAINT IN PART AND GRANTS IT IN PART. THE MOTION IS DENIED AS TO THE PERSONAL SERVICE ON DEFENDANT ROBERT KRAMER AND GRANTED AS IT RELATES TO DEFENDANT CHANDRA KRAMER. NO HEARING ON DEFENDANTS' SECOND MOTION TO QUASH SERVICE OF THE SUMMONS AND COMPLAINT 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, JANUARY 14, 2021 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.**

**4. REINDERS v. VISMAN 21CV0266**

**OSC Re: Preliminary Injunction.**

In 2002 there was litigation between the same parties, which was concluded with a settlement agreement that, among other things, reaffirmed the existing recorded easement in favor of Fudge Factory for ingress and egress on High Hill Ranch Road. (Plaintiff's Exhibit D – Settlement Agreement, paragraph 7 and Defense Exhibit 1 – Settlement Agreement, paragraph 7.) The parties continued to have disputes related to the easement rights under the settlement agreement, which lead to arbitration and a limited civil case (PCL-20110390). An arbitration award was issued on November 29, 2010 and the award was entered as a judgment upon stipulation for confirmation of the award on May 7, 2011 (2011 Arbitration Award/Judgment). (Defense Exhibit 5.)

On December 7, 2021 plaintiff Frances Reinders d.b.a. Fudge Factory Farm filed an action against defendants Visman and High Hill Ranch, LLC asserting causes of action for interference with easement, declaratory relief, intentional interference with business relationship, private nuisance, and breach of contract related to use of an easement to access plaintiff's business location.

Plaintiff applied for a TRO and hearing on a request for preliminary injunction. On December 8, 2021 the court entered an order granting the TRO that directed the following pending hearing of the request for preliminary injunction: defendants are to comply with the requirements of the stipulation for confirmation of arbitration award and judgment entered on May 17, 2011 in case number PCL-20110390; defendants are restrained from closing plaintiff's easement on High Hill Road except during lawfully designated high season dates, placing vehicles, equipment and other personal property on plaintiff's easement, including High Hill

Ranch Road, Orchard Road, and the connector road, and/or failing to ensure easement access as provided in the judgment; and defendants are not to steal, remove, cover, and/or destroy Fudge Factory signs.

Plaintiff seeks issuance of a preliminary injunction pending entry of the final judgment in this action. Plaintiff argues: issuance of a preliminary injunction is appropriate for the following reasons: defendants have blocked and continue to block the plaintiff's easement in defiance of a prior court judgment; defendants have removed and/or destroyed Fudge Factory signs; Fudge Factory's easement rights are essential to its business operation as the property is landlocked with no public road to the business; there is a likelihood that plaintiff will prevail on plaintiff's claim that defendants have violated the 2011 arbitration award and judgment; and that plaintiff will suffer irreparable harm by the defendants' obstruction of customer access to the Fudge Factory forcing them to gain access unlawfully through neighboring properties and causing confusion to truck drivers making deliveries to plaintiff's business, while defendants will not suffer harm as they will only be required to allow use of the easement as specified in the 2011 arbitration award/judgment.

Plaintiff submitted counsel's declaration and plaintiff's declaration in support of the request for preliminary injunction and requested judicial notice of the stipulation to confirm arbitration award and judgment entered in case number PCL-2011090.

Defendants oppose the issuance of a preliminary injunction on the following grounds: the dispute related to the use of the easement should be arbitrated as provided in the 2011 arbitration award and the request for preliminary injunction should be denied; it is unlikely that plaintiff will prevail in this action; plaintiff unreasonably delayed in filing this action, because plaintiff's concerns about defendants' interpretation of the terms of the 2011 arbitration award related to closing the subject easement within the terms of the 2011 arbitration award have

never been raised until now; it is appropriate for safety reasons to close the easement road and connector road as vehicular traffic on the roads is dangerous to the pedestrian traffic during the high season, therefore defendants are justified under the 2011 arbitration ward to close the easement and connector road allowing access to plaintiff's business seven days a week during the "high season" as defined in the arbitration award and during the extended season from mid-August to mid-December; plaintiff has acquiesced to the closures by filling parking spaces in front of the connector road with food carts and vendors and creating signs to accommodate the closing of the connector road; plaintiff has only recently requested defendants to publish its high season schedule; plaintiff benefits from the closure of the easement and alternate road to its business by defendants' customer's foot traffic to parking in the West end of defendants' orchard as they must then walk past plaintiff's business; the request for injunction is a mandatory injunction that is unjustified; and should the court impose a preliminary injunction, the court should impose a bond requirement in the amount of $3,000,000 due to defendants' liability for potential claims for customer injuries on the road, lost business due to the inability to have customers walk on the easement road, increased insurance costs, and to compensate for attorney fees and costs of litigation incurred by defendants.

Plaintiff replied to the opposition: defendants concede that the plaintiff may seek a preliminary injunction under Code of Civil Procedure, § 1281.8 even if arbitration is currently pending; the disputes regarding the easements rights of plaintiff are ongoing that can not be remedied by monetary damages; irreparable harm will result in the form of lost business, damaged business reputation, and interference with plaintiff's ability to access her own residence, which is on the same parcel as the Fudge Factory business; the arbitration award does not mandate the parties to arbitrate easement disputes as it merely provides that the

arbitrator retains jurisdiction; issuance of the preliminary injunction will preserve the status quo; the injunction sought is prohibitory and not mandatory as defendants argue, because it prohibits the closure of the road, prohibits placement of portable road closed signs, and requires the removal of portable closed signs that could be easily repositioned if plaintiff fails to prevail in this case; plaintiff has demonstrated a likelihood of success in this action as defendants must comply with the 2011 judgment as a matter of law, acquiescence is not a valid defense as the judgment was the final determination of their rights related to the easement (Code of Civil Procedure, § 577.), failure to object to violation of a judgment does not invalidate the judgment requirements as page 9 of the settlement agreement only allowed modification of the settlement by written modification; it is not accurate to state that plaintiff did not object to defendants' traffic management since 2011, because between 2011 and the 2020 season the High Hill Ranch Road easement was only closed on weekends and holidays during the business season as allowed by the 2011 judgment, High Hill Ranch Road and the alternate connector road were not closed permanently until 2020 shortly after plaintiff's spouse died and during the COVID-19 crisis so Fudge Factory choose not to pursue litigation until later, and extensive efforts were made to resolve the issues in 2021; the health and safety argument raised by defendants is the same argument raised in the arbitration proceeding and defendants seek to relitigate that issue after a final judgment was entered; there is no credible evidence or reason to shut down the connector road access; the traffic studies do not support closure of High Hill Ranch Road and the connector road; there is no evidence that any law enforcement official or the County directed that defendants do anything with respect to the issues decided in the 2011 arbitration award and judgment; and should the preliminary injunction issue, the bond should be limited to $250 to be posted at the commencement of the business season as defendants have not provided any evidence or justification for the $3,000,000 bond sought.

Objections to Declaration of Defendant Visman in Support of Motion

Objection numbers 1, 3, 4, 6, and 7 are overruled.

Objection number 9 is sustained. The statement that the Fudge Factory created signs to accommodate the closing of the last access easement to the Fudge Factory as depicted in Exhibit 9 is a legal conclusion and the court notes that the Fudge Factory sign defendants conclude was placed to accommodate closure of the connector road is merely a sign with a directional arrow and "Fudge Factory". At best this appears to be merely a sign placed to try to mitigate losses of plaintiff's customers due to defendants' failure to allow any easement access to the Fudge Factory.

Objection numbers 10-23 are sustained.

Objection number 2 is sustained in part related to the single photo from Facebook located in Exhibit 1 and overruled as to the remainder of the objections.

Objection number 5 is sustained as to the improper legal conclusion that all of High Hill Ranch's interpretations of the 2011 arbitration award were within the terms of that award and the objection to the remainder of the subject language is overruled.

Objection number 8 is sustained as to the improper legal conclusion that the plaintiff's placement of food carts and vendors in front of the connector road indicate that plaintiff acquiesced in the closure of the connector easement road and overruled as to the remainder of the subject language.

Arbitration of Dispute

"(b) A party to an arbitration agreement may file in the court in the county in which an arbitration proceeding is pending, or if an arbitration proceeding has not commenced, in any proper court, an application for a provisional remedy in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled

may be rendered ineffectual without provisional relief. The application shall be accompanied by a complaint or by copies of the demand for arbitration and any response thereto. If accompanied by a complaint, the application shall also be accompanied by a statement stating whether the party is or is not reserving the party's right to arbitration." (Code of Civil Procedure, § 1281.8.)

Although defendants request that the court send this matter to arbitration and the 2011 award/judgment states that jurisdiction is retained to arbitrate further disputes, there is no properly noticed motion to compel arbitration before the court. The request for arbitration in an opposition to an OSC re: preliminary injunction filed and served nine court days prior to the hearing is insufficient advance notice and would violate the due process rights of the plaintiff if it were considered a motion to compel arbitration. Therefore, the court can not consider the request on its merits and deny it without prejudice to filing a motion to compel arbitration.

Preliminary Injunction Principles

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

necessary to prevent a multiplicity of judicial proceedings. ¶ (7) Where the obligation arises from a trust." (Code of Civil Procedure, § 526(a).)

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

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

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

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

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

threatened' "]; *7978 Corporation v. Pitchess* (1974) 41 Cal.App.3d 42, 46, 115 Cal.Rptr. 746 [same].) ¶ If the threshold requirement of irreparable injury is established, then we must examine two interrelated factors to determine whether the trial court's decision to issue a preliminary injunction should be upheld: "(1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction." (*Butt v. State of California* (1992) 4 Cal.4th 668, 677–678, 15 Cal.Rptr.2d 480, 842 P.2d 1240.) Appellate review is generally limited to whether the trial court's decision constituted an abuse of discretion. (*Ibid.*). (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1463, 47 Cal.Rptr.3d 147.) However, [t]o the extent that the trial court's assessment of likelihood of success on the merits depends on legal rather than factual questions, [such as when the meaning of a contract or a statute are at issue,] our review is de novo.' " (*City of Lake Forest v. Evergreen Holistic Collective* (2012) 203 Cal.App.4th 1413, 1428, 138 Cal.Rptr.3d 332; *Garamendi v. Executive Life Ins. Co.* (1993) 17 Cal.App.4th 504, 512, 21 Cal.Rptr.2d 578.)" (Costa Mesa City Employees' Assn. v. City of Costa Mesa (2012) 209 Cal.App.4th 298, 305–306.)

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

""Irreparable harm" is a cornerstone of the availability of another provisional remedy, injunctive relief (§ 526, subd. (a)(2)), a provisional remedy also expressly allowed by section 1281.8. In the context of injunctions, insolvency or the inability to otherwise pay money damages is a classic type of irreparable harm. (*Leach v. Day* (1865) 27 Cal. 643, 646; *Friedman v. Friedman* (1993) 20 Cal.App.4th 876, 890, 24 Cal.Rptr.2d 892.) A close

examination of section 1281.8 confirms that both insolvency and the inability to otherwise pay damages are appropriate measures of irreparable harm that might render an arbitration award ineffectual when a writ of attachment is sought." (California Retail Portfolio Fund GmbH & Co. KG v. Hopkins Real Estate Group (2011) 193 Cal.App.4th 849, 857.)

The Third District Court of Appeal has held: "A preliminary injunction is an equitable remedy, and as Blue Cross argues, one who seeks equity must do equity. (*Ephraim v. Metropolitan Trust Co.* (1946) 28 Cal.2d 824, 837, 172 P.2d 501; *Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal.App.4th 34, 52, 6 Cal.Rptr.2d 602.)" (Davenport v. Blue Cross of California (1997) 52 Cal.App.4th 435, 454–455.)

The Third District Court of Appeal has also held: "A court exercising injunctive power may do so upon conditions that protect all—including the public—whose interests the injunction may affect. (*Inland Steel Co. v. United States* (1939) 306 U.S. 153, 157, 59 S.Ct. 415, 83 L.Ed. 557.)" (County of Inyo v. City of Los Angeles (1976) 61 Cal.App.3d 91, 100.)

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

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

Plaintiff declares: defendant Visman's parents originally owned the plaintiff's property, which had been part of the High Hills Ranch parcel; plaintiff and her husband purchased the property in 1977 and acquired access to a non-exclusive 50 foot easement on High Hill Ranch Road in order to access the plaintiff's property, which is otherwise landlocked; the Fudge Factory and

plaintiff's home are located on that property; there is no pubic road to the Fudge Factory and no other easement access to Fudge Factory over any other neighboring property; the easement rights are essential to plaintiff's business as customers gain access to the business by that easement and delivery trucks use the easement to deliver goods to the business; High Hills Ranch began blocking the easement in 2002 by posting "road closed" signs despite plaintiff's non-exclusive unrestricted easement; defendants claimed that it was necessary due to high volume pedestrian traffic; while it is accurate that there is such pedestrian traffic during the fall on certain weekends and holidays, High Hill Ranch arbitrarily closed the easement on a nearly "24/7" basis, including times when no customers were to be seen; High Hills Ranch sued plaintiff in 2002 (Case Number PC-20020033) and in settlement of the case plaintiff agreed that although she had an easement without restriction, certain restrictions on access to the easement would be allowed; during the business season in 2009 defendants ignored their obligations under the settlement agreement by posting a "road closed" sign on Hugh Hill Ranch Road at nearly all hours of the day resulting in Fudge Factory's easement being closed during nearly the entire 2009 season in breach of the settlement agreement; the easement was closed when there were no crowds on the road, including before Fudge Factory and High Hills Ranch were open for business and long after they closed for the day; in addition, the defendants breached the settlement agreement by failing to provide alternative access to the Fudge Factory when High Hills Ranch Road was closed; High Hill Ranch placed barriers on the easement, including picnic tables, vendor stands and booths, cones, tape, and a green fence that obstructed the view of and access to the Fudge Factory; defendants' actions negatively impacted plaintiff's business as many customers had difficulty locating the store; employees, vendors and delivery trucks experienced difficulty getting to plaintiff's store; arbitration commenced in 2010 resulting in an arbitration award reduced to a judgment in 2011;

for approximately eight years after entry of that judgment defendants generally allowed access to the easement, Orchard Road, and the connector road as provided in the arbitration award and judgment; as disputes arose, defendant Jerry Visman generally back down when plaintiff's spouse asked for access to the easement pursuant to the judgment, however, defendants failed and continue to fail to install fencing and markers designating the connector road as mandated by the judgment; within a few months of plaintiff's spouse's death, defendant Jerry Visman began to bully plaintiff and her daughter who operates the Fudge Factory; at no time during the high season of 2020 did defendants provide plaintiff with a list of high season dates as required by the judgment; during the 2020 season defendants violated the judgment by placing a "road closed" sign at the entrance of the High Hill Ranch Road and maintained that sign there 24/7 in plain violation of the judgment; High Hill Ranch had its security guard inform plaintiff that she was not allowed to walk along the easement road in order to get to her own mail box to retrieve her mail; defendants had their security guard close the road at night when there were no customers present and Fudge Factory and High Hills Ranch were closed; the unlawful closure of the road confused delivery drivers and plaintiff's customers, who had a difficult time reaching the Fudge Factory; defendants placed obstructions on the connector road thereby preventing access to the Fudge Factory in violation of the judgment; with COVID restrictions and effects on plaintiff's business, it was decided to wait until the 2021 season to contact an attorney to prevent further problems during the 2021 season; during the 2021 season defendants continued to fail to provide a list of season dates and closed the easement on a regular basis; in September 2021 a High Hill Ranch security watchman told a Fudge Factory employee, who lived on the Fudge Factory property for seven years, that the employee was not allowed to drive on Hugh Hill Ranch Road to his own home; during the 2021 high season plaintiff received phone calls from confused customers believing that the Fudge

Factory was closed because of the ”road closed” signs; the signs also confuses customers attempting to locate the store; defendants also did not provide the mandated alternative access across Orchard Road and the connector road by blocking the connector road with vehicles and equipment; at no time between August 15, 2021 through the date of the declaration has defendants provide the mandated 50 foot easement on the connector road as mandated by the judgment; the unlawful closure of the easement has negatively impacted and continues to negatively impact plaintiff's business, Fudge Factor's business reputation, and confuses delivery trucks and customers; defendants have also interfered with plaintiff's signs by covering the signs, removing the signs, running over signs, or otherwise destroying signs; in 2015 or 2016 plaintiff witnessed on a dark night that defendant Jerry Visman was holding one of the Fudge Factory signs, which he tossed, and then ran away and drove off in his golf cart; when plaintiff's daughter later asked him during that season why he removed the sign, he said he owned most of the property in the area and her father should pay him for the privilege of being able to post the sign; the Fudge Factory is allowed to maintain not less than four signs on permanent posts at specific spots on the easement; and defendant's conduct has depreciated the value of plaintiff's business and her real property. (Declaration of Plaintiff Frances Reinders in Support of Application for Preliminary Injunction, paragraphs 2, 7-15, and 17-28.)

Defendant Visman declares: the Fudge Factory operates a business on the parcel adjacent to High Hill Ranch; Fudge Factory has an express ingress and egress easement over High Hill Ranch Road; that road runs directly through one of the busiest pedestrian thoroughfares on the High Hill ranch property; although the 2002 settlement agreement states either party may elect to divert traffic to protect the health and safety of customers, defendants have an insurance obligation and potential liability of a pedestrian conflict with a vehicle; during the 2010 arbitration of the easement dispute, Hugh Hill Ranch asserted that pursuant to the terms of the

settlement agreement High Hill Ranch Road needed to be closed for the entire high season for health, safety and welfare reasons related to pedestrian traffic; the arbitration award entered as a judgment created the connector road and confirmed that the parties may elect to divert traffic from the High Hill Ranch Road for health and safety reasons and close the High Hill Ranch Road between the southerly Orchard Road junction and the Fudge Factory; due to ongoing public safety concerns, defendants have had to interpret the 2011 arbitration award/judgment and plaintiffs have never raised any concerns about those interpretations; since 2011, High Hill Ranch has allowed Fudge Factory to use the Orchard Road – Connector Road access to the Fudge Factory when High Hill Ranch Road was closed and Fudge Factory has not objected; the road closed sign is placed in a manner that allows for a fire engine and ambulance to pass unobstructed and the road closed sign is to direct customers into the traffic management system; in 2014 after having determined that the connector road was extremely dangerous to pedestrians, defendants blocked the connector road to vehicular access after numerous letters between the parties' respective attorneys; Fudge Factory then filled the parking spots in front of the connector road with vendors and food carts; and High Hill Ranch has never stolen or damaged Fudge Factory Signs and defendant has not personally stolen or damaged Fudge Factory signs. (Declaration of Defendant Jerry Visman in Opposition, paragraphs 6, 10, 12-19, and 37.)

Plaintiff declares in reply: historically defendant Visman has not closed the easement in January as it is the offseason and the judgment prohibits closure of the easement in the offseason; defendant Visman's statement in his declaration that the connector road has been closed since 2014 is untrue as Fudge Factory had access to the connector road during the weekends and holidays when the main easement was closed up until the 2020 season; there are no safety concerns for pedestrians on the connector road as the judgment required

defendants to mark and designate the connector road with fences, but defendants did not do so, and vehicles travel on Orchard Road and are then to cross in the connector road, which is not a path used by pedestrians; plaintiff did not acquiesce to the closure of the connector road by placing signs; the sign was only posted to direct traffic past the connector road as plaintiff had no other choice due to defendants' blocking that road; the food carts referenced by defendant Visman do not impede traffic on the connector road; defendant Visman unilaterally blocked the connector road without any justification; plaintiff has never been informed by the county or law enforcement personnel that the judgment terms cause a safety hazard or that defendant Visman must permanently close the main and alternate easements; plaintiff is unaware of any County, law enforcement or any other authority that has required her to give up her property rights; defendant Visman is incorrect that the pedestrian traffic during weekdays, which are not holidays, require closures of the main easement as there is almost never significant pedestrian traffic on the easement that warrants closure during the weekdays that are not holidays; in the event of outlier circumstances, plaintiff would not oppose closing the easement during the time pedestrians are on the easement, provided, however, defendant Visman under such circumstances must provide access on the connector road during such times; this was addressed at length during the arbitration and defendants must be compelled to abide by the judgment; defendant Visman's claims he never took down any of the Fudge Factory signs is untrue as she and her husband have seen him take down the signs in the past, such as in 2017 or 2018 when he took down their sign on Carson Road; and other signs have gone missing since entry of the judgment.. (Reply Declaration of Plaintiff Frances Reinders in Support of Application for Preliminary Injunction, paragraphs 3-9.)

The arbitration award acknowledged the safety issues during high season that could require diversion of traffic on the High Hills Road easement (Easement Road) (See Defense Exhibit 5A

– 2011 Arbitration Award, page 16, lines 14-18.) and found that the 2002 settlement agreement between the parties expressly provided that Fudge Factory and its customers were to have unrestricted access to the Fudge Factory over the Orchard Road and this access shall be treated as though it were an easement (See Defense Exhibit 5A – 2011 Arbitration Award, page 16, line 23 to page 20, line 7.). The arbitration award/judgment expressly provided that a connector road must be created in a specified manner at the expense of defendant High Hill Ranch. (See Defense Exhibit 5A – 2011 Arbitration Award, page 16, line 23 to page 20, line 7.) The arbitration award/judgment expressly provided during high season the connector road shall not be impaired or obstructed with any vehicles, farm equipment, passenger buses, or any other sort of obstruction; the connector road shall be designated as a no parking area during the high season; and it shall be the duty and responsibility of Hugh Hill Ranch to assure that the 50 foot easement is neither impaired or obstructed during all business hours of high season. (See Defense Exhibit 5A – 2011 Arbitration Award, page 22, lines 15-20.) The arbitration award/judgment concluded with the following summary of findings and orders: high season is designated as September 15 to December 15 each year; High Hills Ranch shall remain open to pedestrian and vehicular traffic at all times, except for designated weekends and holidays during high season; during high season, High Hill Ranch and/or Fudge Factory may elect to divert traffic for health or safety reasons and close High Hill Ranch Road between the southerly Orchard Road Junction and Fudge Factory; during such occasions that a high season traffic diversion is employed, the Orchard Road and a designated connector road, as specified in the arbitration award, shall provide the Fudge Factory and its customers unrestricted access over the Orchard Road and the Connector road to the Fudge Factory; this alternative route shall be treated as though it were the easement; during such times that the Orchard Rodd and Connector road are being treated as the easement, neither party shall

impair or interfere with the other party's rights under the easement; this means no impairments or obstructions shall be placed on the Orchard Road or Connector road and no vehicular parking shall take place on the Orchard Road or Connector road. (Emphasis the court's.)(See Defense Exhibit 5A – 2011 Arbitration Award, page 25, lines 11-25.)

The 2011 arbitration award that was reduced to a judgment entered on May 11, 2011 in case number PCL-20110390 clearly and unambiguously provides that the Orchard Road and connector road were to provide unrestricted access to the Fudge Factory and there are no provisions in that judgment and arbitration award that allowed defendants the discretion to decide to close the connector road for safety reasons as the expressed purpose for the connector road was to provide an unrestricted easement that allowed access to the Fudge Factory in the event that the High Hill Ranch Road easement was closed. The language of the judgment indicates an intent that this be an alternative easement to temporarily replace the High Hill Ranch Road easement when it was not closed and use of the phrase that the Orchard Road – Connector Road was to be "treated as through it were the easement" does not incorporate the right to elect to close the only other access to plaintiff's property or business and effectively extinguish her easement rights. Under the circumstances presented, the use of the language that the Orchard Road – Connector Road is to be treated as though it were the easement is reasonably construed to indicate it is an unrestricted, unobstructed alternative route to replace the express easement that has been closed purportedly for safety reasons. The judgment and arbitration award also designated the high season as September 15 to December 15 each year when closures of the easement road for pedestrian safety reasons could be imposed and that in such instances the Orchard Road and Connector Road shall provide unrestricted access to the Fudge Factory. Defendants admit that in 2014 they violated the judgment and arbitration award by blocking vehicular traffic on the connector road,

because they determined that pedestrian traffic made use of the connector road extremely dangerous. (Declaration of Defendant Jerry Visman in Opposition, paragraph 18.) Defendants have not claimed or provided any evidence whatsoever that it is impossible or impractical to block pedestrian traffic along the connector road by directory and safety signage and/or fencing to prevent access to the road by pedestrians. Defendants do not offer any option to allow vehicular access to the Fudge Factory, which is the plaintiff's legal right and entitlement by express easement and operation of the judgment/arbitration award to unrestricted access. Defendants also contend that they have the defense of acquiescence in and failure to object to the admitted violations by defendant over time and inability to control pedestrian in a safe manner to keep the road connection to plaintiff's business as establishing the likelihood that defendants will prevail in this action. The defendant's declaration concerning failure to object and acquiescence conflicts with the declarations of plaintiff before the court. The defendant's declaration in opposition that pedestrian safety requires closure of both the easement and the alternate route to plaintiff's business and land and that such closures comply with the arbitration award/judgment is unsupported. As stated earlier in this ruling the properly construed provisions of the arbitration award/judgment do not allow closure of the alternate Orchard Road – Connector Road in defendants' discretion for safety reasons or any other reasons.

Defendants argue that the injunction should not issue, because plaintiff has not established it is appropriate to issue a mandatory injunction. The injunction is not a mandatory injunction as it does not mandate defendant to remove structures and only it is only prohibitory in nature as it prohibits defendants from doing anything that violates the plaintiff's easement rights as mandated by the judgment entered in 2011, which would include defendants placing portable signage and portable obstructions to prevent use of the High Hill Ranch Road easement when

defendants are not allowed to do so under the arbitration award/judgment and defendants placing portable signage and portable obstructions to prevent use of the alternate route when the easement has been closed in accordance with the arbitration award/judgment.

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

Bond Requirement

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

Defendants have asserted that if the preliminary injunction is issued, the court needs to set bond in the amount of $3,000,000 in order to compensate defendants for lost business, damages it may be responsible for should pedestrians be injured, additional insurance costs, and attorney fees and costs incurred in this litigation. There is no evidentiary support whatsoever for that requested amount and is apparently based on mere speculation.

Absent any evidence that a $250 bond is insufficient, the court will require a bond be posted in the amount of $250.

**TENTATIVE RULING # 4: THE REQUEST FOR ISSUANCE OF A PRELIMINARY INJUNCTION IS GRANTED. BOND IS TO BE POSTED IN THE AMOUNT OF $250. 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, JANUARY 14, 2021 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.**

**5. REED v. SANDOVAL 21UD0034**

**Defendant's Motion to Set Aside Default.**

On November 24, 2021 plaintiff filed an action for unlawful detainer. The proof of service of the summons and complaint filed on December 9, 2021 declares that defendant was personally served at two locations on at 3:30 p.m. December 8, 2021. Default was entered on December 17, 2021. On December 17, 2021 a default judgment was entered for possession only and a writ for possession issued that same date.

On January 3, 2022 the court granted defendant's ex parte application for stay of execution of the writ of possession pending determination of the defendants motion to vacate the default and default judgment.

Defendant moves to vacate and set aside the default pursuant to Code of Civil Procedure, § 473(d) on the grounds that he was never properly served with the summons and complaint; the proof of service of the summons and complaint states he was served at two locations that are two hours travel distance apart at the same time and same date; and he was on a flight in transit to New York City at the time that the summons and complaint were purportedly personally served on him. Defendant requests that he be allowed to file the proposed answer to the complaint.

Plaintiff filed and served her response to the motion on January 12, 2022, which opposed the motion in part and did not oppose part of the motion. While plaintiff generally denies all allegations by defendant, plaintiff does not oppose defendant's requests to set aside the judgment and default, that the proposed answer be filed, and the case heard on its merits.

Code of Civil Procedure, § 473(d) provides that the court may set aside any void judgment or order. Defendant essentially contends that the default and default judgment are void,

because of improper service. "Notice of the litigation does not confer personal jurisdiction absent substantial compliance with the statutory requirements for service of summons. (See *Ault v. Dinner For Two, Inc.* (1972) 27 Cal.App.3d 145, 148, 103 Cal.Rptr. 572.)" (MJS Enterprises, Inc. v. Superior Court (1983) 153 Cal.App.3d 555, 557-558.)

Defendant declares: he entered into a lease purchase option for purchase of the subject property on April 28, 2018 as shown in the agreement attached as Exhibit A; he duly performed all requirements of the agreement including full payment of all rent due; he has not violated the lease; plaintiffs accepted a large payment up front at the inception of the lease in the amount of $50,000; he was never served the summons and complaint; the proof of service filed in this case is false in that he was in transit on a flight to New York City at the time of the purported service as shown by his fight information in Exhibit C; he could not be in two locations at the same time; and he has an interest in the property as shown by an unrecorded grant deed wherein he and Kaylee Reynolds were granted an interest in the property as tenants in common (Exhibit D.) (Declaration of Defendant in Support of Motion, paragraphs 2 and 3; and Exhibits A, C and D.)

"A summons may be served by personal delivery of a copy of the summons and of the complaint to the person to be served. Service of a summons in this manner is deemed complete at the time of such delivery…" (Code of Civil Procedure, § 415.10.)

"The requirements of a personal service are strictly construed; a mere showing that a party had notice in fact is insufficient. (*Lettenmaier v. Lettenmaier* (1962) 203 Cal.App.2d 837, 843--844, 22 Cal.Rptr. 156; *Sternbeck v. Buck* (1957) 148 Cal.App.2d 829, 832, 307 P.2d 970.)" (Whealton v. Whealton (1967) 67 Cal.2d 656, 659, fn 1.)

"'Personal service' means the actual delivery of the papers to the defendant in person. *Holiness Church of San Jose v. Metropolitan Church Ass'n*, 12 Cal.App. 445, 448, 107 P. 633;

*Hunstock v. Estate Development Corporation*, 22 Cal.2d 205, 138 P.2d 1, 4, 148 A.L.R. 968." (Sternbeck v. Buck (1957) 148 Cal.App.2d 829, 832-833.)

The evidence submitted by defendant establishes that he was never validly served with the summons and complaint. "Notice of the litigation does not confer personal jurisdiction absent substantial compliance with the statutory requirements for service of summons. (See *Ault v. Dinner For Two, Inc.* (1972) 27 Cal.App.3d 145, 148, 103 Cal.Rptr. 572.)" (MJS Enterprises, Inc. v. Superior Court (1983) 153 Cal.App.3d 555, 557-558.) The court grants the motion. The default, default judgment and writ of execution are vacated and set aside. An original executed copy of the proposed answer (Defendant's Exhibit E.) is to be filed within five days and an executed copy served on plaintiffs within five days.

**TENTATIVE RULING # 5: DEFENDANT'S MOTION TO SET ASIDE DEFAULT IS GRANTED. THE DEFAULT, DEFAULT JUDGMENT, AND WRIT OF EXECUTION ARE VACATED AND SET ASIDE. DEFENDANT IS TO FILE AN ORIGINAL EXECUTED COPY OF THE PROPOSED ANSWER (DEFENDANT'S EXHIBIT E.) WITHIN FIVE DAYS AND AN EXECUTED COPY IS ORDERED TO BE SERVED ON PLAINTIFF WITHIN FIVE 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.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, JANUARY 14, 2021 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.**

**6. MILLER v. MOSS PC-20210200**

**Hearing Re: Default Judgment.**

On April 16, 2021 plaintiffs filed an action against defendant asserting causes of action for libel, trade libel and false light. The complaint alleges that defendant sustained special damages in the amount of $250,000 arising from loss of old clients, failure to obtain new clients, loss of good will, and injury to business reputation. (Complaint, paragraphs 15, 26, and 37.)

The proof of service filed on November 24, 2021 declares that on October 28, 2021 a registered process server personally served defendant with the summons complaint, notice to litigants, and a statement of damages. Default was entered against defendant on December 9, 2021.

The default form is fatally defective in that the declaration of nonmilitary status portion of the mandatory Judicial Council Form Request for Entry of Default (Form CIV-100.) is not executed.

"…if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court a declaration under penalty of perjury setting forth facts showing that the defendant is not in the military service…"(Military and Veterans Code, § 402(a).) In seeking entry of default against an individual, the mandatory judicial council forms must be utilized and "The following must be included in the documents filed with the clerk: ¶ * * * (5) A declaration of nonmilitary status for each defendant against whom judgment is sought; * * *" (Rules of Court, Rule 3.1800(a)(5).)

This alone justifies denial of entry of a default judgment until it is corrected.

After default the plaintiff may apply to the court for the relief demanded in the complaint; the court shall hear the evidence offered by the plaintiff, and shall render judgment in his or her

favor for such sum not exceeding the amount stated in the complaint, in the statement required by Section 425.11, or in the statement provided for by Section 425.115, as appears by such evidence to be just. (Code of Civil Procedure, § 585(b).)

If a plaintiff seeks damages for personal injury or wrongful death and a defendant does not request a statement of damages from the plaintiff, the plaintiff shall serve the statement on the defendant before a default may be taken. (Code of Civil Procedure, § 425.11(c).)

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

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

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

point out the excesses, it is the duty of the court to act as gatekeeper, ensuring that only the appropriate claims get through." (*Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 868, 121 Cal.Rptr.2d 695 (*Heidary*).)" (Electronic Funds Solutions v. Murphy (2005) 134 Cal.App.4th 1161, 1179.)

The statement of damages is not in the court's file. There is no evidence in the court's file to prove any amount of damages was incurred as a result of the alleged statement defendant posted on the internet. (See Complaint, Exhibit A.) Even assuming for the sake of argument that the nonmilitary status declaration is provided, the court can not enter a default judgment in any amount against defendant.

**TENTATIVE RULING # 6: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, JANUARY 14, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldoradocourt.org/onlineservices/vcourt.html.**

**7. CLARK v. WILLIAMS PC-20200469**

**Plaintiff's Motion to Compel Further Responses to Discovery.**

**TENTATIVE RULING # 7: PLAINTIFF HAVING WITHDRAWN THE MOTION ON JANUARY 5, 2022, THIS MATTER WAS DROPPED FROM THE CALENDAR.**

**8. GAUTSCHI v. KRICKFIT, INC. PC-20200074**

**Plaintiff's Motion for Protective Order.**

**TENTATIVE RULING # 8: THIS MATTER IS CONTINUED TO 8:30 A.M. ON FRIDAY, JANUARY 21, 2022 IN DEPARTMENT NINE.**

**9. PEOPLE v. VALENCIA PC-20200369**

**Petition for Forfeiture.**

On August 3, 2020 the People filed a petition for forfeiture of cash seized in the amount of $729,247.58 by the El Dorado County Sheriff's Department. The petition states: the funds are currently in the hands of the El Dorado County District Attorney's Office; and the property became subject to forfeiture pursuant to Health and Safety Code, § 11470(f), because that money was a thing of value furnished or intended to be furnished by a person in exchange for a controlled substance, the proceeds was traceable to such an exchange, and the money was used or intended to be used to facilitate a violation of various provisions of the Health and Safety Code. The People pray for judgment declaring that the money is forfeited to the State of California.

Claimant Valencia filed a Judicial Council Form MC-200 claim opposing forfeiture in response to a notice of petition.

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

under this chapter, or the issuance of an order of forfeiture of the property, whichever comes first." (Health and Safety Code, § 11470(f).)

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

"(a)(1) Any person claiming an interest in the property seized pursuant to Section 11488 may, unless for good cause shown the court extends the time for filing, at any time within 30 days from the date of the first publication of the notice of seizure, if that person was not personally served or served by mail, or within 30 days after receipt of actual notice, file with the superior court of the county in which the defendant has been charged with the underlying or related criminal offense or in which the property was seized or, if there was no seizure, in

which the property is located, a claim, verified in accordance with Section 446 of the Code of Civil Procedure, stating his or her interest in the property. An endorsed copy of the claim shall be served by the claimant on the Attorney General or district attorney, as appropriate, within 30 days of the filing of the claim…" (Health and Safety Code, § 11488.5(a)(1).)

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

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

hearing, the state or local governmental entity has shown that the assets in question are subject to forfeiture pursuant to Section 11470, in accordance with the burden of proof set forth in subdivision (i) of Section 11488.4." (Health and Safety Code, § 11488.5(d).)

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

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

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

Upon request of counsel, the hearing was continued from August 27, 2021 to January 14, 2022.

**TENTATIVE RULING # 9: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, JANUARY 14, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldoradocourt.org/onlineservices/vcourt.html.**

**10. PEOPLE v. HARRIS PC-20200368**

**Petition for Forfeiture.**

On August 3, 2020 the People filed a petition for forfeiture of cash in the total amount of $285,347.90 seized by the El Dorado County Sheriff's Department. The petition states: the funds are currently in the hands of the El Dorado County District Attorney's Office; and the property became subject to forfeiture pursuant to Health and Safety Code, § 11470(f), because that money was a thing of value furnished or intended to be furnished by a person in exchange for a controlled substance, the proceeds was traceable to such an exchange, and the money was used or intended to be used to facilitate a violation of various provisions of the Health and Safety Code. The People pray for judgment declaring that the money is forfeited to the State of California.

Claimant Harris filed a Judicial Council Form MC-200 claim opposing forfeiture in response to a notice of petition.

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

under this chapter, or the issuance of an order of forfeiture of the property, whichever comes first." (Health and Safety Code, § 11470(f).)

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

"(a)(1) Any person claiming an interest in the property seized pursuant to Section 11488 may, unless for good cause shown the court extends the time for filing, at any time within 30 days from the date of the first publication of the notice of seizure, if that person was not personally served or served by mail, or within 30 days after receipt of actual notice, file with the superior court of the county in which the defendant has been charged with the underlying or related criminal offense or in which the property was seized or, if there was no seizure, in

which the property is located, a claim, verified in accordance with Section 446 of the Code of Civil Procedure, stating his or her interest in the property. An endorsed copy of the claim shall be served by the claimant on the Attorney General or district attorney, as appropriate, within 30 days of the filing of the claim…" (Health and Safety Code, § 11488.5(a)(1).)

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

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

hearing, the state or local governmental entity has shown that the assets in question are subject to forfeiture pursuant to Section 11470, in accordance with the burden of proof set forth in subdivision (i) of Section 11488.4." (Health and Safety Code, § 11488.5(d).)

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

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

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

Upon request of counsel, the hearing was continued from August 27, 2021 to January 14, 2022.

**TENTATIVE RULING # 10: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, JANUARY 14, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldoradocourt.org/onlineservices/vcourt.html.**

**11. PEOPLE v. KUNG PC-20210120**

**Petition for Forfeiture.**

On March 11, 2021 the People filed a petition for forfeiture of cash in the amount of $29,000 that was seized by the El Dorado County Sheriff's Department. The petition states: the funds are currently in the hands of the El Dorado County District Attorney's Office; the property became subject to forfeiture pursuant to Health and Safety Code, § 11470(f), because that money was a thing of value furnished or intended to be furnished by a person in exchange for a controlled substance, the proceeds was traceable to such an exchange, and the money was used or intended to be used to facilitate a violation of various provisions of the Health and Safety Code; and that a criminal case alleging violations of Health and Safety Code, §§ 11360 and 11366 was filed on January 31, 2020. The People pray for judgment declaring that the money is forfeited to the State of California.

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

under this chapter, or the issuance of an order of forfeiture of the property, whichever comes first." (Health and Safety Code, § 11470(f).)

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

"(c) The Attorney General or district attorney shall make service of process regarding this petition upon every individual designated in a receipt issued for the property seized. In addition, the Attorney General or district attorney shall cause a notice of the seizure, if any, and of the intended forfeiture proceeding, as well as a notice stating that any interested party may file a verified claim with the superior court of the county in which the property was seized or if the property was not seized, a notice of the initiation of forfeiture proceedings with respect to

any interest in the property seized or subject to forfeiture, to be served by personal delivery or by registered mail upon any person who has an interest in the seized property or property subject to forfeiture other than persons designated in a receipt issued for the property seized. Whenever a notice is delivered pursuant to this section, it shall be accompanied by a claim form as described in Section 11488.5 and directions for the filing and service of a claim." (Health & Safety Code, § 11488.4(c).)

The proof of service declares that on April 22, 2021 respondent was served notice of the hearing, the petition for forfeiture, a blank claim form opposing forfeiture, and a blank disclaimer of interest form by certified mail. There is no response to the petition or claim opposing forfeiture in the court's file.

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

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

admissible in the proceedings regarding the underlying or related criminal offense set forth in subdivision (a) of Section 11488. ¶ (2) The hearing shall be by jury, unless waived by consent of all parties. ¶ (3) The provisions of the Code of Civil Procedure shall apply to proceedings under this chapter unless otherwise inconsistent with the provisions or procedures set forth in this chapter. However, in proceedings under this chapter, there shall be no joinder of actions, coordination of actions, except for forfeiture proceedings, or cross-complaints, and the issues shall be limited strictly to the questions related to this chapter." (Health and Safety Code, § 11488.5(c).)

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

"(e) The forfeiture hearing shall be continued upon motion of the prosecution or the defendant until after a verdict of guilty on any criminal charges specified in this chapter and pending against the defendant have been decided. The forfeiture hearing shall be conducted in accordance with Sections 190 to 222.5, inclusive, Sections 224 to 234, inclusive, Section 237, and Sections 607 to 630 of the Code of Civil Procedure if trial by jury, and by Sections 631 to

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

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

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

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

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

Upon request of counsel, the hearing was continued from August 27, 2021 to January 14, 2022.

**TENTATIVE RULING # 11: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, JANUARY 14, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldoradocourt.org/onlineservices/vcourt.html.**

**12. KATZAKIAN v. SUN RIDGE RANCH HOA PC-20190048**

**Defendants Sun Ridge Ranch HOA's and Earle's Motion to Strike the Punitive Damages Allegations of the 1st Amended Complaint.**

The court granted plaintiffs' motion for leave to file a 1st amended complaint, which added defendant Earle as an individual defendant, added a claim for punitive damages, and added various allegations. On October 1, 2021 the 1st amended complaint was filed.

Defendants move to strike the punitive damages allegations and prayer arguing the following grounds: punitive damages can not be recovered in this action as it is a breach of contract action, because the breach of fiduciary duty derives from the contractual obligations of the HOA; and the conclusory allegations of fact do not support a claim for punitive damages.

The proofs of service filed with the court declares that plaintiff's counsel was served with notice of the hearing and the documents submitted in support of the motion by email and overnight mail on November 17, 2021. There is no opposition to the motion in the court's file.

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

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

the notice of motion, or in the supporting points and authorities, except as the court may otherwise permit." (Code of Civil Procedure, § 437(b).)

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

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

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

"In order to survive a motion to strike an allegation of punitive damages, the ultimate facts showing an entitlement to such relief must be pled by a plaintiff. (*Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 166, 203 Cal.Rptr. 556; *Blegen v. Superior Court* (1981) 125

Cal.App.3d 959, 962–963, 178 Cal.Rptr. 470.) In passing on the correctness of a ruling on a motion to strike, judges read allegations of a pleading subject to a motion to strike as a whole, all parts in their context, and assume their truth. (*Courtesy Ambulance Service v. Superior Court* (1992) 8 Cal.App.4th 1504, 1519, 11 Cal.Rptr.2d 161; *Dawes v. Superior Court* (1980) 111 Cal.App.3d 82, 91, 168 Cal.Rptr. 319; see California Judges Benchbook, Civil Proceedings Before Trial (1995) § 12.94, p. 611.) In ruling on a motion to strike, courts do not read allegations in isolation. (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6, 172 Cal.Rptr. 427.) We review an order striking punitive damages allegations de novo. (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1223, 44 Cal.Rptr.2d 197.)" (Clauson v. Superior Court (1998) 67 Cal.App.4th 1253, 1255.)

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

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

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

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

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

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

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

With the above-cited legal principles in mind the court will rule on defendants' motion to strike

Punitive Damages for Breach of Fiduciary Duty

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

"A fiduciary relationship is " 'any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts

relating to the interest of the other party without the latter's knowledge or consent....' " ( *Herbert v. Lankershim* (1937) 9 Cal.2d 409, 483, 71 P.2d 220; *In re Marriage of Varner* (1997) 55 Cal.App.4th 128, 141, 63 Cal.Rptr.2d 894; see also *Rickel v. Schwinn Bicycle Co.* (1983) 144 Cal.App.3d 648, 654, 192 Cal.Rptr. 732 [" 'A "fiduciary relation" in law is ordinarily synonymous with a "confidential relation." It is ... founded upon the trust or confidence reposed by one person in the integrity and fidelity of another, and likewise precludes the idea of profit or advantage resulting from the dealings of the parties and the person in whom the confidence is reposed.' "].) ¶ Traditional examples of fiduciary relationships in the commercial context include trustee/beneficiary, directors and majority shareholders of a corporation, business partners, joint adventurers, and agent/principal. (See, e.g., *Evangelho v. Presoto* (1998) 67 Cal.App.4th 615, 621, 79 Cal.Rptr.2d 146 [trustee and beneficiary]; *Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 108-109, 81 Cal.Rptr. 592, 460 P.2d 464 [controlling shareholder of corporation]; *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 818-819, 195 Cal.Rptr. 421 [joint adventurers]; *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1580, 36 Cal.Rptr.2d 343 [agent/principal].) ¶ Inherent in each of these relationships is the duty of undivided loyalty the fiduciary owes to its beneficiary, imposing on the fiduciary obligations far more stringent than those required of ordinary contractors. As Justice Cardozo observed, "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior." (Meinhard *v. Salmon* (1928) 249 N.Y. 458, 164 N.E. 545, 546.)" (Wolf v. Superior Court (2003) 107 Cal.App.4th 25, 29-30.)

The Third District Court of Appeal recently held: "…the directors of a nonprofit mutual benefit corporation, like the Association here, are fiduciaries who must act for the benefit of the

corporation and its members. (*Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 513, 229 Cal.Rptr. 456, 723 P.2d 573 (*Frances T.*) ["Directors of nonprofit corporations ... are fiduciaries who are required to exercise their powers in accordance with the duties imposed by the Corporations Code"]; *Cohen v. S & S Construction Co.* (1983) 151 Cal.App.3d 941, 945, 201 Cal.Rptr. 173 ["This fiduciary duty extends to individual homeowners, not just the homeowners association"].)" (Coley v. Eskaton (2020) 51 Cal.App.5th 943, 958.)

The 1st amended complaint alleges: during the March 2020 Board executive session meeting the fines levied against plaintiffs were reversed and plaintiffs' good standing in the HOA was restored, which was not communicated to plaintiffs; plaintiffs first learned of those facts during the bifurcated trial that took place in January 2021; for almost a full year the HOA led plaintiffs to believe they could not vote, request special elections, file complaints about C,C,&R violations, they had not right to improve their property with architectural committee approval, had no right to nominate anyone to the Board, and/or had not right run for the Board due to their lack of good standing; on March 19, 2020 the HOA purportedly decided to waive the fines against plaintiffs with no explanation, without returning plaintiffs to good standing, and without reversing the actual violations; at no time were the plaintiffs ever informed by the HOA of the purported return of their good standing or reversal of the violations; defendant HOA and Earle engaged in constructive fraud by concealment of a material fact equating to a breach of fiduciary duty; as a direct and proximate result of the HOA's and Earle's breach of duty, plaintiffs suffered and continue to suffer damages including, but not limited to, loss of use, damages to their property, diminished value to their property, and unnecessary emotional distress and attorney fees; and punitive damages are supported by the facts that the HOA has informed the membership that it won this case and no further claims will be litigated, despite the fact that plaintiffs proved at trial that defendant HOA engaged in improper conduct through

Janet Gamboa's improper conduct and there remains breach of contract and breach of fiduciary duty causes of action pending trial. (1st Amended Complaint, paragraphs 46-49, 58, 59, 64, 65, and 68.)

Defendants argue that punitive damages can not be recovered in this action as it is a breach of contract action, because the HOA obligations to homeowners derive from a contract, the governing documents, and, therefore, a breach of those obligations arise from a contract. (Civil Code, § 3294(a).)

Punitive damages are sought in the breach of fiduciary duty cause of action. (Proposed 1st Amended Complaint, paragraph 68.) Breach of fiduciary duty is not an obligation arising from contract. It arises from "the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach". (Emphasis added.) (Roberts v. Lomanto (2003) 112 Cal.App.4th 1553, 1562.) HOA directors and the HOA owe fiduciary duties to the HOA homeowners (Coley v. Eskaton (2020) 51 Cal.App.5th 943, 958.) and as fiduciaries they owe the homeowners a duty of undivided loyalty, which imposes on the HOA and directors fiduciary obligations far more stringent than those required of ordinary contractors. (Wolf v. Superior Court (2003) 107 Cal.App.4th 25, 30.) In short, the fiduciary duties are not contractual obligations and are instead a duty of undivided loyalty exceeding all contractual obligations.

The court rejects defendants'' argument that the breach of fiduciary duty cause of action in the 1st amended complaint is a breach of contract cause of action that can not support a claim for punitive damages.

Sufficiency of the Allegations of Malice, Oppression, or Fraud

The 1st amended complaint essentially alleges that despite defendants' fiduciary duty of undivided loyalty owed to plaintiffs, during the subject litigation defendants concealed for nearly one year the facts that the HOA had reversed the fines imposed on plaintiffs and restored the

plaintiff's good standing, which were major issues of the litigation; the concealment led plaintiffs to believe they still could not vote, request special elections, file complaints about C,C,&R violations, they had no right to improve their property with architectural committee approval, had no right to nominate anyone to the Board, and/or had no right run for the Board due to their lack of good standing; and this resulted in plaintiffs suffering and continuing to suffer damages including, but not limited to, loss of use, damages to their property, diminished value to their property, and unnecessary emotional distress and attorney fees.

In the context of fiduciary conduct towards beneficiaries, reading the previously cited allegations of 1st amended complaint as a whole, all parts in their context, and assuming their truth for the purposes of this motion to strike, the court finds that the allegations adequately allege the evil motive requisite to recovery of punitive damages for despicable conduct by fiduciaries carried on by the defendants with a willful and conscious disregard of the rights of plaintiffs and that subjected plaintiffs to cruel and unjust hardship in conscious disregard of their rights.

The motion to strike is denied.

**TENTATIVE RULING # 12: DEFENDANTS SUN RIDGE RANCH HOA'S AND EARLE'S MOTION TO STRIKE THE PUNITIVE DAMAGES ALLEGATIONS OF THE 1ST AMENDED COMPLAINT IS DENIED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE**

**HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE 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, JANUARY 14, 2021 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.**

**13. TRINITY FINANCIAL SERVICES, LLC v. MCDERMOTT 21UD0003**

**Defendants' Motion to Set Aside Default.**

On October 15, 2021 plaintiff filed a complaint for unlawful detainer. The proofs of service of summons and complaint declares: on October 27, 2021 defendant Stephen McDermott was personally served the summons and complaint at the subject premises; on October 27, 2021 Susan McDermott was served by substituted service at the subject premises by service on Stephen McDermott with follow up mailing on October 28, 2021 to the address of the subject premises; and on October 27, 2021 all other persons or entities in possession were served by posting the summons and complaint at the subject premises, leaving copies of the summons and complaint in the presence defendant Stephen McDermott at the premises on that date, and by mail to the premises address on that same date. Default was entered against defendant Stephen McDermott on November 12, 2021. Although the request for entry of default against Susan McDermott states that the request was rejected for an unstated reason, the court docket states that default was entered against Susan McDermott on November 17, 2021. The request for entry of default against defendants Susan McDermott and all other persons or entities in possession filed on December 1, 2021 was rejected as the default was previously entered on November 17, 2021. On December 16, 2021 defendants Susan McDermott and Stephen McDermott filed a motion to vacate the default on the ground that attorney inadvertence/fault caused the default to be entered. A declaration executed by defendant's attorney was submitted with the moving papers.

Plaintiff opposes the motion on the following grounds: although default has been entered against defendant Stephen McDermott, a default judgment has not been entered against defendants; the evidence presented is insufficient to establish the entry of the defaults were

the result of counsel's mistake, error, or inadvertence, rather than mistake or error by the defendants; relief for attorney fault can not be granted because defendants wrongly assert that a default judgment was entered and request the court to vacate a default judgment, therefore, the motion is improper as the court is not authorized to vacate a default judgment that does not exist (Motion, page 2, lines 7-14.); the evidence submitted in support of the motion is insufficient in that while defense counsel declares that he inadvertently failed to timely file an answer to the complaint, counsel did not state when he was retained, when he learned of the date of service, and he also declared that this was a result of delay in communications between defendants and our office.

"* * * Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties. However, this section shall not lengthen the time within which an action shall be brought to trial pursuant to Section 583.310." (Code of Civil Procedure, § 473(b).)

Code of Civil Procedure, § 473(b) mandates that the court vacate a default and any resulting default judgment where the attorney of the moving party admits in a sworn declaration that it was counsel's mistake, inadvertence, surprise, or neglect that resulted in the default being entered. The court must grant relief even if the neglect was inexcusable, unless the court

finds that the attorney's mistake, inadvertence, surprise or neglect did not in fact cause the default. (Metropolitan Service Corp. v. Casa de Palms, Ltd. (1995) 31 Cal.App.4th 1481, 1487.) The purpose of the mandatory relief provision of section 473(b) is "to relieve an innocent client of the burden of the attorneys fault, to impose the burden on the erring attorney, and to avoid precipitating more litigation in the form of malpractice suits. (Citation omitted.)" (Metropolitan Service Corp., supra at page 1487.)

The court rejects plaintiff's argument that a default cannot be vacated where the moving papers request a default judgment be vacated where no default judgment has been entered. The court is authorized to "vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment…" (Code of Civil Procedure, § 473(b)(1).) The substance of the motion is to vacate the entry of default and any default judgment. Plaintiff argues form over substance. The moving papers provide more than adequate notice to plaintiff concerning the relief sought by defendants.

Defense counsel declares: he is the lead attorney representing defendants in this action; defendants did not timely file a response to the complaint in this action, because he inadvertently missed filing a timey answer; this was a result of delay in communications between defendants of his office; consequently a default judgment was entered as to defendants on November 17, 2021. (Declaration of Peter Nisson in Support of motion, paragraphs 3-6.)

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

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

The evidence before the court sufficiently establishes that inadvertence of counsel resulted in the entry of the defaults against defendants. The motion is granted.

**TENTATIVE RULING # 13: DEFENDANTS' MOTION TO SET ASIDE THE DEFAULTS IS GRANTED. THE DEFAULTS ARE VACATED AND SET ASIDE. DEFENDANT IS TO FILE AN ORIGINAL EXECUTED COPY OF THE PROPOSED ANSWER (DEFENDANT'S EXHIBIT A.) WITHIN FIVE DAYS. THE COPY OF THE EXECUTED ANSWER ATTACHED AS EXHIBIT A TO THE MOVING PAPERS IS DEEMED SERVED ON PLAINTIFF. 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, JANUARY 14, 2021 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.**