1. MATTER OF LUNAS 22CV0068

OSC Re: Name Change.

There is no proof of publication in the court's file, which is mandated by Code of Civil Procedure, § 1277(a).

TENTATIVE RULING # 1: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, MARCH 11, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

2. REINDERS d.b.a. FUDGE FACTORY FARM v. VISMAN 21CV0266

Defendants Visman's and High Hill Ranch, LLC's Motion to Compel Arbitration.

On December 7, 2021 plaintiff filed a verified complaint against defendants seeking injunctive relief, declaratory relief, compensatory damages, punitive damages, and attorney fees and costs related to the parties' dispute concerning an easement. Plaintiff asserts causes of action for interference with easement, intentional interference with business relationship, private nuisance, breach of contract, and declaratory relief. The 2002 settlement agreement related to the subject easement is attached as Exhibit D to the complaint The complaint asserts "Fudge Factory brings this action to enforce its rights to access to the Easement, to obtain injunctive relief prohibiting High Hill Ranch from continuing to block access to the easement or otherwise violating the 2011 judgment, and seeks monetary damages, punitive damages, and attorney fees and costs." (Verified Complaint, page 3, lines 20-23.) The court order confirming a prior arbitration award related to the easement, which was entered as a judgment on May 17, 2011, is attached to the complaint as Exhibit E.

On January 14, 2022, the court granted plaintiff's motion for preliminary injunction.

A request for arbitration was asserted in the opposition to the OSC re: preliminary injunction, which was filed and served nine court days prior to the hearing. Inasmuch as such a request provided insufficient advance notice and would violate the due process rights of the plaintiff if it were considered a motion to compel arbitration, the court decided that it could not consider the request on its merits and denied it without prejudice to filing a motion to compel arbitration.

Defendants move to compel arbitration of the disputes raised in the complaint and stay further proceedings in this action pending binding arbitration of the disputes on the following grounds: that the 2002 settlement agreement related to the subject easements included an agreement to arbitrate "All disputes arising from or related to the terms or topics of this Settlement Agreement,

including, but not limited to the interpretation thereof…" (Complaint, Exhibit D – 2002 Compromise Settlement Agreement and Mutual Release, paragraph C.3.); the November 29, 2010 arbitration award, which was confirmed and entered as a judgment on May 17, 2011 in Reinders v. Visman, case number PCL-20110390, provides: "The Arbitrator retains jurisdiction to resolve any disputes as to the implementation of this order, and to address any future issues that may arise from time to time in the administration of the easement." (Complaint, Exhibit E – May 17 Confirmation and Judgment in Reinders v. Visman, case number PCL-20110390, Exhibit A – November 29, 2010 Arbitration Award, page 26, lines 8-10.); the claims in this action fall squarely within the scope of the arbitration agreement; the arbitration agreement is broad and covers the claims alleged in the complaint; and any further proceedings on plaintiff's complaint must be stayed.

Plaintiff opposes the motion on the following grounds: enforcement of a permanent injunction can only be adjudicated in a court proceeding and not by arbitration; the arbitration agreement does not apply to this lawsuit; the 3rd and 4th tort causes of action are not within the scope of the arbitration agreement; the settlement agreement does not mandate arbitration; High Hill Ranch, LLC did not execute the arbitration agreement, therefore, it can not enforce the arbitration agreement; the arbitrator lacks authority to retain jurisdiction over all future disputes concerning the easement; the arbitrator's purported reservation of jurisdiction does not cover the present dispute; and the arbitrator does not have jurisdiction over this dispute.

Plaintiff also requests the court to take judicial notice of the October 27, 2016 decision and judgment in the small claims case that High Hill Ranch brought against the Fudge Factory for costs to maintain the easement in Hugh Hill Ranch v. Fudge Factory, case number PSC-20160156; and the stipulation to confirm arbitration award and judgment entered in case number PCL-201100390.

Defendants replied to the opposition.

General Arbitration Principles

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

"California has a strong public policy in favor of arbitration and any doubts regarding the arbitrability of a dispute are resolved in favor of arbitration. (*Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 782, 191 Cal.Rptr. 8, 661 P.2d 1088 [(the court should " ' " 'indulge every intendment to give effect to' " ' " an arbitration agreement]; *Valsan Partners Limited Partnership v. Calcor Space Facility, Inc.*, supra, 25 Cal.App.4th at pp. 816-817, 30 Cal.Rptr.2d 785; *Titan Group, Inc. v. Sonoma Valley County Sanitation Dist.*, supra, 164 Cal.App.3d at p. 1127, 211 Cal.Rptr. 62.) As the Supreme Court recently noted, "... the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels...." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 10, 10 Cal.Rptr.2d 183, 832 P.2d 899.) This strong policy has resulted in the general rule that arbitration should be upheld "unless it can be said with assurance that an arbitration clause is not susceptible to an interpretation covering the asserted dispute. (Citation.))" (*Bos Material Handling, Inc. v. Crown Controls Corp.* (1982) 137 Cal.App.3d 99, 105, 186 Cal.Rptr. 740 [a terminated dealer's tort causes of action against a manufacturer, including claims for breach of the covenant of good faith and fair dealing, were all required to be arbitrated under their dealership agreement].) ¶ It seems clear that the burden must fall upon the party opposing arbitration to demonstrate that an arbitration clause cannot be interpreted to require arbitration of the dispute. Thus, if there is any reasonable doubt as to whether Coast Plaza's claims come within the Service Agreement's arbitration clause, that doubt must be resolved in favor of arbitration, not against it. (*Hayes*

Children Leasing Co. v. NCR Corp. (1995) 37 Cal.App.4th 775, 788, 43 Cal.Rptr.2d 650; *Vianna v. Doctors' Management Co.* (1994) 27 Cal.App.4th 1186, 1189, 33 Cal.Rptr.2d 188; *United Transportation Union v. Southern Cal. Rapid Transit Dist.* (1992) 7 Cal.App.4th 804, 808, 9 Cal.Rptr.2d 702.)" (Coast Plaza Doctors Hosp. v. Blue Cross of California (2000) 83 Cal.App.4th 677, 686-687.)

"In California, "[g]eneral principles of contract law determine whether the parties have entered a binding agreement to arbitrate." (*Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416, 420, 100 Cal.Rptr.2d 818; see *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972–973, 64 Cal.Rptr.2d 843, 938 P.2d 903.) Generally, an arbitration agreement must be memorialized in writing. (*Fagelbaum & Heller LLP v. Smylie* (2009) 174 Cal.App.4th 1351, 1363, 95 Cal.Rptr.3d 252.) A party's acceptance of an agreement to arbitrate may be express, as where a party signs the agreement. A signed agreement is not necessary, however, and a party's acceptance may be implied in fact (e.g., *Craig,* at p. 420, 100 Cal.Rptr.2d 818 [employee's continued employment constitutes acceptance of an arbitration agreement proposed by the employer]) or be effectuated by delegated consent (e.g., *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 852–854, 114 Cal.Rptr.3d 263, 237 P.3d 584 (*Ruiz*).) An arbitration clause within a contract may be binding on a party even if the party never actually read the clause. (*24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1215, 78 Cal.Rptr.2d 533.)" (Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC (2012) 55 Cal.4th 223, 236.)

""As this court has noted in the past, arbitration agreements should be liberally interpreted and arbitration should be ordered unless an agreement clearly does not apply to the dispute in question. (*Vianna v. Doctors' Management Co.* (1994) 27 Cal.App.4th 1186, 1189, 33 Cal.Rptr.2d 188.)" (Oakland-Alameda County Coliseum Authority v. CC Partners (2002) 101 Cal.App.4th 635, 644.)

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

"However, notwithstanding the cogency of the policy favoring arbitration and despite frequent judicial utterances that because of that policy every intendment must be indulged in favor of finding an agreement to arbitrate, the policy favoring arbitration cannot displace the necessity for a voluntary agreement to arbitrate. (See *Player v. Geo. M. Brewster & Son, Inc.*, supra, 18 Cal.App.3d 526, 534, 96 Cal.Rptr. 149.) As our Supreme Court recently observed: 'There is indeed a strong policy in favor of enforcing agreements to arbitrate, but there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate . . ..' (*Freeman v. State Farm Mut. Auto. Ins. Co.*, supra, 14 Cal.3d 473, 481, 121 Cal.Rptr. 477, 482, 535 P.2d 341, 346.) And it has been held that to be enforceable, an agreement to arbitrate must have been 'openly and fairly entered into.' (*Player v. Geo. M. Brewster & Son, Inc.*, supra, 18 Cal.App.3d 526, 534, 96 Cal.Rptr. 149; *Windsor Mills, Inc. v. Collins & Aikman Co.*, supra, 25 Cal.App.3d 987, 993--994, 101 Cal.Rptr. 347.)" (Wheeler v. St. Joseph Hospital (1976) 63 Cal.App.3d 345, 356.)

"It follows, of course, that if there was no valid contract to arbitrate, the petition must be denied. (Ibid. ["There is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate. [Citation.]"]; *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit*

Co. (1992) 6 Cal.App.4th 1266, 1271, 8 Cal.Rptr.2d 587.)" (Banner Entertainment, Inc. v. Superior Court (Alchemy Filmworks, Inc.) (1998) 62 Cal.App.4th 348, 356.)

With the above-cited legal principles in mind, the court will rule on the motion.

Enforcement of Arbitration Award Through Arbitration

Citing Code of Civil Procedure, §§ 525 and 1287.4, Grail Semiconductor, Inc. v. Mitsubishi Electric and Electronics USA, Inc. (2014) 225 Cal.App.4th 786, 800, and Luster v. Collins (1993) 15 Cal.App.4th 1338, 1348, plaintiff argues that statutory and case law mandates that the judgment entered in 2011 is a permanent injunction that must be enforced solely by court proceedings and an arbitrator can not under any circumstances enforce the arbitration award entered as a judgment, even if it is so provided in the judgment.

"An injunction is a writ or order requiring a person to refrain from a particular act. It may be granted by the court in which the action is brought, or by a judge thereof; and when granted by a judge, it may be enforced as an order of the court." (Emphasis added.) (Code of Civil Procedure, § 525.)

"If an award is confirmed, judgment shall be entered in conformity therewith. The judgment so entered has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action of the same jurisdictional classification; and it may be enforced like any other judgment of the court in which it is entered, in an action of the same jurisdictional classification." (Emphasis added.) (Code of Civil Procedure, § 1287.4)

Sections 525 and 1287.4 are discretionary in nature. They provide that a confirmed arbitration award entered as a judgment and an injunction entered by the court as an order may be enforced by the court. (Emphasis the court's.) Those statutes do not provide that the judgment and/or injunction must be enforced by the court under all circumstances.

"We construe statutes and regulations in a manner that carries out the legislative or regulatory intent. (*Trope v. Katz* (1995) 11 Cal.4th 274, 280, 45 Cal.Rptr.2d 241, 902 P.2d 259.) We must " 'ascertain the intent of the [drafters] so as to effectuate the purpose' " of the regulations. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230, 110 Cal.Rptr. 144, 514 P.2d 1224.) The words used are the primary source for identifying the drafter's intent. (Ibid.) We give those words their usual and ordinary meaning where possible. (Code Civ. Proc., § 1858; Trope, supra, 11 Cal.4th at p. 280, 45 Cal.Rptr.2d 241, 902 P.2d 259.) We give significance to every word, avoiding an interpretation that renders any word surplusage. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798-799, 268 Cal.Rptr. 753, 789 P.2d 934.) We also interpret the words of a regulation in context, harmonizing to the extent possible all provisions relating to the same subject matter. (*County of Alameda v. Pacific Gas & Electric Co.* (1997) 51 Cal.App.4th 1691, 1698, 60 Cal.Rptr.2d 187.)" (Emphasis added.) (Simi Corp. v. Garamendi (2003) 109 Cal.App.4th 1496, 1505-1506.)

The usual and ordinary meaning of "may" is that the act is discretionary and not mandatory.

The cited portion of the appellate opinion in Grail Semiconductor, Inc. states: ""A permanent injunction is an equitable remedy for certain torts or wrongful acts of a defendant where a damage remedy is inadequate. A permanent injunction is a determination on the merits that a plaintiff has prevailed on a cause of action for tort or other wrongful act against a defendant and that equitable relief is appropriate." (*Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 646, 4 Cal.Rptr.2d 689.)" (Grail Semiconductor, Inc. v. Mitsubishi Electric & Electronics USA, Inc. (2014) 225 Cal.App.4th 786, 800.)

"An opinion is not authority for a point not raised, considered, or resolved therein. (E.g., *People v. Castellanos* (1999) 21 Cal.4th 785, 799, fn. 9, 88 Cal.Rptr.2d 346, 982 P.2d 211; *San*

Diego Gas & Elec. Co. v. Superior Court (1996) 13 Cal.4th 893, 943, 55 Cal.Rptr.2d 724, 920 P.2d 669.)" (Styne v. Stevens (2001) 26 Cal.4th 42, 57-58.)

That Grail Semiconductor, Inc. opinion does not raise, consider, or hold that permanent injunctions are only enforceable by the court.

The cited portion of the Luster opinion states: "From a statutory perspective we see nothing in section 1280 et seq., which authorizes an arbitrator to include economic sanctions, such as those imposed here, as part of the award. Our review of the statutory framework reveals the Legislature was keenly aware the arbitrator should have sufficient power to deal with problems pertaining to discovery. Section 1283.05, subdivision (b) expressly provides the arbitrator can enforce discovery orders "by the imposition of the same terms, conditions, consequences, liabilities, sanctions, and penalties as can be or may be imposed in like circumstances in a civil action by a superior court...." (See also § 1283.05, subd. (c).) There is no counterpart to this provision giving the arbitrator the statutory power to enforce the award." (Luster v. Collins (1993) 15 Cal.App.4th 1338, 1348.)

That portion of the opinion followed the appellate court's finding that "The award's language makes clear the per diem award reflects the arbitrator's attempt to enforce his orders by imposing a sanction for future violations of the orders." (Luster v. Collins (1993) 15 Cal.App.4th 1338, 1348.)

The appellate court also expressly found that the parties are free to agree to enforce arbitration awards reduced to a judgment. The appellate court stated: "Whether the parties stipulated the arbitrator should have the power to impose economic sanctions is a separate question. We are unaware of any legal impediment precluding the parties from agreeing the arbitrator could concurrently impose economic sanctions to effect performance of the award. There is nothing in the agreement, however, to this effect. The parties stipulated the arbitrator's

powers were those prescribed in section 1280 et seq. They did not say the arbitrator would also have the power to enforce his award. Our earlier discussion pointing out the enforcement mechanisms provided by statute following confirmation of the award as a judgment explains why the parties did not do so." (Luster v. Collins (1993) 15 Cal.App.4th 1338, 1349–1350.)

The settlement agreement entered into by the parties expressly provided that all disputes between the parties arising from the easement as a term or topic of the settlement agreement "shall be subject to binding arbitration" (Verified Complaint, Exhibit D – Settlement Agreement, paragraphs C.3 and C.7.) and the parties expressly stipulated/agreed to confirm the 2010 arbitration award concerning their disputes over that same easement and agreed to have it entered as a court judgment in case number PCL-20110390. The arbitration award expressly provided that the arbitrator retained jurisdiction to resolve any disputes as to the implementation of the order and to address any future issues that may arise in the administration of the easement.

The stipulation to confirm the award and enter it as a judgment is a stipulated agreement between the parties to have the arbitrator retain jurisdiction "to resolve any disputes as to the implementation of this order, and to address any future issues that may arise from time to time in the administration of the easement." (Complaint, Exhibit E – May 17 Confirmation and Judgment in Reinders v. Visman, case number PCL-20110390, Exhibit A – November 29, 2010 Arbitration Award, page 26, lines 8-10.) There is contractual authority to enforce arbitration of "any disputes as to the implementation of this order, and to address any future issues that may arise from time to time in the administration of the easement." The arbitrator need not rely on any statutory authority to enforce the 2011 judgment.

The court rejects the argument that the permanent injunction and disputes concerning the easement that arise after entry of judgment in 2011 can only be determined by the court.

Agreement to Binding Arbitration of All Disputes Arising From or Related to the Subject Easement in Favor of Plaintiff

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. (Verified Complaint, Exhibit D – Settlement Agreement, paragraph C.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. (Verified Complaint, Exhibit E – Stipulation and 2011 Arbitration Award/Judgment.) The settlement agreement entered into by the parties expressly provided that all disputes between the parties arising from the easement as a term or topic of the settlement agreement "shall be subject to binding arbitration" (Verified Complaint, Exhibit D – Settlement Agreement, paragraphs C.3 and C.7.) and the parties expressly stipulated/agreed to confirm the 2010 arbitration award concerning their disputes over that same easement and agreed to have it entered as a court judgment in case number PCL-20110390. The arbitration award expressly provided that the arbitrator retained jurisdiction to resolve any disputes as to the implementation of the order and to address any future issues that may arise in the administration of the easement.

The settlement agreement was entered into by and between Jerry Visman and George Visman, individually and d.b.a High Hill Ranch and Marcus Reinders and Frances Reinders, individually and d.b.a The Fudge Factory. (Verified Complaint, Exhibit D – Settlement Agreement.) The Stipulation for Confirmation of Arbitration Award and for Entry of Judgment was executed by the counsels on behalf of Jerry Visman and George Visman, individually and d.b.a

High Hill Ranch and Marcus Reinders and Frances Reinders, individually and d.b.a The Fudge Factory

- Scope of Arbitration Agreement

Plaintiff argues that the 2002 settlement agreement did not agree to successive arbitrations over the same issues, particularly where there is a judgment entered and the claims involve violation of the terms of the judgment.

Plaintiff also argues that the parties did not agree to arbitrate the 3rd and 4th tort causes of action for intentional interference with business relationship and private nuisance.

“"... the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels...." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 10, 10 Cal.Rptr.2d 183, 832 P.2d 899.) This strong policy has resulted in the general rule that arbitration should be upheld "unless it can be said with assurance that an arbitration clause is not susceptible to an interpretation covering the asserted dispute. (Citation.))" (Citation omitted.)” (Coast Plaza Doctors Hosp. v. Blue Cross of California (2000) 83 Cal.App.4th 677, 686.)

“It seems clear that the burden must fall upon the party opposing arbitration to demonstrate that an arbitration clause *cannot* be interpreted to require arbitration of the dispute. Thus, if there is any reasonable doubt as to whether Coast Plaza's claims come within the Service Agreement's arbitration clause, that doubt must be resolved in favor of arbitration, not against it. (*Hayes Children Leasing Co. v. NCR Corp.* (1995) 37 Cal.App.4th 775, 788, 43 Cal.Rptr.2d 650; *Vianna v. Doctors' Management Co.* (1994) 27 Cal.App.4th 1186, 1189, 33 Cal.Rptr.2d 188; *United Transportation Union v. Southern Cal. Rapid Transit Dist.* (1992) 7 Cal.App.4th 804, 808, 9 Cal.Rptr.2d 702.)” (Coast Plaza Doctors Hosp. v. Blue Cross of California (2000) 83 Cal.App.4th 677, 686-687.)

Plaintiff contends: that the 2002 settlement agreement was limited solely to the terms and topics of the agreement; the purpose of the settlement was to resolve the 2002 litigation; a judgment was entered in 2011; the primary objective of the instant litigation is not to enforce the 2002 settlement agreement and the primary objective of this litigation is to enforce the 2011 judgment; forcing the instant lawsuit to arbitration would undermine the 2002 settlement agreement by depriving plaintiff of the benefit of that bargain, because the parties have already arbitrated many of the issues in dispute with the arbitration award final and binding; the parties did not intend that the agreement provided for re-arbitration of disputes already submitted to binding arbitration; arbitration would undermine the finality of the prior award; and defendants have engaged in a course of conduct inconsistent with their current position in bypassing arbitration and suing plaintiff in small claims court for easement maintenance costs (Plaintiff's Request for Judicial Notice, Exhibit 1 – Decision and Judgment in case number PSC-20160156.)

Plaintiff further contends: the tort claims for intentional inference with business relationship and private nuisance are not rooted in the 2002 settlement agreement and are, instead, rooted in plaintiff's longstanding easement right; the tort claims also arise from the 2011 judgment; and the tort causes of action are rooted in independent tortious, anti-competitive behavior.

The terms and topics of the 2002 settlement agreement expressly included the recorded easement in favor of the Fudge Factory for ingress and egress on High Hill Road; the operation of that easement road to provide access to the Fudge Factory; an alternate easement road over Orchard Road, which the Fudge Factory, its customers, and invitees are to have unrestricted access to use in the event that High Hill Ranch diverts traffic from High Hill Road due to health, safety and welfare concerns; neither party is to do anything to impair or interfere with the other party's rights under the easement; the parties agree to remove any obstructions and barriers which impair the ordinary flow of traffic and/or pedestrians within the easement to or from the

parties, parking facilities, or businesses; the Fudge Factory shall have the right to install a promotional sign within the recorded easement that does not interfere with High Hill Ranch signage or impair ingress or egress to the properties; and the Fudge Factory may place no more than three directional signs within the easement to help direct traffic into the Fudge Factory parking facilities. (Verified Complaint, Exhibit D – Settlement Agreement, paragraphs C.7 and C.10.)

As stated earlier in this ruling, the parties expressly agreed in the stipulation to confirm the award and enter it as a judgment to have the arbitrator retain jurisdiction "to resolve any disputes as to the implementation of this order, and to address any future issues that may arise from time to time in the administration of the easement." (Complaint, Exhibit E – May 17 Confirmation and Judgment in Reinders v. Visman, case number PCL-20110390, Exhibit A – November 29, 2010 Arbitration Award, page 26, lines 8-10.) There is contractual authority to enforce arbitration of "any disputes as to the implementation of this order, and to address any future issues that may arise from time to time in the administration of the easement." The arbitrator need not rely on any statutory authority to enforce the 2011 judgment.

The facts alleged in the verified complaint make it clear that this case and all causes of action arise from disputes concerning the easement that is the subject of the 2002 settlement agreement and 2011 judgment/arbitration award, including alleged anti-competitive behavior such as removal of the Fudge Factory signs and closure of High Hill Ranch Road that confuse delivery drivers and customers who had a difficult time reaching the Fudge Factory. (Verified Complaint, paragraphs 8-10; 12, 17, 19-31, 33-36, 38-43, 49, 57, 64, 71, and 80.)

The arbitration would not undermine the 2002 settlement agreement by depriving plaintiff of the benefit of that bargain and, in fact, the plaintiff will receive the benefit of the bargain by having access to arbitration plaintiff agreed to in 2002.

The arbitration would not undermine the finality of the prior award and, in fact, it is consistent with the final award providing for the arbitrator to decide "any disputes as to the implementation of this order, and to address any future issues that may arise from time to time in the administration of the easement."

Resolving doubts in favor of arbitration, not against it, the court finds that under the totality of circumstance presented, the arbitration clause of the settlement agreement and arbitrator's retention of jurisdiction in the judgment entered in 2011 is susceptible to an interpretation covering the asserted disputes in this action.

Plaintiff also argues defendants have engaged in a course of conduct inconsistent with their current position in bypassing arbitration and suing plaintiff in small claims court in 2016 for easement maintenance costs, which is essentially an argument that defendants have waived the right to arbitrate all disputes arising from defendants' conduct concerning the plaintiff's easement rights.

"California law, "like [federal law], reflects a strong policy favoring arbitration agreements and requires close judicial scrutiny of waiver claims." (*St. Agnes Medical Center v. PacifiCare of California, supra,* at p. 1195, 8 Cal.Rptr.3d 517, 82 P.3d 727.) Moreover, "waivers are not lightly to be inferred and the party seeking to establish a waiver bears a heavy burden of proof." (*Ibid.*)" (Wagner Const. Co. v. Pacific Mechanical Corp. (2007) 41 Cal.4th 19, 31.)

"The principles underlying the waiver doctrine are well settled. " ' "Waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts. [Citations.] The burden, moreover, is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and 'doubtful cases will be decided against a waiver." ' [Citations.]" (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60, 35 Cal.Rptr.2d 515; *City of Ukiah v. Fones*

(1966) 64 Cal.2d 104, 107-108, 48 Cal.Rptr. 865, 410 P.2d 369.) 'The pivotal issue in a claim of waiver is the intention of the party who allegedly relinquished the known legal right.' (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.*, supra, at p. 60, 35 Cal.Rptr.2d 515; *Jovine v. FHP, Inc.* (1998) 64 Cal.App.4th 1506, 1527, 76 Cal.Rptr.2d 322.)" (Emphasis added.) (Southern California Edison Co. v. Public Utilities Com'n (2000) 85 Cal.App.4th 1086, 1107.)

"As our decisions explain, the term "waiver" has a number of meanings in statute and case law. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 982-983, 64 Cal.Rptr.2d 843, 938 P.2d 903 (*Engalla*).) While "waiver" generally denotes the voluntary relinquishment of a known right, it can also refer to the loss of a right as a result of a party's failure to perform an act it is required to perform, regardless of the party's intent to relinquish the right. (*Engalla*, supra, 15 Cal.4th at p. 983, 64 Cal.Rptr.2d 843, 938 P.2d 903; *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 315, 24 Cal.Rptr.2d 597, 862 P.2d 158.) In the arbitration context, "[t]he term 'waiver' has also been used as a shorthand statement for the conclusion that a contractual right to arbitration has been lost." (*Platt Pacific, Inc. v. Andelson*, supra, 6 Cal.4th at p. 315, 24 Cal.Rptr.2d 597, 862 P.2d 158.)" (Saint Agnes Medical Center v. PacifiCare of California (2003) 31 Cal.4th 1187, 1195, fn. 4.)

"Both state and federal law emphasize that no single test delineates the nature of the conduct that will constitute a waiver of arbitration. (E.g., *Engalla*, supra, 15 Cal.4th at p. 983, 64 Cal.Rptr.2d 843, 938 P.2d 903; *Martinez v. Scott Specialty Gases, Inc.* (2000) 83 Cal.App.4th 1236, 1249-1250, 100 Cal.Rptr.2d 403; *Adams v. Merrill Lynch Pierce Fenner & Smith* (10th Cir.1989) 888 F.2d 696, 701; *Burton-Dixie Corp. v. Timothy McCarthy Construction Co.* (5th Cir.1971) 436 F.2d 405, 408; *Brownyard v. Maryland Casualty Co.* (D.S.C.1994) 868 F.Supp. 123, 126.) " 'In the past, California courts have found a waiver of the right to demand arbitration

in a variety of contexts, ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration [citations] to instances in which the petitioning party has unreasonably delayed in undertaking the procedure. [Citations.] The decisions likewise hold that the "bad faith" or "wilful misconduct" of a party may constitute a waiver and thus justify a refusal to compel arbitration. [Citations.]' " (*Engalla*, supra, 15 Cal.4th at p. 983, 64 Cal.Rptr.2d 843, 938 P.2d 903, quoting *Davis v. Blue Cross of Northern California* (1979) 25 Cal.3d 418, 425-426, 158 Cal.Rptr. 828, 600 P.2d 1060.) ¶ In *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 72 Cal.Rptr.2d 43, the Court of Appeal referred to the following factors: "In determining waiver, a court can consider '(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether "the litigation machinery has been substantially invoked" and the parties "were well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) "whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place"; and (6) whether the delay "affected, misled, or prejudiced" the opposing party.' " (*Sobremonte v. Superior Court,* supra, 61 Cal.App.4th at p. 992, 72 Cal.Rptr.2d 43, quoting *Peterson v. Shearson/American Exp., Inc.* (10th Cir.1988) 849 F.2d 464, 467- 468.) We agree these factors are relevant and properly considered in assessing waiver claims." (Saint Agnes Medical Center v. PacifiCare of California (2003) 31 Cal.4th 1187, 1195-1196.)

"" ' "There is no single test for waiver of the right to compel arbitration... ." ' " (*Augusta v. Keehn & Associates* (2011) 193 Cal.App.4th 331, 337, 123 Cal.Rptr.3d 595 (*Augusta*), quoting *Berman v. Health Net* (2000) 80 Cal.App.4th 1359, 1363–1364, 96 Cal.Rptr.2d 295 (*Berman*).)

Our high court, however, has articulated six factors a trial court should consider to determine whether a party has waived its right to arbitrate: " ' "(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether 'the litigation machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) 'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party." [Citations.]' " (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196, 8 Cal.Rptr.3d 517, 82 P.3d 727 (*St. Agnes*).) Though some courts apply a more limited three-factor test, " 'the party who seeks to establish waiver must show that some prejudice has resulted from the other party's delay in seeking arbitration.' " (*Berman, supra,* 80 Cal.App.4th at p. 1364, 96 Cal.Rptr.2d 295, quoting *Davis v. Continental Airlines, Inc.* (1977) 59 Cal.App.4th 205, 212, 69 Cal.Rptr.2d 79 [applying a three-factor test].) (O'Donoghue v. Superior Court (2013) 219 Cal.App.4th 245, 262-263.)

The appellate court in O'Donoghue v. Superior Court (2013) 219 Cal.App.4th 245 stated the following regarding what has been found to be a sufficient showing of prejudice justifying denial of arbitration due to prejudice: ""Notwithstanding plaintiff's use of discovery procedures and its delay in seeking judicial reference, we conclude plaintiff has not waived its right to reference because defendants have not established prejudice. Courts " 'will not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses.' [Citation.] [Courts] assess prejudice in light of California's strong public policy favoring arbitration. [Citation.] 'Prejudice typically is found only where the petitioning party's conduct has substantially

undermined this important public policy or substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration.' [Citation.] Prejudice may be found where the petitioning party used the judicial process to gain information it could not have gained in arbitration, waited until the eve of trial to seek arbitration, or delayed so long that evidence was lost. [Citation.]" (*Brown, supra,* 216 Cal.App.4th at p. 1316, 157 Cal.Rptr.3d 779.)" (O'Donoghue v. Superior Court (2013) 219 Cal.App.4th 245, 264-265.)

"In California, whether or not litigation results in prejudice also is critical in waiver determinations. (*Keating v. Superior Court* (1982) 31 Cal.3d 584, 605, 183 Cal.Rptr. 360, 645 P.2d 1192, disapproved on other grounds, *Southland Corp. v. Keating* (1984) 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1; Doers, supra, 23 Cal.3d at pp. 188-189, 151 Cal.Rptr. 837, 588 P.2d 1261; *Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 212, 69 Cal.Rptr.2d 79.) That is, while " '[w]aiver does not occur by mere participation in litigation' " if there has been no judicial litigation of the merits of arbitrable issues, " ' "waiver could occur prior to a judgment on the merits if prejudice could be demonstrated." ' " (*Christensen v. Dewor Developments*, supra, 33 Cal.3d at p. 782, 191 Cal.Rptr. 8, 661 P.2d 1088). ¶ Because merely participating in litigation, by itself, does not result in a waiver, courts will not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses. (See *Groom v. Health Net* (2000) 82 Cal.App.4th 1189, 1197, 98 Cal.Rptr.2d 836 [mere expense of responding to motions or other preliminary pleadings filed in court is not the type of prejudice that bars a later petition to compel arbitration]; accord, *Crysen/Montenay Energy Co. v. Shell Oil Co.* (2d Cir.2000) 226 F.3d 160, 163.) ¶ Rather, courts assess prejudice with the recognition that California's arbitration statutes reflect " 'a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution' " and are intended " 'to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal

of their own choosing.' " (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9, 10 Cal.Rptr.2d 183, 832 P.2d 899.) Prejudice typically is found only where the petitioning party's conduct has substantially undermined this important public policy or substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration. ¶ For example, courts have found prejudice where the petitioning party used the judicial discovery processes to gain information about the other side's case that could not have been gained in arbitration (e.g., *Berman v. Health Net* (2000) 80 Cal.App.4th 1359, 1366, 96 Cal.Rptr.2d 295; *Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 558, 94 Cal.Rptr.2d 201; *Davis v. Continental Airlines, Inc.*, supra, 59 Cal.App.4th at p. 215, 69 Cal.Rptr.2d 79); where a party unduly delayed and waited until the eve of trial to seek arbitration (e.g., *Sobremonte v. Superior Court*, supra, 61 Cal.App.4th at pp. 995-996, 72 Cal.Rptr.2d 43); or where the lengthy nature of the delays associated with the petitioning party's attempts to litigate resulted in lost evidence (e.g., *Christensen v. Dewor Developments*, supra, 33 Cal.3d at p. 784, 191 Cal.Rptr. 8, 661 P.2d 1088)." (Emphasis added.) (Saint Agnes Medical Center v. PacifiCare of California (2003) 31 Cal.4th 1187, 1203-1204.)

Defendant filed a small claims action limited solely to recovery of costs for maintaining the subject easement road during a certain period of time. The issues raised in this action were not raised in the prior small claims action. The use of the summary proceeding in small claims to resolve a dispute concerning road maintenance costs does not establish that defendants intentionally relinquished their right to arbitrate other disputes arising from the judgment and settlement agreement. Furthermore, the small claims litigation conduct has not substantially undermined the important public policy regarding agreements to arbitrate and has not substantially impaired the plaintiff's ability to take advantage of the benefits and efficiencies of

arbitration of the disputes raised in this action. In other words, the prior small claims litigation did not result in prejudice to plaintiff related to arbitration concerning other issues.

The court rejects plaintiff's arguments that the issues in the subject litigation, including the tort causes of action, fall outside the scope of the arbitration agreement and judgment; and that defendants' prosecution of a small claims litigation against plaintiff concerning the easement road maintenance costs bars arbitration of the issues in this action.

Settlement Agreement Mandates Arbitration

Plaintiff argues that the settlement agreement provides that arbitration of the disputes by the parties is not mandated and is voluntary as established by paragraph L of the settlement agreement providing for award of attorney fees to the prevailing party in arbitrations or litigation of disputes and paragraph M of the settlement agreement that makes clear that the parties understood the court would ultimately enforce the settlement agreement and did not exclusively require arbitration.

"A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." (Civil Code, § 1643.)

""' 'As a rule, the language of an instrument must govern its interpretation if the language is clear and explicit. [Citations.] A court must view the language in light of the instrument as a whole and not use a "disjointed, single-paragraph, strict construction approach' [citation]." If possible, the court should give effect to every provision. [Citations.] An interpretation which renders part of the instrument to be surplusage should be avoided. [Citations.]" (Emphasis added.) (National City Police Officers' Ass'n v. City of National City (2001) 87 Cal.App.4th 1274, 1279.)

The settlement agreement provides with regards to recovery of attorney fees arising out of the settlement agreement: "If any party to this settlement agreement becomes involved in a

dispute or controversy, including, but not limited to, arbitration or litigation…" (Verified Complaint, Exhibit D – Settlement Agreement, paragraph L.)

The settlement agreement also provides: "The parties specifically entered into this SETTLEMENT AGREEMENT with the understanding that it is enforceable by the court in which the SUBJECT LITIGATION has been filed. In the event any party fails to perform the conditions or terms required therein, the court may enforce the terms of this SETTLEMENT AGREEMENT." (Emphasis in Original.) (Verified Complaint, Exhibit D – Settlement Agreement, paragraph M.)

The agreement that the settlement agreement may be enforced by the court is reasonably construed in light of the binding arbitration provision to mean that the court may enforce the mandated, binding arbitration provision of the agreement wherein the parties expressly agreed that all disputes between the parties arising from the easement as a term or topic of the settlement agreement "shall be subject to binding arbitration" (Emphasis added.) (Verified Complaint, Exhibit D – Settlement Agreement, paragraphs C.3 and C.7.)

To accept plaintiff's interpretation of the effect of paragraphs L and M of the settlement agreement will render the mandatory language that all disputes shall be subject to binding arbitration to be mere surplusage and instead essentially rewrite the arbitration provision to provide that all disputes may be determined by the court or by binding arbitration. (Emphasis added.)

The court rejects plaintiff's interpretation of the effect of paragraph M of the settlement agreement on the express mandatory requirement of the arbitration provision.

Defendant High Hill Ranch, LLC May Move to Compel Arbitration Despite Not Having Executed the Agreement as an LLC

It is beyond doubt that defendant Visman is a signatory of the settlement agreement and, therefore, defendant Visman and plaintiff are required to arbitrate the disputes raised in this action with the action stayed pending such arbitration.

Plaintiff asserts in opposition that defendant High Hills Ranch, LLC can not enforce the arbitration agreement against plaintiff as it is not signatory to the agreement and the agreement is not generally binding on successors in interest to the parties as paragraph H of the agreement provides: "The provisions of this SETTLEMENT AGREEMENT will be binding upon and inure to the benefit of the heirs, executors, administrators, and personal representatives of the respective parties hereto." (Verified Complaint, Exhibit D – Settlement Agreement, paragraph H.)

Plaintiff also argues in footnote 2 on page 11 of the opposition that the rights of the settlement agreement are not assignable as paragraph E states: plaintiffs and defendants will not in the future assign, transfer or hypothecate to anyone any right or obligation "set forth herein." (Verified Complaint, Exhibit D – Settlement Agreement, paragraph E.)

"A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." (Civil Code, § 1589.)

"" 'Generally speaking, one must be a party to an arbitration agreement to be bound by it or invoke it.' [Citations.] 'There are exceptions to the general rule that a nonsignatory to an agreement cannot be compelled to arbitrate and cannot invoke an agreement to arbitrate, without being a party to the arbitration agreement.' " (*JSM Tuscany, LLC v. Superior Court* (2011) 193 Cal.App.4th 1222, 1236–1237, 123 Cal.Rptr.3d 429 (*JSM Tuscany*).) " ' "As one authority has stated, there are six theories by which a nonsignatory may be bound to arbitrate: '(a)

incorporation by reference; (b) assumption; (c) agency; (d) veil-piercing or alter ego; (e) estoppel; and (f) third-party beneficiary.' " ' " (*Cohen v. TNP 2008 Participating Notes Program, LLC* (2019) 31 Cal.App.5th 840, 859, 243 Cal.Rptr.3d 340 (*Cohen*).)" (Emphasis added.) (Pillar Project AG v. Payward Ventures, Inc. (2021) 64 Cal.App.5th 671, 675 [279 Cal.Rptr.3d 117, 121.)

"In the arbitration context, a party who has *not* signed a contract containing an arbitration clause may nonetheless be compelled to arbitrate when he seeks enforcement of other provisions of the same contract that benefit him. (*Id.* at p. 418; *NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 81, 100 Cal.Rptr.2d 683 (*NORCAL*).)" (Metalclad Corp. v. Ventana Environment Organizational Partnership (2003) 109 Cal.App.4th 1705, 1713.)

Plaintiff is a signatory to the 2002 settlement agreement and the 2011 stipulation to confirm the 2010 arbitration award that includes a provision for arbitration of easement issues that arise in the future.

Plaintiff's verified complaint admits that defendant Jerry Visman and his father operated High Hill Ranch as a sole proprietorship until April 22, 2011 when Jerry formed defendant High Hill Ranch, LLC; and the settlement agreement provided that subject easement is on High Hill Ranch property that includes the High Hill Ranch Road, or, in the alternative, Orchard Road. (Verified Complaint, paragraphs 3 and 23; and Exhibit D, paragraph C.7.)

Defendant Visman admits in his declaration in opposition to the preliminary injunction the following facts: High Hill Ranch, LLC (High Hill Ranch) owns the subject real property; 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; and that road runs directly through one of the busiest pedestrian thoroughfares on the High Hill Ranch property. (Emphasis added.) (Declaration of Defendant Jerry Visman in Opposition to OSC Re: Preliminary Injunction, paragraphs 1, 3, and 6.)

The court takes judicial notice of the records of the California Secretary of State concerning High Hill Ranch, LLC that the LLC was registered with the Secretary of State on April 22, 2011, prior to High Hill Ranch agreeing to confirmation of the arbitration award and entry of the award as a judgment in PCL-201100390 wherein the parties agreed that High Hill Ranch would be bound by confirmation of that award. The court further takes judicial notice of the records of the Secretary of State that defendant Jerry Visman is the sole member of the LLC, agent for service of process, and CEO, as reflected in the statement of information on the LLC on file with the Secretary of State.

Defendant High Hill Ranch, LLC is at the very least a mere continuation of the High Hill Ranch proprietorship.

Although defendants concede in the reply that defendant High Hill Ranch, LLC is not a signatory to the arbitration agreement and seek to move forward with arbitration between the plaintiff and defendant Visman with a stay of further proceedings in the case, defendant High Hill Ranch, LLC is allegedly the agent of all other defendants, including signatory defendant Visman, and, therefore, is entitled to move to compel arbitration.

Paragraph 4 of the complaint alleges "…Defendants, together with DOES 1 through 10, inclusive, were and are the agents, employees, and/or joint venturers of each other and that all defendants participated in each of the acts and omissions of the other defendants…that all of the things alleged to have been done by those defendants were done under the scope and capacity of and as agents, employees, representatives and/or joint venturers for each of the other defendants…"

"There are, however, "exceptions to the general rule that a nonsignatory ... cannot invoke an agreement to arbitrate, without being a party to the arbitration agreement." (*Westra, supra,* 129 Cal.App.4th at p. 765, 28 Cal.Rptr.3d 752.) <u>One such exception provides that when a plaintiff</u>

alleges a defendant acted as an agent of a party to an arbitration agreement, the defendant may enforce the agreement even though the defendant is not a party thereto. (E.g., *Dryer v. Los Angeles Rams* (1985) 40 Cal.3d 406, 418, 220 Cal.Rptr. 807, 709 P.2d 826 (*Dryer*); *RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 Cal.App.4th 1511, 1520, 81 Cal.Rptr.3d 892 (*RN Solution*); *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1210, 78 Cal.Rptr.2d 533 (*24 Hour Fitness*).) [FN 7] Here, the operative complaint alleged: "At all times relevant herein, Defendants, and each of them, acted as an agent of each other Defendant in connection with the acts and omissions alleged herein." It also alleged that in soliciting Katherine to act or refrain from acting and providing her with information, "Defendants were acting as the actual or ostensible agents of the other Defendants." The operative complaint further alleged that Westlake, in all of his dealings with Katherine, "acted on behalf of, and as the authorized agent of," all of the other defendants. Accordingly, as alleged agents of parties to the agreements containing arbitration clauses, AFI, Westlake, WGG, IDS and RiverSource are also entitled to compel arbitration of John's claims against them. ¶ FN 7. Some of the arbitration clauses introduced by defendants require arbitration be "conducted pursuant to the Federal Arbitration Act." This does not require us to apply federal law in determining defendants' right to compel arbitration, however. Even when the Federal Arbitration Act applies, state law governs such matters as who is bound by and who may enforce an arbitration agreement. (*Arthur Andersen LLP v. Carlisle* (2009) 556 U.S. 624, 630–632, 129 S.Ct. 1896, 1902, 173 L.Ed.2d 832, 839–840; *Bank of America v. UMB Financial Services, Inc.* (8th Cir.2010) 618 F.3d 906, 912.) ¶ John contended at oral argument, however, that the allegations of agency he made in the operative complaint cannot be used to require him to arbitrate his claims against the defendants which are not parties to any of the agreements Katherine executed. According to John, agency is only a theory of tort liability by which he may hold those defendants responsible for the wrongdoing that

allegedly arose out of the relationship created by those agreements. We disagree. Having alleged all defendants acted as agents of one another, John is bound by the legal consequences of his allegations. (See *Westra, supra,* 129 Cal.App.4th at p. 766, 28 Cal.Rptr.3d 752 [plaintiffs' allegations that nonsignatory to arbitration agreement acted as agent of signatory parties constituted binding judicial admissions].) And, as the cases cited above hold, a plaintiff's allegations of an agency relationship among defendants is sufficient to allow the alleged agents to invoke the benefit of an arbitration agreement executed by their principal even though the agents are not parties to the agreement. (*Dryer, supra,* 40 Cal.3d at p. 418, 220 Cal.Rptr. 807, 709 P.2d 826; *RN Solution, supra,* 165 Cal.App.4th at p. 1520, 81 Cal.Rptr.3d 892; *24 Hour Fitness, supra,* 66 Cal.App.4th at p. 1210, 78 Cal.Rptr.2d 533.) Moreover, it would be unfair to defendants to allow John to invoke agency principles when it is to his advantage to do so, but to disavow those same principles when it is not. (See Civ.Code, § 3521 ["He who takes the benefit must bear the burden."]; *Avina v. Cigna Healthplans of California* (1989) 211 Cal.App.3d 1, 3, 259 Cal.Rptr. 105, ["To allow respondent to assert rights and benefits under the contract and then later repudiate it merely to avoid arbitration would be entirely inequitable."].) We therefore reject John's attempt to limit the legal effect of his agency allegations to the imposition of tort liability on defendants." (Emphasis added.) (Thomas v. Westlake (2012) 204 Cal.App.4th 605, 614–615.)

The motion is being brought against a signatory plaintiff by a signatory defendant and his alleged nonsignatory agent. Defendant Hugh Hill Ranch, LLC has standing to invoke the arbitration provision and move to compel arbitration as the alleged agent of defendant Visman. The court rejects plaintiff's argument that defendant High Hill Ranch, LLC can not move to compel arbitration pursuant to the 2002 settlement agreement and the 2011 judgment.

The Arbitrator Lacks Authority to Retain Jurisdiction Over All Future Disputes Concerning the Easement

Plaintiff contends that arbitration award reduced to a judgment can not be reasonably interpreted to extend the arbitrator's jurisdiction over any of the issues in this case as those issues were not before the arbitrator in the prior arbitration award, which renders the portion of the award retaining any such jurisdiction invalid.

- The Arbitrator's Purported Reservation Of Jurisdiction Does Not Cover the Present Dispute

Plaintiff argues that arbitration award entered as a judgment that states the arbitrator is retaining jurisdiction to resolve any disputes as to the implementation of the arbitration award only allows the arbitrator to amend or supplement the arbitrator's order and does not retain jurisdiction over disputes that occur after entry of the judgment and award.

First, the arbitration provision of the 2002 settlement agreement applies. As stated earlier in this ruling, the 2002 settlement agreement related to the subject easements included an agreement to arbitrate "All disputes arising from or related to the terms or topics of this Settlement Agreement, including, but not limited to the interpretation thereof…" (Complaint, Exhibit D – 2002 Compromise Settlement Agreement and Mutual Release, paragraph C.3.) The terms and topics of the 2002 settlement agreement expressly included the recorded easement in favor of the Fudge Factory for ingress and egress on High Hill Road; the operation of that easement road to provide access to the Fudge Factory; an alternate easement road over Orchard Road, which the Fudge Factory, its customers, and invitees are to have unrestricted access to use in the event that High Hill Ranch diverts traffic from High Hill Road due to heath safety and welfare concerns; neither party is to do anything to impair or interfere with the other party's rights under the easement; the parties agree to remove any obstructions, barriers which impair the ordinary flow of traffic and/or pedestrians within the easement to or from the parties;

parking facilities or businesses; the Fudge Factory shall have the right to install a promotional sign within the recorded easement that does not interfere with High Hill Ranch signage or impair ingress or egress to the properties; and the Fudge Factory may place no more than three directional signs within the easement to help direct traffic into the Fudge Factory parking facilities. (Verified Complaint, Exhibit D – Settlement Agreement, paragraphs C.7 and C.10.) The provision is not limited to the disputes that arose at the time of the settlement and includes future events arising from or related to the terms or topics of the Settlement Agreement. The instant action involves disputes involving terms or topics of the Settlement Agreement related to the subject easement and conduct relating to the signage and obstruction of easement claims. Therefore, an arbitrator would have jurisdiction to decide these issues.

Furthermore, the stipulation to confirm the award and enter it as a judgment is a stipulated agreement between the parties to have the arbitrator retain jurisdiction "to resolve any disputes as to the implementation of this order, and to address any future issues that may arise from time to time in the administration of the easement." (Emphasis added.) (Complaint, Exhibit E – May 17 Confirmation and Judgment in Reinders v. Visman, case number PCL-20110390, Exhibit A – November 29, 2010 Arbitration Award, page 26, lines 8-10.) There is contractual authority to enforce arbitration of "any disputes as to the implementation of this order, and to address any future issues that may arise from time to time in the administration of the easement."

The court rejects plaintiff's argument that the arbitrator's retaining jurisdiction to resolve any disputes as to the implementation of the arbitration award only allows the arbitrator to amend or supplement the arbitrator's order and does not retain jurisdiction over disputes that occur after entry of the judgment and award.

- The Arbitrator Does Not Have Jurisdiction Over This Dispute

Citing Ajida Technologies, Inc. v. Roos Instruments, Inc. (2001) 87 Cal.App.4th 534, 547-548, plaintiff contends an arbitrator may not exert or retain jurisdiction over issues that the parties have not submitted. Plaintiff further contends this action is not to enforce the 2002 settlement agreement, this action is only to enforce the 2011 judgment, the alleged misconduct all arose long after the arbitration award was issued, and, therefore, there is no jurisdiction to arbitrate the disputes raised in this action.

"Appellant next claims that the arbitrators improperly retained jurisdiction by mandating arbitration in the event of future disputes. Appellant points out that the arbitrators' tentative final award expressly declined to reserve jurisdiction absent both parties' consent. But the later versions of the award included the arbitration provision challenged here. Appellant objects to that provision as an improper attempt to retain arbitral jurisdiction. ¶ Respondent counters that the arbitrators did not *retain* jurisdiction in including those provisions; they merely decided that the parties' contractual arbitration provision would apply to future disputes over the award. Respondent thus distinguishes between the reservation of jurisdiction, which permits a pending arbitration to continue, and the provision challenged here, which mandates the institution of a new arbitration proceeding in the event of future disputes. We appreciate that distinction and its procedural implications. (See, e.g., § 1284 [arbitrators lose jurisdiction to correct award 30 days after its service].) In the context of this particular appeal, however, that distinction need not affect our analysis since appellant resists the prospect of any future arbitration, whether it results from the retention of jurisdiction or from the institution of a new proceeding. (Cf. *Colvig v. RKO General, Inc.* (1965) 232 Cal.App.2d 56, 74–75, 42 Cal.Rptr. 473.) In any event, appellant's objection is unavailing. ¶ An arbitrator's continuing authority may properly be drawn both from the parties' agreement to arbitrate their disputes and from the nature of the remedy itself.

(Cf. *Swan Magnetics, Inc. v. Superior Court, supra,* 56 Cal.App.4th at p. 1512, 66 Cal.Rptr.2d 541.)[Footnote omitted.] Of course, an arbitrator may not exert or retain jurisdiction over issues that the parties have not submitted. (*Ray Wilson Co. v. Anaheim Memorial Hospital Assn.* (1985) 166 Cal.App.3d 1081, 1091–1092, 213 Cal.Rptr. 62, disapproved on other grounds in *Moncharsh v. Heily & Blase, supra,* 3 Cal.4th at pp. 27–28, 10 Cal.Rptr.2d 183, 832 P.2d 899.) Nor may an arbitrator reserve jurisdiction when the remedy does not warrant it. (*San Jose Federation etc. Teachers v. Superior Court* (1982) 132 Cal.App.3d 861, 868, 183 Cal.Rptr. 410.) The arbitrators in this case did neither, however. Here, the parties gave the arbitration panel the authority to resolve "any disputes over" their agreement—an agreement that contemplated continuing performance for five years after its termination. Given the nature of the contract and the character of the dispute in this case, the arbitrators were warranted in fashioning a remedy that permitted future arbitral jurisdiction." (Emphasis added.) (Ajida Technologies, Inc. v. Roos Instruments, Inc. (2001) 87 Cal.App.4th 534, 547–548.)

The parties stipulated/agreed to the arbitrator retaining jurisdiction to resolve any disputes as to the implementation of this order, and to address any future issues that may arise from time to time in the administration of the easement and that award was entered as a judgment pursuant to that stipulation. This provision merely recognized that the parties' contractual arbitration provision would apply to future disputes over the award and binding arbitration of other future disputes within the scope of the arbitration provision.

If the parties wanted to challenge arbitration of future disputes, the parties were free to move to correct or vacate the award pursuant to Code of Civil Procedure, § 1285 to remove that portion of the arbitration award/order. Having stipulated to entry of the award as a judgment over a decade ago, it is too late to challenge that portion of the arbitration award/judgment as exceeding the authority of the arbitrator.

The court rejects plaintiff's argument that the arbitrator does not have jurisdiction over the disputes raised in this action.

In summary, defendants Visman's and High Hill Ranch, LLC'S motion to compel arbitration is granted and this action is stayed pending binding arbitration

TENTATIVE RULING # 2: DEFENDANTS VISMAN'S AND HIGH HILL RANCH, LLC'S MOTION TO COMPEL ARBITRATION IS GRANTED AND THIS ACTION IS STAYED PENDING BINDING ARBITRATION. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME

ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, MARCH 11, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

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

County of El Dorado's Demurrer to Appeal from Administrative Penalty.

High Hill Ranch appeals from the administrative decision in a code enforcement case.

The County demurs to the appeal on the ground that High Hills Ranch failed to exhaust its administrative remedy of appeal to the Board of Supervisors (Board) before filing an appeal in the Superior Court.

High Hill Ranch opposes the demurrer on the ground that the applicable County Ordinance together with the language at the conclusion of the administrative decision does not mandate exhaustion of the remedy of appeal to the Board and allows for direct appeal from the administrative order without resort to appeal to the Board.

At the time this ruling was prepared there was no reply in the court's file.

Demurrer Principles

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

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

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

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

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

With the above-cited legal principles in mind, the court will rule on the demurrer.

Exhaustion of Administrative Remedies

"As the Court of Appeal observed, the rule of exhaustion of administrative remedies is well established in California jurisprudence, and should apply to Campbell's action. "In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292, 109 P.2d 942 (*Abelleira*).) The rule "is not a matter of judicial discretion, but is a fundamental rule of procedure ... binding upon all courts." (Id. at p. 293, 109 P.2d 942.) We have emphasized that "Exhaustion of administrative remedies is 'a jurisdictional prerequisite to resort to the courts.' [Citation]." (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70, 99 Cal.Rptr.2d 316, 5 P.3d 874.)" (Campbell v. Regents of University of California (2005) 35 Cal.4th 311, 321.)

"…The administrative claim or "cause of action" is within the special jurisdiction of the administrative agency, and the courts may act only to review the final administrative determination. Allowing a suit prior to such a final determination would constitute interference with the subject matter jurisdiction of another tribunal. Accordingly, the exhaustion of an administrative remedy is a jurisdictional element in California. (2 Witkin, Cal.Procedure (2d ed. 1970) Actions, s 181, p. 1045.) ¶ The trial court did not have jurisdiction to litigate appellant's request for injunctive relief because he had not exhausted his administrative remedies and therefore a cause of action was not stated." (Hayward v. Henderson (1979) 88 Cal.App.3d 64, 70.)

"'This is the doctrine of 'exhaustion of administrative remedies.' In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act. The authorities to this effect are so numerous that only the more important ones need be cited here as illustrations. See *Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (National Labor Relations

Board); *Prentis v. Atlantic Coast Line*, 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150 [rate orders]; *Porter v. Investors' Syndicate*, 286 U.S. 461, 468, 52 S.Ct. 617, 76 L.Ed. 1226 [investment commissioners and permit of investment company]; *United States v. Sing Tuck,* 194 U.S. 161, 24 S.Ct. 621, 48 L.Ed. 917 [immigration and the powers of the Secretary of Labor]; *Gorham Manufacturing Company v. State Tax Commission*, 266 U.S. 265, 45 S.Ct. 80, 69 L.Ed. 279 [tax board]; *Red River Broadcasting Co. v. Federal Communications Commission*, 69 App.D.C 1, 98 F.2d 282, 284; *Western Powder Mfg. Co. v. Interstate Coal Co. D.C.,* 5 F.Supp. 619, 621; *Hegeman Farms Corporation v. Baldwin*, 293 U.S. 163, 172, 55 S.Ct. 7, 79 L.Ed. 259 [liquor control board]; *United States Navigation Co. v. Cunard S. S. Company*, 284 U.S. 474, 52 S.Ct. 247, 76 L.Ed. 408 [shipping board]; *De Pauw University v. Brunk, D.C.,* 53 F.2d 647, 652; *Palermo Land & Water Co. v. Railroad Commission, D.C*., 227 F. 708; *Hammerstrom v. Toy Nat. Bank*, 8 Cir., 81 F.2d 628 [tax board]; *American Bond, etc., Co. v. United States,* 7 Cir., 52 F.2d 318; *Monocacy Broadcasting Co. v. Prall*, 67 App.D.C. 176, 90 F.2d 421; *Federal Trade Commission v. Claire Furnace Co.*, 274 U.S. 160, 174, 47 S.Ct. 553, 71 L.Ed. 978; *St. Clair Borough v. Tamaqua, etc., Ry. Co*., 259 Pa. 462, 103 A. 287, 289, 5 A.L.R. 20; Corstvet v. Bank of Deerfield, 220 Wis. 209, 263 N.W. 687, 697; *Earl Carroll Realty Corp. v. New York Edison Co.*, 141 Misc. 266, 252 N.Y.S. 538, 543; 48 Yale L.J. 981; 51 Harv.L.Rev. 1251; 35 Columb.L.Rev. 230; 12 N.Y.Univ.L.Q.Rev. 393; 28 Mich.L.Rev. 637; 28 Cal.L.Rev. 129, 151, 154, 162. The California cases have consistently applied this settled rule. See *Teeter v. Los Angeles*, 209 Cal. 685, 290 P. 11; *Collier & Wallis v. Astor*, 9 Cal.2d 202, 70 P.2d 171; *San Joaquin, etc., Co. v. Stanislaus County*, 155 Cal. 21, 27, 99 P. 365; *Dawson v. Los Angeles County*, Cal.Sup., 98 P.2d 495. ¶ 'The rule itself is settled with scarcely any conflict. It is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of stare decisis, and binding upon all courts. We are here

asked to sanction its violation, either on the ground that a valid exception to the rule is applicable, or that despite the uniformity with which the rule has been applied, it may be disregarded by lower tribunals without fear of prevention by the higher courts. This last point cannot be too strongly emphasized, for the rule will disappear unless this court is prepared to enforce it. To review such action of a lower court only on appeal or petition for hearing would permit interference with the administrative proceeding pending the appeal or hearing, with the effect of completely destroying the effectiveness of the administrative body. The writ of prohibition can alone operate surely and swiftly enough to prevent this unfortunate result; and only if we recognize that the rule is jurisdictional will it be uniformly enforced. Bearing in mind the analysis of jurisdiction which has heretofore been made, and examining the authorities dealing with the rule, we are necessarily led to the conclusion that exhaustion of the administrative remedy is a jurisdictional prerequisite to resort to the courts." (Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280, 292-293.)

"'It is, of course, well settled that where an administrative remedy is provided by statute relief must be sought from the administrative body and the remedy exhausted before the courts will act; and that a court violating the rule acts in excess of jurisdiction. (*Abelleira v. District Ct. of Appeal*, 17 Cal.2d 280, 292, 109 P.2d 942, 132 A.L.R. 715.) It is equally well settled that where a statute provides an administrative remedy and also provides an alternative judicial remedy the rule requiring exhaustion of the administrative remedy has no application if the person aggrieved, and having both remedies afforded him by the same statute, elects to use the judicial one. (*Scripps Memorial Hospital, Inc., v. California Emp. Comm*., 24 Cal.2d 669, 673, 151 P.2d 109, 112, 155 A.L.R. 360.) * * *'" (Emphasis added.) (Susanville v. Lee C. Hess Co. (1955) 45 Cal.2d 684, 689.)

The Appeal admits that petitioner High Hill Ranch is appealing from a hearing officer's decision in a code enforcement hearing that was served on petitioner on October 29, 2021. The appeal was filed on November 18, 2021.

El Dorado County Ordinance Code § 9.02.470A provides that within 30 days of the administrative decision the party may appeal from the decision to the Board of Supervisors.

The ordinance also provides that review is provided in the superior court by filing an appeal from an order or other decision of the Board within 20 days after service of that order of decision. (Emphasis added.) (El Dorado County Ordinance Code § 9.02.470B.) This is not an alternate venue for review in lieu of appeal to the Board. The superior court only reviews the order or decision of the Board, not the hearing officer's order or decision. (Emphasis the court's.) Use of the term "may" in Section 9.02.470A merely indicates the party may choose to appeal or may just accept the decision. The Ordinance Code does not provide any right to bypass the Board appeal process and proceed directly by appeal to the Superior Court.

However, that does not end the court's inquiry. The administrative order concluded: "Pursuant to EDCOC section 9.02.440(H), this Administrative Order is the final administrative decision regarding the Administrative Citation. The parties are hereby advised of their right to seek judicial review of this Administrative Order by filing: (1) an appeal to the El Dorado County Superior Court pursuant to California Government Code section 53069.4 within 20 days of service of the Administrative Order; or (2) a petition for writ of mandate pursuant to California Code of Civil Procedure section 1094.6 no later than 90 days after service of the Administrative Order." (Notice of Appeal, Exhibit A.)

High Hill Ranch essentially argues that it complied with the hearing officer's advisement of the alternative right to file a direct appeal to the Superior Court.

El Dorado County Ordinance Code § 9.02.440H. provides: "The administrative order shall become final on the date of service of the order."

Government Code, § 53069.4(b)(1) provides: "(b)(1) Notwithstanding Section 1094.5 or 1094.6 of the Code of Civil Procedure, within 20 days after service of the final administrative order or decision of the local agency is made pursuant to an ordinance enacted in accordance with this section regarding the imposition, enforcement, or collection of the administrative fines or penalties, a person contesting that final administrative order or decision may seek review by filing an appeal to be heard by the superior court, where the same shall be heard de novo, except that the contents of the local agency's file in the case shall be received in evidence. A proceeding under this subdivision is a limited civil case. A copy of the document or instrument of the local agency providing notice of the violation and imposition of the administrative fine or penalty shall be admitted into evidence as prima facie evidence of the facts stated therein. A copy of the notice of appeal shall be served in person or by first-class mail upon the local agency by the contestant."

"The principles underlying the waiver doctrine are well settled. " ' "Waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts. [Citations.] The burden, moreover, is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and 'doubtful cases will be decided against a waiver." ' [Citations.]" (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60, 35 Cal.Rptr.2d 515; *City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107-108, 48 Cal.Rptr. 865, 410 P.2d 369.) 'The pivotal issue in a claim of waiver is the intention of the party who allegedly relinquished the known legal right.' (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.*, supra, at p. 60, 35 Cal.Rptr.2d 515; *Jovine v. FHP, Inc.* (1998) 64 Cal.App.4th 1506, 1527, 76 Cal.Rptr.2d 322.)" (Southern California Edison Co. v. Public Utilities Com'n (2000) 85 Cal.App.4th 1086, 1107.)

"' "Waiver always rests upon intent." ' (*City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107, 48 Cal.Rptr. 865, 410 P.2d 369.) The intention may be express, based on the waiving party's words, or implied, based on conduct that is ' "so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished." ' (*Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 598, 57 Cal.Rptr.3d 215; see *Waller*, at pp. 31, 33–34, 44 Cal.Rptr.2d 370, 900 P.2d 619.)" (*Lynch v. California Coastal Com.* (2017) 3 Cal.5th 470, 475, 219 Cal.Rptr.3d 754, 396 P.3d 1085.)" (Dones v. Life Insurance Company of North America (2020) 55 Cal.App.5th 665, 678.)

""The doctrine of equitable estoppel is based on the theory that a party who by his declarations or conduct misleads another to his prejudice should be estopped from obtaining the benefits of his misconduct. [Citation.] Under appropriate circumstances equitable estoppel will preclude a defendant from pleading the bar of the statute of limitations where the plaintiff was induced to refrain from bringing a timely action by the fraud, misrepresentation or deceptions of the defendant." (*Kleinecke v. Montecito Water Dist.* (1983) 147 Cal.App.3d 240, 245, 195 Cal.Rptr. 58 (*Kleinecke*).) "A defendant should not be permitted to lull his adversary into a false sense of security, cause the bar of the statute of limitations to occur and then plead in defense the delay occasioned by his own conduct." (*Ibid*.) "Statutes of limitations are not so rigid that under certain circumstances principles of equity and justice will not allow them to be extended or tolled." (*Id*. at p. 247, 195 Cal.Rptr. 58.)" (Citizens for a Responsible Caltrans Decision v. Department of Transportation (2020) 46 Cal.App.5th 1103, 1128.)

"The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite for such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which

would result from the raising of an estoppel." (*Long Beach*, at pp. 496-497, 91 Cal.Rptr. 23, 476 P.2d 423.)" (Citizens for a Responsible Caltrans Decision v. Department of Transportation (2020) 46 Cal.App.5th 1103, 1128–1129.)

The Third District Court of Appeals has stated: "…equitable estoppel "ordinarily will not apply against a governmental body except in unusual instances when necessary to avoid grave injustice and when the result will not defeat a strong public policy." (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 793, 72 Cal.Rptr.2d 624, 952 P.2d 641.)" (Davis v. Physician Assistant Bd. (2021) 66 Cal.App.5th 227, 266.)

"When, as here, equitable estoppel is alleged against a public entity, the plaintiff must also show that the "injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 496–497, 91 Cal.Rptr. 23, 476 P.2d 423.)" (Organizacion Comunidad De Alviso v. City of San Jose (2021) 60 Cal.App.5th 783, 796.)

An estoppel may arise even though there was no designed fraud on the part of the person sought to be estopped. It is sufficient to create an equitable estoppel where the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss. (Lantzy v. Centex Homes (2003) 31 Cal.4th 363, 384.)

The County either waived the provision requiring resort to the administrative remedy of Board review of the administrative order by the express statement of the County's Administrative Hearing Officer directing High Hills Ranch as to the proper manner to seek review of the Administrative Order or is estopped from claiming High Hill Ranch was required to exhaust the administrative remedy of appeal to the Board prior to resort to an appeal to the court by the

County Administrative Hearing Officer expressly misleading High Hill Ranch in her order by stating the order is final and the only rights of review were appeal to the Superior Court or a petition for writ of mandate filed in the court and High Hill Ranch reasonably relied upon that statement in the order to its detriment of not filing a timely appeal to the Board. The time to file the appeal to the Board has long since expired and estopping the County from asserting the exhaustion of remedies defense under the circumstances is necessary to avoid grave injustice and it does not appear the result will defeat a strong public policy.

The demurrer to the appeal is overruled.

TENTATIVE RULING # 3: COUNTY OF EL DORADO'S DEMURRER TO APPEAL FROM ADMINISTRATIVE PENALTY IS OVERRULED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR

TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, MARCH 11, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

4. TUNDAVIA v. DASGUPTA PC-20200482

Hearing Re: Appointment of Partition Referee

The parties stipulated to appointment of David Becker as partition referee in this action for the following purposes: ascertaining the existence, nature, and priority of liens and encumbrances on the subject real property; ascertaining whether, under the circumstances presented, sale and division of the proceeds would be more equitable than division of the property; dividing and selling the property as ordered by the court; and performing any acts necessary to exercise the authority conferred by Title 10.5 of the Code of Civil Procedure, or by order of the court.

At the trial setting conference on February 14, 2022 the court confirmed the resignation of partition referee Becker and set this hearing to appoint a partition referee. The court further ordered that any pleadings regarding the appointment hearing were to be due on or before February 25, 2022. The parties were present at that hearing by counsel on Zoom.

At the time this ruling was prepared there were no pleadings regarding the appointment hearing in the court's file and the time to file those pleadings had expired.

TENTATIVE RULING # 4: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, MARCH 11, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

5. VILICICH v. ENGELBREKTSON PC-20200301

Defendant Jon Engelbrektson's Motion to Compel Responses to Discovery and Request for Statement of Damages.

On July 8, 2020 plaintiff filed a 1st amended complaint asserting causes of action to quiet title to property, to quiet title to a prescriptive easement, for trespass, and for conversion of property. Plaintiff prays for compensatory and punitive damages.

Defendant Jon Engelbrektson's counsel declares: on March 1, 2021 form and special interrogatories, and requests for production were served on plaintiff; despite a meet and confer letter sent to plaintiff by mail, email, and Fax seeking responses and production, plaintiff failed to provide any responses to the discovery propounded; and during a telephonic case management conference on September 13, 2021 defense counsel advised the court that no responses had been received from plaintiff, plaintiff responded that he had received the requests and refused to respond on the ground that defendant had allegedly perjured himself in his verified answer, and the court advised plaintiff that this was an insufficient reason to refuse to respond to the discovery.

Defendant Jon Engelbrektson moves to compel answers and production of documents without objections, requests the court to order plaintiff to provide a statement of damages as requested, and further requests an award of monetary sanctions in the amount of $700.

The proof of service in the court's file declares that on February 9, 2022 notice of the hearing and copies of the moving papers were served by mail and email on plaintiff. There is no opposition to the motion in the court's file.

The court notes that while the notice of motion states the hearing will be held on March 3, 2022 at 2:00 p.m. in Department Ten, the caption page on every document filed in support of

this motion, including the notice of hearing, expressly states that the hearing will be held in Department Nine at 8:30 a.m. on March 11, 2022. It appears the notice contains a clerical error.

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

"When a complaint is filed in an action to recover damages for personal injury or wrongful death, the defendant may at any time request a statement setting forth the nature and amount of damages being sought. The request shall be served upon the plaintiff, who shall serve a responsive statement as to the damages within 15 days. In the event that a response is not served, the defendant, on notice to the plaintiff, may petition the court in which the action is pending to order the plaintiff to serve a responsive statement." (Code of Civil Procedure, § 425.11(b).)

The memorandum of points and authorities in support of the motion contends that on March 1, 2021 defendant served a request for statement of damages on plaintiff and argues that since plaintiff has not provided a responsive statement, a motion to compel the statement is properly granted. (See Defendant's Memorandum of Points and Authorities, page 4, lines 6-8.)

There are no facts or exhibits in the declaration submitted in support of the motion establishing that a request for statement of damages was served on March 1, 2021. The proof of service attached as Exhibit D to the declaration only declares that the interrogatories, requests for production, and a declaration for additional discovery was served by mail and email on plaintiff

on March 1, 2021. Therefore, there is no evidentiary basis to compel plaintiff to provide a statement of damages.

Absent opposition, it appears appropriate under the circumstances to grant the motion to compel answers and production and to deny the motion as it requests an order compelling plaintiff to provide defendant with a statement of damages.

Sanctions

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

It appears appropriate under the circumstances presented to order plaintiff to pay defendant Jon Engelbrektson the sum of $540 in monetary sanctions.

TENTATIVE RULING # 5: DEFENDANT JON ENGELBREKTSON'S MOTION TO COMPEL RESPONSES TO DISCOVERY AND REQUEST FOR STATEMENT OF DAMAGES IS GRANTED IN PART AND DENIED IN PART AS DESCRIBED IN THIS RULING. THE COURT ORDERS PLAINTIFF TO ANSWER FORM INTERROGATORIES, SET ONE, SPECIAL INTERROGATORIES, SET ONE, AND PRODUCE THE DOCUMENTS REQUESTED IN REQUESTS FOR PRODUCTION, SET ONE WITHIN TEN DAYS. THE COURT FURTHER ORDERS PLAINTIFF TO PAY DEFENDANT JON ENGELBREKTSON MONETARY SANCTIONS IN THE AMOUNT OF $540 WITHIN TEN DAYS. THE PORTION OF THE MOTION SEEKING TO COMPEL PLAINTIFF TO PROVIDE A STATEMENT OF DAMAGES 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, MARCH 11, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

6. DEBT MANAGEMENT PARTNERS v. MCCOY PCL-20210423

Plaintiff's Motion to Deem Admitted Requests for Admission.

Plaintiff's counsel declares: on October 8, 2021 requests for admission were served on defendant and despite extending time to provide responses without objections, defendant failed to provide any responses to the requests for admission. Plaintiff moves to deem admitted the requests for admission. Plaintiff has not requested an award of monetary sanctions.

The proof of service in the court's file declares that on December 8, 2021 notice of the hearing and copies of the moving papers were served by mail on defendant. There is no opposition to the motion in the court's file.

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

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

TENTATIVE RULING # 6: PLAINTIFF'S MOTION TO DEEM ADMITTED REQUESTS FOR ADMISSION IS GRANTED. THE COURT ORDERS THAT REQUESTS FOR ADMISSION, SET ONE PROPOUNDED UPON DEFENDANT ARE DEEMED ADMITTED. MONETARY SANCTIONS NOT HAVING BEEN REQUESTED, SANCTIONS ARE NOT AWARDED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR

ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, MARCH 11, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

7. BAUER v. BUKEMA OF MUHOJOKI MJ FAMILY LIVING TRUST PC-20200382

Petition to Approve Compromise of Disputed Claim of Minor.

The petition states the minor fell into a septic tank and sustained injuries consisting of laceration, abrasions, bruising, upper respiratory congestion and a cough, night terrors, diarrhea, bilateral ear pain, anxiety, and bumps on the backs of her knee and left elbow. Petitioner requests the court authorize a compromise of the minor's claim against defendant/respondent in the gross amount of $80,000.

The petition states the minor incurred $1,094.62 in medical expenses, which was paid by Medi-Cal. The petition states that Medi-Cal will accept $801.56 as full satisfaction of its lien rights. The Medi-Cal lien letter was attached to the petition.

The petition states that the minor has not fully recovered from the injuries allegedly suffered as the minor still suffers from occasional nightmares. There is no current doctor's report concerning the minor's condition and prognosis of recovery as required by Local Rule 7.10.12A.(3).

The minor's attorney requests attorney's fees in the amount of $18,641.75, which represents approximately 25% of the net settlement after costs are deducted. The court uses a reasonable fee standard when approving and allowing the amount of attorney's fees payable from money or property paid or to be paid for the benefit of a minor or a person with a disability. (Rules of Court, Rule 7.955(a)(1).) The fees appear to be reasonable.

The minor's attorney also requests reimbursement for costs in the amount of $5,400.50. There are no copies of bills substantiating the claimed costs attached to the petition as required by Local Rule 7.10.12A.(6).

The net settlement amount is to be deposited into a blocked custodial investment account under the provisions of CUTMA.

Pursuant to Rules of Court, Rule 7.952(a) the petitioner and the minor are required to appear at hearings on petitions to approve minor compromises, unless the court dispenses with the requirement upon finding good cause.

TENTATIVE RUING # 7: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, MARCH 11, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

8. ALLIANCE ONE v. JODAR VINEYARDS PC-20210494

Hearing Re: Default Judgment.

On September 9, 2022 plaintiff filed an action against defendants asserting causes of action for breach of contract, breach of personal guaranty, and common counts. The complaint alleges: defendants Jordan Vineyards and Winery, Inc. owes plaintiff $240,384; defendant Wooldridge owes plaintiff the amount of $240,384 as he executed a personal guaranty of defendant Jordan Vineyards and Winery, Inc.'s debt; defendant Atherstone Foods, Inc. owes plaintiff at least $178,752 as the amount remaining unpaid on services rendered to it in the amount of $219,072; and defendant Teneral Cellars, Inc. owes plaintiff $21,312.

On November 5, 2021 default was entered against defendant Atherstone Foods, Inc. On November 2, 2021 defaults were entered against defendants Jordan Vineyards and Winery, Inc. and Wooldridge. On October 27, 2021 default was entered against defendant Teneral Cellars, Inc.

Plaintiff seeks entry of a default judgment against defendants.

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).)

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

is that needed to establish the amount of damages. (See *Beeman v. Burling, supra,* 216 Cal.App.3d at p. 1597, 265 Cal.Rptr. 719; see also *Ostling v. Loring, supra,* 27 Cal.App.4th at p. 1745, 33 Cal.Rptr.2d 391.) ¶ "The 'well-pleaded allegations' of a complaint refer to ' " 'all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.' " ' [Citations.]" (*Kim, supra*, 201 Cal.App.4th at p. 281, 133 Cal.Rptr.3d 774.) A well-pleaded complaint "set[s] forth the ultimate facts constituting the cause of action, not the evidence by which plaintiff proposes to prove those facts." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211–212, 197 Cal.Rptr. 783, 673 P.2d 660, fn. omitted; see also *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550, 67 Cal.Rptr.3d 330, 169 P.3d 559 ["[T]he complaint ordinarily is sufficient if it alleges ultimate rather than evidentiary facts."].) "The complaint delimits the legal theories a plaintiff may pursue and the nature of the evidence which is admissible. [Citation.] 'The court cannot allow a plaintiff to prove different claims or different damages at a default hearing than those pled in the complaint.' [Citation.]" (*Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, 1182, 36 Cal.Rptr.3d 663.) Thus, the plaintiff cannot supplement the general allegations of the complaint by reference to the plaintiff's showing in the summary judgment proceeding. (Cf. *FPI, supra*, 231 Cal.App.3d at pp. 383–384, 282 Cal.Rptr. 508.)" (Carlsen v. Koivumaki (2014) 227 Cal.App.4th 879, 898–899.)

"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.)

Plaintiff's CEO declares the following in support of entry of the default judgment: he has supervision and control of plaintiff's files as they relate to the Jodar defendants' joint and several obligations to plaintiff; the declaration is made after having reviewed plaintiff's loan files with respect to the matters contained therein; the debt arises from a factoring agreement between defendant Jordan Vineyards and Winery, Inc. and plaintiff and the personal guaranty executed by defendant Wooldridge; defendants Atherstone Foods, Inc. and Teneral Cellars, Inc. received notification that defendant Jordan Vineyards and Winery, Inc. had assigned its present and future accounts to plaintiff and that payments thereon are to be made to plaintiff; the amount of $240,384 is the due, owing and unpaid by defendant Jordan Vineyards and Winery, Inc., plus interest of 10% from September 7, 2021 to November 17, 2021 in the sum of $4,676.06; the unpaid amount that remains due and owing on defendant Teneral Cellars, Inc.'s obligation to defendant Jordan Vineyards and Winery, Inc. that was assigned to plaintiff is $21,312, plus interest of 10% from September 7, 2021 to November 17, 2021 in the sum of $414.64; and the unpaid amount that remains due and owing on defendant Atherstone Foods, Inc.'s obligation to defendant Jordan Vineyards and Winery, Inc. that was assigned to plaintiff is $178,752, plus interest of 10% from September 7, 2021 to November 17, 2021 in the sum of $3,476.87. (Declaration of David Alibrandi, paragraphs 2, 5, 7, 8, 11, 12, 18, 20, 22, 27, 28, 29, 33, and 34.)

TENTATIVE RULING # 8: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, MARCH 11, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED

AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

9. HAYNES v. MOKANU PC-20210524

Hearing Re: Default Judgment.

On September 24, 2021 plaintiff filed an action against defendants asserting causes of action for declaratory relief, to quiet title to a recorded easement, to quiet title to a prescriptive easement, and for injunctive relief.

On October 20, 2021 the court received correspondence from plaintiff's counsel advising the court that the case had settled by agreement of the parties to enter a default judgment. The copy of the written settlement agreement appears to have been executed in October 2021 by the plaintiff, defendants, and counsels representing them. Although various hearings were dropped from the calendar, the court has not entered judgment.

Defaults were entered against the three defendants on December 2, 2021. On December 1, 2021 plaintiff requested a prove-up hearing and this hearing was set.

There is an absolute ban on a judgment on default in quiet title actions and the traditional default prove-up does not apply. Even where a defendant is defaulted in a quiet title action, the plaintiff is not automatically entitled to judgment in his or her favor but must prove his or her case in an evidentiary hearing with live witnesses and any other admissible evidence. (Nickell v. Matlock (2012) 206 Cal.App.4th 934, 945-947.)

Plaintiff must submit the original, executed settlement agreement/stipulation to enter default judgment as stipulated, or provide evidence at the hearing establishing plaintiff is entitled to quiet title.

TENTATIVE RULING # 9: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, MARCH 11, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED

AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

10. ALL ABOUT EQUINE ANIMAL RESCUE v. BYRD PC-20200294

Defendants Terry Wilson's and Dawn Wilson's Motion to Set Aside Default and Default Judgment.

On June 22, 2020 plaintiff All About Equine Animal Rescue, Inc. filed a complaint against defendants Wilson and others under case number PC-20200294. Default was entered against defendants Terry Wilson and Dawn Wilson on October 12, 2021. On February 3, 2022 defendants Terry Wilson and Dawn Wilson filed a motion to vacate the default on the ground that attorney fault caused the default to be entered. A declaration of fault executed by defendants' attorney was submitted with the moving papers.

The proofs of service declare that on February 3, 2022 the interested parties and counsels in this consolidated action, including plaintiff All About Equine Animal Rescue, Inc.'s counsel, were served notice of the hearing and the moving papers by email.

At the time this tentative ruling was prepared, there was no opposition to the motion in the court's file and the time to file an opposition had expired.

"* * * 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.)

Defense counsel declares: on August 17, 2021 plaintiff granted an extension to defendants to respond to the complaint on or before September 15, 2021; another extension to respond was granted on September 9, 2021, which required defendants to respond on or before September 30, 2021; counsel drafted a demurrer to the All About Equine Animal Rescue, Inc. complaint, which was filed on September 30, 2021; that demurrer was mistakenly filed on behalf of defendants who had already appeared in the action by answer; the demurrer filed on September 30, 2021 was supposed to have been brought by defendants Terry Wilson and Dawn Wilson; and counsel's captioning the demurrer filed on September 30, 2021 with the wrong defendants and including the improper defendants as the demurring parties was due to counsel's mistake, inadvertence, and/or neglect, and a mix up in substitution of counsel regarding which lawyer had responded to which complaints and cross-complaints in this matter.

Under the totality of the circumstances presented, it appears that the default was entered as a result of attorney mistake, inadvertence, surprise, or neglect. Therefore, granting relief from the default is mandated. An original, executed demurrer by defendants Terry Wilson and Dawn Wilson to the complaint in case number PC-20200294 is to be filed and served which notices the date, time, and department where the demurrer will be heard.

TENTATIVE RULING # 10: DEFENDANTS TERRY WILSON'S AND DAWN WILSON'S MOTION TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT IS GRANTED. AN ORIGINAL, EXECUTED DEMURRER BY DEFENDANTS TERRY WILSON AND DAWN WILSON TO THE COMPLAINT IN CASE NUMBER PC-20200294 IS TO BE FILED AND SERVED WHICH NOTICES THE DATE, TIME, AND DEPARTMENT WHERE THE DEMURRER WILL BE HEARD. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY

PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, MARCH 11, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

11. ON DECK CAPITAL, INC. v. EPOXY ARMOR SYSTEMS, INC. PC-20210219

Motion to Compel Arbitration.

Defendant filed a petition to compel arbitration of a dispute arising out of an agreement. Attached to the motion are copies of the loan agreements, which include an arbitration provision.

Defendant argues: plaintiff should be compelled to arbitrate the disputes raised in this action as the two subject loans contained arbitration provisions; plaintiff was assigned the loans and as successor in interest was subject to those provisions; and equity prevents plaintiff from avoiding arbitration.

Plaintiff opposes the motion on the ground that defendant's conduct of filing a motion to quash service of the summons and complaint asserting that the claims must be litigated in Utah and failure to file the motion to arbitrate until after defendants were unsuccessful in arguing that litigation in the Utah courts was mandated by the agreement waived defendant's right to compel arbitration.

General Arbitration Principles

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

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

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

"In California, "[g]eneral principles of contract law determine whether the parties have entered a binding agreement to arbitrate." (*Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416, 420, 100 Cal.Rptr.2d 818; see *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972–973, 64 Cal.Rptr.2d 843, 938 P.2d 903.) Generally, an arbitration agreement must be memorialized in writing. (*Fagelbaum & Heller LLP v. Smylie* (2009) 174 Cal.App.4th 1351, 1363, 95 Cal.Rptr.3d 252.) A party's acceptance of an agreement to arbitrate may be express, as where a party signs the agreement. A signed agreement is not necessary, however, and a party's

acceptance may be implied in fact (e.g., *Craig,* at p. 420, 100 Cal.Rptr.2d 818 [employee's continued employment constitutes acceptance of an arbitration agreement proposed by the employer]) or be effectuated by delegated consent (e.g., *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 852–854, 114 Cal.Rptr.3d 263, 237 P.3d 584 (*Ruiz*).) An arbitration clause within a contract may be binding on a party even if the party never actually read the clause. (*24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1215, 78 Cal.Rptr.2d 533.)" (Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC (2012) 55 Cal.4th 223, 236.)

""As this court has noted in the past, arbitration agreements should be liberally interpreted and arbitration should be ordered unless an agreement clearly does not apply to the dispute in question. (*Vianna v. Doctors' Management Co.* (1994) 27 Cal.App.4th 1186, 1189, 33 Cal.Rptr.2d 188.)" (Oakland-Alameda County Coliseum Authority v. CC Partners (2002) 101 Cal.App.4th 635, 644.)

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

"However, notwithstanding the cogency of the policy favoring arbitration and despite frequent judicial utterances that because of that policy every intendment must be indulged in favor of finding an agreement to arbitrate, the policy favoring arbitration cannot displace the necessity for a voluntary agreement to arbitrate. (See *Player v. Geo. M. Brewster & Son, Inc.*, supra, 18

Cal.App.3d 526, 534, 96 Cal.Rptr. 149.) As our Supreme Court recently observed: 'There is indeed a strong policy in favor of enforcing agreements to arbitrate, but there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate . . ..' (*Freeman v. State Farm Mut. Auto. Ins. Co.*, supra, 14 Cal.3d 473, 481, 121 Cal.Rptr. 477, 482, 535 P.2d 341, 346.) And it has been held that to be enforceable, an agreement to arbitrate must have been 'openly and fairly entered into.' (*Player v. Geo. M. Brewster & Son, Inc.*, supra, 18 Cal.App.3d 526, 534, 96 Cal.Rptr. 149; *Windsor Mills, Inc. v. Collins & Aikman Co.*, supra, 25 Cal.App.3d 987, 993--994, 101 Cal.Rptr. 347.)" (Wheeler v. St. Joseph Hospital (1976) 63 Cal.App.3d 345, 356.)

"It follows, of course, that if there was no valid contract to arbitrate, the petition must be denied. (Ibid. ["There is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate. [Citation.]"]; *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.* (1992) 6 Cal.App.4th 1266, 1271, 8 Cal.Rptr.2d 587.)" (Banner Entertainment, Inc. v. Superior Court (Alchemy Filmworks, Inc.) (1998) 62 Cal.App.4th 348, 356.)

With the above-cited legal principles in mind, the court will rule on the motion.

Binding Arbitration Agreement Applicable to Dispute

The arbitration provisions contained in the two subject agreements with Celtic Bank provide that the parties agreed that claims and disputes arising out of, or in relation to the agreements shall be, at the election of any party, resolved by mandatory binding arbitration in Utah and the award based upon Utah law. (Complaint, Exhibit A – Agreement, paragraph 35; and Exhibit B – Agreement, paragraph 33.)

The agreements also provide that the agreements shall bind and inure to the benefit of the respective successors and assigns of each of the parties, provided that the borrower may not assign the agreements without prior consent, and the lender may assign the agreement and no

consent or approval by the borrower is required in connection with such assignment. (Complaint, Exhibit A – Loan Agreement, paragraph 38; and Exhibit B – Loan Agreement, paragraph 35.)

Plaintiff alleges in its complaint that it is the assignee and successor in interest to Celtic Bank as to all rights, title, and interest in both the line of credit agreement (Complaint, Exhibit A.) and the business loan agreement (Complaint, Exhibit B.) and any and all amounts owed thereunder, including accounts receivable arising out of account documents pertaining to defendant. (Complaint, Attachment 9(b).)

"Turning to the merits, we begin by noting the general rule that only a party to an arbitration agreement is bound by [FN 5.] or may enforce the agreement. (Code Civ. Proc., § 1281.2; [FN 6.] *Jones v. Jacobson* (2011) 195 Cal.App.4th 1, 17, 125 Cal.Rptr.3d 522; *Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.* (2005) 129 Cal.App.4th 759, 763, 28 Cal.Rptr.3d 752 (*Westra*).) Here, the only defendant that is a party to the agreements containing arbitration clauses is AFSI. Hence, under the general rule, only AFSI could enforce the arbitration provisions against John. ¶ FN5. John, who is acting as Katherine's successor in interest and as successor trustee of the Family Trust, is bound by the arbitration provisions of the agreements Katherine signed. A decedent's successor in interest steps into the decedent's position as to a particular action. (*Exarhos v. Exarhos* (2008) 159 Cal.App.4th 898, 905, 72 Cal.Rptr.3d 409.) "Thus, where [a decedent's successor in interest] asserts a claim on behalf of the estate, he or she must also abide by the terms of any valid agreement, including an arbitration agreement, entered into by the decedent." (*SouthTrust Bank v. Ford* (Ala.2002) 835 So.2d 990, 994.) Similarly, "a new trustee 'succeed[s] to *all* the rights, duties, and responsibilities of his predecessors.' " (*Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1131, 69 Cal.Rptr.2d 317, 947 P.2d 279.) Thus, a successor trustee is bound by a valid arbitration agreement executed by a predecessor. (See *Hays and Co. v. Merrill Lynch* (3d Cir.1989) 885 F.2d 1149, 1153 [holding

bankruptcy trustee bound by arbitration clause in customer agreement signed by debtor].) Indeed, John has never contended the various arbitration clauses do not bind him."" (Thomas v. Westlake (2012) 204 Cal.App.4th 605, 613-614.)

"A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." (Civil Code, § 1589.)

"" 'Generally speaking, one must be a party to an arbitration agreement to be bound by it or invoke it.' [Citations.] 'There are exceptions to the general rule that a nonsignatory to an agreement cannot be compelled to arbitrate and cannot invoke an agreement to arbitrate, without being a party to the arbitration agreement.' " (*JSM Tuscany, LLC v. Superior Court* (2011) 193 Cal.App.4th 1222, 1236–1237, 123 Cal.Rptr.3d 429 (*JSM Tuscany*).) " ' "As one authority has stated, there are six theories by which a nonsignatory may be bound to arbitrate: '(a) incorporation by reference; (b) assumption; (c) agency; (d) veil-piercing or alter ego; (e) estoppel; and (f) third-party beneficiary.' " ' " (*Cohen v. TNP 2008 Participating Notes Program, LLC* (2019) 31 Cal.App.5th 840, 859, 243 Cal.Rptr.3d 340 (*Cohen*).)" (Pillar Project AG v. Payward Ventures, Inc. (2021) 64 Cal.App.5th 671, 675 [279 Cal.Rptr.3d 117, 121.)

"In the arbitration context, a party who has *not* signed a contract containing an arbitration clause may nonetheless be compelled to arbitrate when he seeks enforcement of other provisions of the same contract that benefit him. (*Id.* at p. 418; *NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 81, 100 Cal.Rptr.2d 683 (*NORCAL*).)" (Metalclad Corp. v. Ventana Environment Organizational Partnership (2003) 109 Cal.App.4th 1705, 1713.)

Plaintiff as successor in interest and assignee of the two agreements, having accepted the benefits of those two agreements, and having sought to enforce those agreements, the

arbitration provisions included In those agreements bind plaintiff to arbitrate the disputes even though plaintiff is not a signatory on the agreements.

The question then becomes whether defendant's conduct waived the right to arbitrate the dispute.

Waiver of Right to Arbitrate

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

An exception to the statutory mandate to compel arbitration pursuant to an agreement exists where the right to compel arbitration has been waived by the petitioner. (Code of Civil Procedure, § 1281.2(a).)

"While in general arbitration is a highly favored means of settling disputes (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 189, 151 Cal.Rptr. 837, 588 P.2d 1261 (*Doers*)), it is beyond dispute a trial court may deny a petition to compel arbitration if it finds the moving party has waived that right. (Code Civ. Proc., § 1281.2, subd. (a); *Davis*, supra, 59 Cal.App.4th 205, 211, 69 Cal.Rptr.2d 79.)" (Berman v. Health Net (2000) 80 Cal.App.4th 1359, 1363.)

"Waiver refers to the act, or the consequences of the act, of one side. Waiver is the intentional relinquishment of a known right after full knowledge of the facts and depends upon the intention of one party only. Waiver does not require any act or conduct by the other party." (DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd. (1994) 30 Cal.App.4th 54, 59.) "The principles underlying the waiver doctrine are well settled. " ' "Waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts. [Citations.] The burden, moreover, is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and 'doubtful cases will be

decided against a waiver." ' [Citations.]" (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60, 35 Cal.Rptr.2d 515; *City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107-108, 48 Cal.Rptr. 865, 410 P.2d 369.) 'The pivotal issue in a claim of waiver is the intention of the party who allegedly relinquished the known legal right.' (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.*, supra, at p. 60, 35 Cal.Rptr.2d 515; *Jovine v. FHP, Inc.* (1998) 64 Cal.App.4th 1506, 1527, 76 Cal.Rptr.2d 322.)" (Emphasis added.) (Southern California Edison Co. v. Public Utilities Com'n (2000) 85 Cal.App.4th 1086, 1107.)

"California law, "like [federal law], reflects a strong policy favoring arbitration agreements and requires close judicial scrutiny of waiver claims." (*St. Agnes Medical Center v. PacifiCare of California, supra,* at p. 1195, 8 Cal.Rptr.3d 517, 82 P.3d 727.) Moreover, "waivers are not lightly to be inferred and the party seeking to establish a waiver bears a heavy burden of proof." (*Ibid.*)" (Wagner Const. Co. v. Pacific Mechanical Corp. (2007) 41 Cal.4th 19, 31.)

"As our decisions explain, the term "waiver" has a number of meanings in statute and case law. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 982-983, 64 Cal.Rptr.2d 843, 938 P.2d 903 (*Engalla*).) While "waiver" generally denotes the voluntary relinquishment of a known right, it can also refer to the loss of a right as a result of a party's failure to perform an act it is required to perform, regardless of the party's intent to relinquish the right. (*Engalla*, supra, 15 Cal.4th at p. 983, 64 Cal.Rptr.2d 843, 938 P.2d 903; *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 315, 24 Cal.Rptr.2d 597, 862 P.2d 158.) In the arbitration context, "[t]he term 'waiver' has also been used as a shorthand statement for the conclusion that a contractual right to arbitration has been lost." (*Platt Pacific, Inc. v. Andelson*, supra, 6 Cal.4th at p. 315, 24 Cal.Rptr.2d 597, 862 P.2d 158.)" (Saint Agnes Medical Center v. PacifiCare of California (2003) 31 Cal.4th 1187, 1195, fn. 4.)

"Both state and federal law emphasize that no single test delineates the nature of the conduct that will constitute a waiver of arbitration. (E.g., *Engalla*, supra, 15 Cal.4th at p. 983, 64 Cal.Rptr.2d 843, 938 P.2d 903; *Martinez v. Scott Specialty Gases, Inc.* (2000) 83 Cal.App.4th 1236, 1249-1250, 100 Cal.Rptr.2d 403; *Adams v. Merrill Lynch Pierce Fenner & Smith* (10th Cir.1989) 888 F.2d 696, 701; *Burton-Dixie Corp. v. Timothy McCarthy Construction Co.* (5th Cir.1971) 436 F.2d 405, 408; *Brownyard v. Maryland Casualty Co.* (D.S.C.1994) 868 F.Supp. 123, 126.) " 'In the past, California courts have found a waiver of the right to demand arbitration in a variety of contexts, ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration [citations] to instances in which the petitioning party has unreasonably delayed in undertaking the procedure. [Citations.] The decisions likewise hold that the "bad faith" or "wilful misconduct" of a party may constitute a waiver and thus justify a refusal to compel arbitration. [Citations.]' " (*Engalla*, supra, 15 Cal.4th at p. 983, 64 Cal.Rptr.2d 843, 938 P.2d 903, quoting *Davis v. Blue Cross of Northern California* (1979) 25 Cal.3d 418, 425-426, 158 Cal.Rptr. 828, 600 P.2d 1060.) ¶ In *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 72 Cal.Rptr.2d 43, the Court of Appeal referred to the following factors: "In determining waiver, a court can consider '(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether "the litigation machinery has been substantially invoked" and the parties "were well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) "whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place"; and (6) whether the delay "affected, misled, or prejudiced" the opposing party.' " (*Sobremonte v. Superior Court,* supra, 61 Cal.App.4th at p.

992, 72 Cal.Rptr.2d 43, quoting *Peterson v. Shearson/American Exp., Inc.* (10th Cir.1988) 849 F.2d 464, 467- 468.) We agree these factors are relevant and properly considered in assessing waiver claims." (Saint Agnes Medical Center v. PacifiCare of California (2003) 31 Cal.4th 1187, 1195-1196.)

"As mentioned, the "" ' "There is no single test for waiver of the right to compel arbitration... ." ' " (*Augusta v. Keehn & Associates* (2011) 193 Cal.App.4th 331, 337, 123 Cal.Rptr.3d 595 (*Augusta*), quoting *Berman v. Health Net* (2000) 80 Cal.App.4th 1359, 1363–1364, 96 Cal.Rptr.2d 295 (*Berman*).) Our high court, however, has articulated six factors a trial court should consider to determine whether a party has waived its right to arbitrate: " ' "(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether 'the litigation machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) 'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay 'affected, misled, or prejudiced' the opposing party." [Citations.]' " (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196, 8 Cal.Rptr.3d 517, 82 P.3d 727 (*St. Agnes*).) Though some courts apply a more limited three-factor test, " 'the party who seeks to establish waiver must show that some prejudice has resulted from the other party's delay in seeking arbitration.' " (*Berman, supra,* 80 Cal.App.4th at p. 1364, 96 Cal.Rptr.2d 295, quoting *Davis v. Continental Airlines, Inc.* (1977) 59 Cal.App.4th 205, 212, 69 Cal.Rptr.2d 79 [applying a three-factor test].) (O'Donoghue v. Superior Court (2013) 219 Cal.App.4th 245, 262-263.)

The appellate court in O'Donoghue v. Superior Court (2013) 219 Cal.App.4th 245 stated the following regarding what has been found to be a sufficient showing of prejudice justifying denial of arbitration due to prejudice: ""Notwithstanding plaintiff's use of discovery procedures and its delay in seeking judicial reference, we conclude plaintiff has not waived its right to reference because defendants have not established prejudice. Courts " 'will not find prejudice where the party opposing arbitration shows only that it incurred court costs and legal expenses.' [Citation.] [Courts] assess prejudice in light of California's strong public policy favoring arbitration. [Citation.] 'Prejudice typically is found only where the petitioning party's conduct has substantially undermined this important public policy or substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration.' [Citation.] Prejudice may be found where the petitioning party used the judicial process to gain information it could not have gained in arbitration, waited until the eve of trial to seek arbitration, or delayed so long that evidence was lost. [Citation.]" (*Brown, supra,* 216 Cal.App.4th at p. 1316, 157 Cal.Rptr.3d 779.)" (O'Donoghue v. Superior Court (2013) 219 Cal.App.4th 245, 264-265.)

"In California, whether or not litigation results in prejudice also is critical in waiver determinations. (*Keating v. Superior Court* (1982) 31 Cal.3d 584, 605, 183 Cal.Rptr. 360, 645 P.2d 1192, disapproved on other grounds, *Southland Corp. v. Keating* (1984) 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1; Doers, supra, 23 Cal.3d at pp. 188-189, 151 Cal.Rptr. 837, 588 P.2d 1261; *Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 212, 69 Cal.Rptr.2d 79.) That is, while " '[w]aiver does not occur by mere participation in litigation' " if there has been no judicial litigation of the merits of arbitrable issues, " ' "waiver could occur prior to a judgment on the merits if prejudice could be demonstrated." ' " (*Christensen v. Dewor Developments*, supra, 33 Cal.3d at p. 782, 191 Cal.Rptr. 8, 661 P.2d 1088). ¶ Because merely participating in litigation, by itself, does not result in a waiver, courts will not find prejudice where the party opposing

arbitration shows only that it incurred court costs and legal expenses. (See *Groom v. Health Net* (2000) 82 Cal.App.4th 1189, 1197, 98 Cal.Rptr.2d 836 [mere expense of responding to motions or other preliminary pleadings filed in court is not the type of prejudice that bars a later petition to compel arbitration]; accord, *Crysen/Montenay Energy Co. v. Shell Oil Co.* (2d Cir.2000) 226 F.3d 160, 163.) ¶ Rather, courts assess prejudice with the recognition that California's arbitration statutes reflect " 'a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution' " and are intended " 'to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing.' " (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9, 10 Cal.Rptr.2d 183, 832 P.2d 899.) Prejudice typically is found only where the petitioning party's conduct has substantially undermined this important public policy or substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration. ¶ For example, courts have found prejudice where the petitioning party used the judicial discovery processes to gain information about the other side's case that could not have been gained in arbitration (e.g., *Berman v. Health Net* (2000) 80 Cal.App.4th 1359, 1366, 96 Cal.Rptr.2d 295; *Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 558, 94 Cal.Rptr.2d 201; *Davis v. Continental Airlines, Inc.*, supra, 59 Cal.App.4th at p. 215, 69 Cal.Rptr.2d 79); where a party unduly delayed and waited until the eve of trial to seek arbitration (e.g., *Sobremonte v. Superior Court*, supra, 61 Cal.App.4th at pp. 995-996, 72 Cal.Rptr.2d 43); or where the lengthy nature of the delays associated with the petitioning party's attempts to litigate resulted in lost evidence (e.g., *Christensen v. Dewor Developments*, supra, 33 Cal.3d at p. 784, 191 Cal.Rptr. 8, 661 P.2d 1088)." (Emphasis added.) (Saint Agnes Medical Center v. PacifiCare of California (2003) 31 Cal.4th 1187, 1203-1204.)

"Generally, the determination of waiver is a question of fact, and the trial court's finding, if supported by sufficient evidence, is binding on the appellate court. (*Platt Pacific, Inc. v. Andelson, supra,* 6 Cal.4th at p. 319, 24 Cal.Rptr.2d 597, 862 P.2d 158; see also *Engalla, supra,* 15 Cal.4th at p. 983, 64 Cal.Rptr.2d 843, 938 P.2d 903.) "When, however, the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court's ruling." (*Platt Pacific, Inc. v. Andelson, supra,* 6 Cal.4th at p. 319, 24 Cal.Rptr.2d 597, 862 P.2d 158.)" (St. Agnes Medical Center v. PacifiCare of California (2003) 31 Cal.4th 1187, 1196.)

Plaintiff argues that defendant's conduct of filing a motion to quash service of the summons and complaint on the ground that the claims must be litigated in Utah and failure to file the motion to arbitrate until after defendants were unsuccessful in arguing that litigation in the Utah courts was mandated by the agreement waived defendant's right to compel arbitration.

Defendant, a California Corporation, specially appeared to move to quash service of the summons and complaint on the grounds that the subject agreement provides that the exclusive venue for disputes concerning the agreement is the State of Utah; and the forum selection clause must be respected as the borrower and lender have a reasonable basis for the forum selection as stated in the governing law provision as the borrower plaintiff understood and agreed that the initial lender, Celtic Bank Corp., a Utah Corporation, is located in Utah, makes all credit decisions from lender's office in Utah, the line of credit is made in Utah, and borrower's payments are not accepted until received by the lender in Utah (Complaint, Exhibit A – Loan Agreement, paragraph 44; and Exhibit B – Loan Agreement, paragraph 40.); and upon filing this motion, the plaintiff has the burden to prove valid service of the summons and complaint on defendant.

On November 19, 2021 the court denied the motion on the ground that the forum choice provision of the agreement was not an exclusive provision and the parties were free to choose Utah as the forum for litigation of the contractual dispute between the parties

Filing the motion to quash by special appearance was not a general appearance in this litigation. The motion to quash was a preliminary motion regarding the proper forum to prosecute the action and was not a ruling on the merits of the complaint. Mere participation in the litigation, particularly in an initial law and motion proceeding regarding the proper forum is not conduct that has substantially undermined the important and strong public policy favoring agreements for arbitration of disputes or substantially impaired the plaintiff's ability to take advantage of the benefits and efficiencies of arbitration.

Under the totality of the facts presented, the court finds that there was no waiver of the defendant's right to seek arbitration of the disputes under the arbitration provisions in the loans.

Defendant's motion to compel arbitration is granted. This action is stayed pending arbitration pursuant to the terms of the agreements.

TENTATIVE RULING # 11: DEFENDANT'S MOTION TO COMPEL ARBITRATION IS GRANTED. THIS ACTION IS STAYED PENDING ARBITRATION PURSUANT TO THE TERMS OF THE AGREEMENTS. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE

TENTATIVE RULING IS ISSUED AND THE PARTIES ARE PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, MARCH 11, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

12. BEAVER v. VRG PROPERTY MANAGEMENT PC-20210482

(1) Defendant's Motion to Compel Answers to Form and Special Interrogatories without Objections.

(2) Defendant's Motion to Compel Responses and Production of Documents without Objections.

(3) Defendant's Motion to Deem Admitted Requests for Admission.

Declarations were submitted in support of each motion. Defense counsel declares: on December 28, 2021 form and special interrogatories, requests for production, and requests for admission were served on plaintiff; plaintiff's counsel filed a motion for leave to withdraw as counsel of record for plaintiff on January 3, 2022, which was set for hearing on March 4, 2022; and despite discussions between counsels about responses and production and that plaintiff's counsel stated that plaintiff was provided the discovery for review and completion, plaintiff failed to provide any responses to the discovery propounded.

Defendant moves to compel answers and production of documents without objections and to deem admitted requests for admission. Defendant also requests an award of monetary sanctions in the total amount of $3,433.

The proofs of service in the court's file declare that on February 18, 2022 notice of the hearing and copies of the moving papers were served by email on plaintiff's counsel; and on February 24, 2022 the amended notices of hearing were served by email on plaintiff's counsel.

On February 24, 2022 the court ordered the time to hear the motions shortened, directed the oppositions were to be filed and served by March 3, 2022, and directed that the replies be filed and served by March 7, 2022.

There are no oppositions to the motions in the court's file.

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

"If a party to whom requests for admission have been directed fails to serve a timely response, the following rules apply: ¶ * * * (b) The requesting party may move for an order that the genuineness of any documents and the truth of any matters specified in the requests be deemed admitted, as well as for a monetary sanction under Chapter 7 (commencing with Section 2023.010)." (Code of Civil Procedure, § 2033.280(b).)

""If a party to whom requests for admission have been directed fails to serve a timely response, the following rules apply: ¶ * * *The court shall make this order, unless it finds that the party to whom the requests for admission have been directed has served, before the hearing on the motion, a proposed response to the requests for admission that is in substantial compliance with Section 2033.220. It is mandatory that the court impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) on the party or attorney, or both, whose failure to serve a timely response to requests for admission necessitated this motion." (Code of Civil Procedure, § 2033.280(c).)

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

Sanctions

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

It appears appropriate under the circumstances presented to order plaintiff to pay defendant the sum of $1,490 in monetary sanctions.

TENTATIVE RULING # 12: DEFENDANT'S MOTION TO COMPEL ANSWERS TO FORM AND SPECIAL INTERROGATORIES WITHOUT OBJECTIONS IS GRANTED. PLAINTIFF IS ORDERED TO ANSWER FORM INTERROGATORIES, SET ONE AND SPECIAL INTERROGATORIES, SET ONE WITHOUT OBJECTIONS WITHIN TEN DAYS. DEFENDANT'S MOTION TO COMPEL RESPONSES AND PRODUCTION OF DOCUMENTS WITHOUT OBJECTIONS IS GRANTED. PLAINTIFF IS TO ANSWER REQUESTS FOR PRODUCTION, SET ONE WITHOUT OBJECTIONS AND PRODUCE THE DOCUMENTS REQUESTED WITHOUT OBJECTIONS WITHIN TEN DAYS. DEFENDANT'S MOTION TO DEEM ADMITTED REQUESTS FOR ADMISSION IS GRANTED. THE COURT ORDERS THAT REQUESTS FOR ADMISSION, SET ONE PROPOUNDED UPON PLAINTIFF ARE DEEMED ADMITTED. PLAINTIFF IS FURTHER ORDERED TO PAY DEFENDANT THE SUM OF $1,490 IN MONETARY SANCTIONS WITHIN TEN DAYS. NO HEARING ON THESE MATTERS WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE

TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, MARCH 11, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

13. PLOOG v. BELLEI PC-20210314

Defendant Estate of Bellei's Demurrer to Complaint.

On January 18, 2021 plaintiffs filed an action to quiet title to certain property on the ground of adverse possession. Defendant Estate of Bellei demurs to the complaint on the following grounds: plaintiffs failed to follow the creditor's claim procedures prior to suing the personal representative of the defendant Estate; plaintiffs failed to include the legal description of the property as required by statute (Code of Civil Procedure, § 761.020(a).); plaintiffs failed to properly name a correct defendant, the personal representative of the Estate or successor in interest of the Estate, as required by statute; plaintiffs did not file an affidavit that complied with Code of Civil Procedure, § 762.030 and included no allegations in the complaint that plaintiffs were unaware of the appointment of a personal representative for decedent Bellei; and the few, brief facts alleged are insufficient to establish the quiet title cause of action.

On February 28, 2022 plaintiffs exercised their option to file an amended complaint prior to the hearing on the demurrer and not later that the date for filing an opposition to the demurrer. (See Code of Civil Procedure, § 472(a).) The 1st Amended Complaint supersedes the Complaint, making the demurrer moot.

""The filing of the first amended complaint rendered [the defendant]'s demurrer moot since ' "an amendatory pleading supersedes the original one, which ceases to perform any function as a pleading. [Citations.]" [Citation.]' " (*Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1054, 18 Cal.Rptr.3d 882.) ¶ When Strathmann filed the amended complaint, the hearing on the demurrer should have been taken off calendar. (*Barton v. Khan, supra,* 157 Cal.App.4th at p. 1221, 69 Cal.Rptr.3d 238.) Since there was no demurrer for the trial court to rule on, and the amended complaint had superseded the complaint to which

the demurrer was directed, we decline to address issues raised by the demurrer." (People ex rel. Strathmann v. Acacia Research Corp. (2012) 210 Cal.App.4th 487, 506.)

TENTATIVE RULING # 13: THE 1ST AMENDED COMPLAINT HAVING RENDERED THE DEMURRER MOOT, THIS MATTER IS DROPPED FROM THE CALENDAR.

14. IN RE J.G. WENTWORTH ORIGINATIONS, LLC 22CV0151

Petition to Approve Transfer of Payment Rights.

A settlement agreement on the payee's behalf was executed on March 29, 2009 that resulted in annuity payments. Payee R.A. agreed to sell monthly payments commencing May 15, 2039 and ending December 15, 2059 in the total amount of $1,479,156.92 in payments, which the petitioner states has a present value of $947,800.87. In exchange, the petition states payee will be paid $60,000, which the petition states will be used to purchase a new septic system and make needed repairs.

During the period of August 2015 through October 2021 the payee has completed 19 court approved transactions selling monthly payments from the payee's structured settlement annuities. The 20th transaction is awaiting oral argument on the petition to take place at 2:30 p.m. on March 11, 2022 in Department Nine.

Petitioner seeks an order approving the transfer of the structured settlement payments pursuant to the provisions of Insurance Code, §§ 10134, et seq. on the ground that the transfer of the structured settlement payment rights is fair and reasonable and in the best interest of the payee, taking into account the welfare and support of payee's dependents. (Insurance Code, 10137(a).)

"No transfer of structured settlement payment rights, either directly or indirectly, shall be effective by a payee domiciled in this state, or by a payee entitled to receive payments under a structured settlement funded by an insurance contract issued by an insurer domiciled in this state or owned by an insurer or corporation domiciled in this state, and no structured settlement obligor or annuity issuer shall be required to make any payment directly or indirectly to a transferee, unless all of the provisions of this section are satisfied." (Insurance Code, § 10136(a).)

There is no declaration of the payee in the court's file that addresses the factors set forth in Insurance Code, §10139.5(b), which the court must consider in exercising its discretion in ruling on the petition

"When determining whether the proposed transfer should be approved, including whether the transfer is fair, reasonable, and in the payee's best interest, taking into account the welfare and support of the payee's dependents, the court shall consider the totality of the circumstances, including, but not limited to, all of the following: ¶ (1) The reasonable preference and desire of the payee to complete the proposed transaction, taking into account the payee's age, mental capacity, legal knowledge, and apparent maturity level. ¶ (2) The stated purpose of the transfer. ¶ (3) The payee's financial and economic situation. ¶ (4) The terms of the transaction, including whether the payee is transferring monthly or lump sum payments or all or a portion of his or her future payments. ¶ (5) Whether, when the settlement was completed, the future periodic payments that are the subject of the proposed transfer were intended to pay for the future medical care and treatment of the payee relating to injuries sustained by the payee in the incident that was the subject of the settlement and whether the payee still needs those future payments to pay for that future care and treatment. ¶ (6) Whether, when the settlement was completed, the future periodic payments that are the subject of the proposed transfer were intended to provide for the necessary living expenses of the payee and whether the payee still needs the future structured settlement payments to pay for future necessary living expenses. ¶ (7) Whether the payee is, at the time of the proposed transfer, likely to require future medical care and treatment for the injuries that the payee sustained in connection with the incident that was the subject of the settlement and whether the payee lacks other resources, including insurance, sufficient to cover those future medical expenses. ¶ (8) Whether the payee has other means of income or support, aside from the structured settlement payments that are the subject of the

proposed transfer, sufficient to meet the payee's future financial obligations for maintenance and support of the payee's dependents, specifically including, but not limited to, the payee's child support obligations, if any. The payee shall disclose to the transferee and the court his or her court-ordered child support or maintenance obligations for the court's consideration. ¶ (9) Whether the financial terms of the transaction, including the discount rate applied to determine the amount to be paid to the payee, the expenses and costs of the transaction for both the payee and the transferee, the size of the transaction, the available financial alternatives to the payee to achieve the payee's stated objectives, are fair and reasonable. ¶ (10) Whether the payee completed previous transactions involving the payee's structured settlement payments and the timing and size of the previous transactions and whether the payee was satisfied with any previous transaction. ¶ (11) Whether the transferee attempted previous transactions involving the payee's structured settlement payments that were denied, or that were dismissed or withdrawn prior to a decision on the merits, within the past five years. ¶ (12) Whether, to the best of the transferee's knowledge after making inquiry with the payee, the payee has attempted structured settlement payment transfer transactions with another person or entity, other than the transferee, that were denied, or which were dismissed or withdrawn prior to a decision on the merits, within the past five years. ¶ (13) Whether the payee, or his or her family or dependents, are in or are facing a hardship situation. ¶ (14) Whether the payee received independent legal or financial advice regarding the transaction. The court may deny or defer ruling on the petition for approval of a transfer of structured settlement payment rights if the court believes that the payee does not fully understand the proposed transaction and that independent legal or financial advice regarding the transaction should be obtained by the payee. ¶ (15) Any other factors or facts that the payee, the transferee, or any other interested party calls to the attention of the

reviewing court or that the court determines should be considered in reviewing the transfer." (Insurance Code, §10139.5(b).)

The court can not rule on the merits of the petition until the payee submits a declaration addressing the above-cited factors.

Furthermore, due to the number of transactions completed within the past few years regarding the payee's settlement annuities, the court is concerned about whether there remains sufficient income to support the payee and the payee's family, which must be addressed.

Notice of the hearing and copies of the petitioning papers must be filed and served 20 days prior to the hearing, plus 2 court days when served by express mail. (Insurance Code, §10139.5(f)(2) and Code of Civil Procedure, § 1013(c).)

The proofs of service in the court's file declare that petitioner served the amended notice of the hearing, the amended petition, and amended supporting documents on the beneficiary/payee of the structured settlement payments, the annuity issuer and the payment obligor by overnight mail on March 1, 2022.

"At the time of filing a petition pursuant to Section 10139.5 for court approval, the transferee shall file with the Attorney General a copy of the transferee's petition for approval, a copy of the written disclosure statement required by subdivision (a) of Section 10136, a copy of the transfer agreement as defined in subdivision (o) of Section 10134, a copy of the annuity contract, a copy of any qualified assignment agreement, a copy of the underlying structured settlement agreement, a copy of any order or approval of any court or responsible administrative authority authorizing or approving the structured settlement, a copy and proof of notice to the interested parties, and a verified statement from the transferee stating that all of the conditions set forth in Sections 10136, 10137, and 10138 have been met." (Insurance Code, § 10139(a).) "The Attorney General may, but is not required to, review any transfer agreement in order to ensure

that the transfer meets the requirements of this article." (Insurance Code, § 10139(b).) "The Attorney General may charge a reasonable fee for the filing of the transfer agreement as provided in this section. The fee shall be paid by the transferee." (Insurance Code, § 10139(c).)

There is no proof that the Attorney General was served a copy of the transferee's petition for approval, a copy of the written disclosure statement required by subdivision (a) of Section 10136, a copy of the transfer agreement as defined in subdivision (o) of Section 10134, a copy of the annuity contract, a copy of any qualified assignment agreement, a copy of the underlying structured settlement agreement, a copy of any order or approval of any court or responsible administrative authority authorizing or approving the structured settlement, a copy and proof of notice to the interested parties, and a verified statement from the transferee stating that all of the conditions set forth in Sections 10136, 10137, and 10138 have been met as mandated by Insurance Code, § 10139(a). The court can not rule on the merits of the petition until the Attorney General/Department of Justice has been properly served with the required documents.

Service of notice of the amended notice, amended petition, and amended supporting documents ten calendar days before the hearing date does not comply with the statutory service requirements. The court can not rule on the merits of the petition until there is proof of adequate advance service of notice of the hearing, the petition and supporting documents on the interested parties.

TENTATIVE RULING # 14: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, MARCH 11, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.