1. CBL SERVICES v. WECKWORTH ELECTRIC PCL-20200638

Judgment Debtor Examination.

TENTATIVE RULING # 1: THE PERSONAL APPEARANCE OF THE DEBTOR IS REQUIRED AT 8:30 A.M., FRIDAY, MARCH 25, 2022, IN DEPARTMENT NINE, PROVIDED PROOF OF SERVICE OF THE ORDER TO APPEAR FOR EXAMINATION IS FILED PRIOR TO THE HEARING SHOWING THAT PERSONAL SERVICE ON THE DEBTOR WAS AFFECTED NO LATER THAN TEN DAYS PRIOR TO THE HEARING DATE (CCP, § 708.110(d)). IF THE APPROPRIATE PROOF OF SERVICE IS NOT FILED, NO EXAMINATION WILL TAKE PLACE.

2. MATTER OF MARCUM 22CV0038

OSC Re: Name Change.

The petition seeks to change the name of a minor; the minor's father has not joined in the petition; there is no proof of personal service of notice of the hearing or the order to show cause on the minor's father in the court's file; and there is no explanation provided in the verified petition to establish that notice of the hearing cannot reasonably be accomplished pursuant to Code of Civil Procedure, §§ 415.10 or 415.40. (Code of Civil Procedure, § 1277(a).) The court cannot rule on the merits until proof of adequate service on the father has been filed.

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

TENTATIVE RULING # 2: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, MARCH 25, 2022, IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

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

Petitioner Alliance for Responsible Planning's Motion for Attorney Fees.

On June 7, 2016, Measure E was approved by the electors. Petitioners Alliance for Responsible Planning filed a petition for writ of mandate and complaint for declaratory and injunctive relief seeking a determination that Measure E is invalid, issuance of a writ of mandate directing the El Dorado County Board of Supervisors (Board) and County of El Dorado to cease enforcing the measure, and the issuance of an injunction prohibiting the Board of Supervisors and County of El Dorado from taking any action to enforce or implement Measure E.

Respondents/Intervenors Taylor and Save Our County opposed the petition.

Respondent El Dorado County also opposed the petition.

The petition was granted in part and denied in part. Respondents/Intervenors Taylor and Save Our County appealed from the judgment; petitioners Alliance for Responsible Planning opposed the appeal and filed a cross-appeal; and El Dorado County also filed a brief on appeal. The Third District Court of Appeal in a published opinion affirmed the judgment and ordered respondents/intervenors Taylor and Save Our County to pay costs on appeal. (Alliance for Responsible Planning v. Taylor (2021) 63 Cal.App.5th 1072.)

Petitioner Alliance for Responsible Planning moves for an award of $320,600 in attorney fees payable solely by the County of El Dorado, which represents a 1.7 multiplier applied to the lodestar amount of $185,500 and $5,250 in fees incurred to bring the motion. Petitioner Alliance for Responsible Planning argues: petitioner has meet the requirements for an award of attorney fees under Code of Civil Procedure, § 1021.5 as it was a successful party, the litigation vindicated an important public right, the litigation conferred a significant benefit on the general public or a large class of persons, and the necessity and financial burden of private enforcement makes the award appropriate; the fee should be determined by the lodestar method; the lodestar amount is

reasonable; and it is appropriate to apply a 1.7 multiplier due to the contingency and risk, delay in receiving the attorney fees that was five years after the work commenced and more than four years after the trial court decision, the novelty and difficulty of the issues, and the excellent results.

Petitioner further requests an award of costs incurred through the trial court phase of the litigation against El Dorado County in the amount of $510 and costs of appeal payable by respondents/intervenors Taylor and Save Our County in the amount of $1,005.50 as claimed in the memorandum of costs on appeal that was filed on August 16, 2021.

The proofs of service declare that on August 16, 2021, notice of the hearing, the moving papers, and the memorandum of costs of appeal were served by mail on counsels for respondents/intervenors Taylor and Save Our County and respondent El Dorado County.

El Dorado County opposes the motion on the following grounds: the petitioner has not established with the evidence presented that the Alliance for Responsible Planning had any financial burden resulting from enforcement such as to make the award appropriate as William Bacchi and Maryann Argyres both acknowledge that Alliance for Responsible Planning has no members and fail to identify any financial burden on Alliance for Responsible Planning for successfully prosecuting the petition for writ of mandate and successfully opposing an appeal from the trial court judgment; County is not an opposing party in the appellate proceedings, because it did not appeal from the court judgment and accepted the trial court decision by removal of the offensive provisions of Measure E from the General Plan, therefore, none of the appellate fees are recoverable from the County pursuant to the provisions of Section 1021.5; the County should not be responsible for the attorney fees incurred as a result of respondents/intervenors Taylor and Save Our County actions, such as the fees incurred to reply to respondents/intervenors Taylor's and Save Our County's brief opposing petitioner's

constitutional arguments, as the County focused its responsive brief on the role of the court and that a definitive interpretation was unnecessary to resolve the facial challenge to Measure E; and counsel for petitioner Alliance for Responsible Planning's counsel owns an interest in a parcel directly impacted by Measure E, therefore, counsel has an independent financial interest and could suffer significant personal financial expense due to Measure E and there is no evidence he would not have undertaken the litigation absent an expectation of compensation under the private attorney general statute.

Alliance for Responsible Planning replied to the opposition: all requirements for an award of attorney fees under Section 1021.5 have been met; Alliance for Responsible Planning is a non-profit public benefit corporation engaged in education and advocacy regarding local land use and planning issues; petitioner is not a landowner, developer, or development project advocate and is a coalition of taxpayers, business owners, ranchers, farmers, community leaders, and others with diverse backgrounds; Alliance for Responsible Planning's financial burden for the legal victory substantially exceeded any personal financial stake it had in the outcome; contingent representation by counsel does not obviate the financial burden on Alliance for Responsible Planning; in successfully opposing the County's motion for discovery concerning the identity and financial stakes of Alliance for Responsible Planning's members, contributors, officers, participants and organizers and its counsel in land located in El Dorado County, except for their personal residences, petitioner provided declarations of Board members and its counsel, Mr. Brunello, with nearly 500 pages of attachments describing the organization and its work, resulting in the court denying the motion for discovery and finding "…there is insufficient evidence to suggest that Alliance was motivated to litigate the action primarily for the benefit of the nonlitigant corporate officers/directors or Alliance's counsel and they were hiding behind Alliance's corporate front"; the impact of Measure E on Mr. Brunello's 17% minority interest in

Huddinge Partners, a Nevada LLC, which owns certain real property for 25 years and never filed a development application, is not quantifiable considering the range of possible use of the properties with a wide range of traffic impacts and speculative assumptions of project timing in relation to other potential development that could also be responsible for improvements; the cost of the litigation transcends any interests of Mr. Brunello and would have placed a burden on Mr. Brunello out of proportion to his individual stake; County was never aligned with petitioner during the appeal and it should be considered an opposing party; the fees incurred prior to the court's ruling on the petition were incurred during a time that County was an opposing party and County's claim that they should be disallowed as having been incurred as a result of the intervenor's conduct and not the County's should be rejected; petitioner has been unable to find any authority for the position that holding an initiative proponent, such as respondents/intervenors Taylor and Save Our County, responsible for attorney fees when intervening to defend against a constitutional challenge when there is concern that a government entity may not adequately defend against the challenge; even if the fees are apportioned between intervenors and the County, the court should find joint and several liability for the fees; and the motion for fees should be augmented to include the $7,000 in fees incurred to oppose the motion for discovery.

Attorney Fees Incurred to Oppose County's Motion for Limited Discovery

Ruling on the request for $7,000 in additional fees that were requested in a reply would violate the County's night to due process in that the reply request leaves the County with no reasonable opportunity to oppose the request. The court reserves ruling on this issue and sets a hearing on the request for 8:30 a.m. on Friday, May 6, 2022, in Department Nine. The court will only entertain oral argument concerning the request for fees incurred to oppose the motion for discovery at the hearing on May 6, 2022. Oral argument on the remainder of this motion will be

held upon request of a party at 8:30 a.m. on Friday, March 25, 2022, or another date if a long cause hearing is requested. County is to file and serve its opposition to the request not later than April 25, 2022, and the reply is to be filed and served not later than April 29, 2022. The opposition and reply are to be strictly limited to the issue of attorney fees incurred for the discovery motion.

Private Attorney General Doctrine and Award of Fees

"The following items are allowable as costs under Section 1032: ¶ * * * (10) Attorney fees, when authorized by any of the following: (A) Contract. ¶ (B) Statute. ¶ (C) Law." (Code of Civil Procedure, § 1033.5(a)(10).)

"Any award of costs shall be subject to the following: ¶ * * * (5) When any statute of this state refers to the award of "costs and attorney's fees," attorney's fees are an item and component of the costs to be awarded and are allowable as costs pursuant to subparagraph (B) of paragraph (10) of subdivision (a). Any claim not based upon the court's established schedule of attorney's fees for actions on a contract shall bear the burden of proof. Attorney's fees allowable as costs pursuant to subparagraph (B) of paragraph (10) of subdivision (a) may be fixed as follows: (A) upon a noticed motion, (B) at the time a statement of decision is rendered, (C) upon application supported by affidavit made concurrently with a claim for other costs, or (D) upon entry of default judgment. Attorney's fees allowable as costs pursuant to subparagraph (A) or (C) of paragraph (10) of subdivision (a) shall be fixed either upon a noticed motion or upon entry of a default judgment, unless otherwise provided by stipulation of the parties." (Code of Civil Procedure, § 1033.5(c)(5).)

"Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial

burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor, unless one or more successful parties and one or more opposing parties are public entities, in which case no claim shall be required to be filed therefor under Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code. ¶ Attorneys' fees awarded to a public entity pursuant to this section shall not be increased or decreased by a multiplier based upon extrinsic circumstances, as discussed in Serrano v. Priest, 20 Cal.3d 25, 49." (Code of Civil Procedure, § 1021.5.)

"Section 1021.5 codifies the private attorney general doctrine, which provides an exception to the " 'American rule' " that each party bears its own attorney fees. (*Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1147, 74 Cal.Rptr.3d 81, 179 P.3d 882.) The fundamental objective of the private attorney general doctrine is to encourage suits enforcing important public policies by providing substantial attorney fees to successful litigants in such cases. (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565, 21 Cal.Rptr.3d 331, 101 P.3d 140.) Under section 1021.5, the court may award attorney fees to (1) a successful party in any action (2) that has resulted in the enforcement of an important right affecting the public interest (3) if a significant benefit has been conferred on the general public or a large class of persons, and (4) the necessity and financial burden of private enforcement are such as to make the award appropriate. (*Ibid.*) The burden is on the claimant to establish each prerequisite to an award of attorney fees under section 1021.5. (*Serrano v. Stefan Merli Plastering Co., Inc.* (2010) 184 Cal.App.4th 178, 185, 108 Cal.Rptr.3d 777.)" (Emphasis added.) (Ebbetts Pass Forest Watch v. California Dept. of Forestry and Fire Protection (2010) 187 Cal.App.4th 376, 381.)

"The determination of private attorney general fee awards under section 1021.5 is reviewed under an abuse of discretion standard. (See *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (2000) 79 Cal.App.4th 505, 511–512, 94 Cal.Rptr.2d 205 (*Families Unafraid*), citing *Feminist Women's Health Center v. Blythe* (1995) 32 Cal.App.4th 1641, 1666, 39 Cal.Rptr.2d 189.)" (MBNA America Bank, N.A. v. Gorman (2006) 147 Cal.App.4th Supp. 1, 6.)

"The threshold requirement for a fee award under section 1021.5 is that the fee applicant must be a "successful party." (*Protect Our Water v. County of Merced, supra,* 130 Cal.App.4th at p. 493, 30 Cal.Rptr.3d 202.) In this case, Robinson obtained (1) a peremptory writ of mandate that required City to provide him with notice of removal, a statement of reasons, and an opportunity for an administrative appeal and (2) a final judgment awarding him damages for breach of contract. Based on the actions City was required to perform pursuant to the writ of mandate and the damages it was required to pay under the judgment as a result of Robinson prevailing on some of his claims, we conclude as a matter of law that Robinson was a successful party. (See *Urbaniak v. Newton* (1993) 19 Cal.App.4th 1837, 1843, 24 Cal.Rptr.2d 333 [success determined by the action or cessation of action produced by the judgment, such as specific performance or payment of damages].) ¶ The fact that Robinson did not obtain all of the relief he sought in his original pleading does not lead to the conclusion that City, rather than Robinson, was the successful party in this litigation. Instead, a plaintiff's partial success is a factor considered in determining the amount of any fee award. (*Sokolow v. County of San Mateo* (1989) 213 Cal.App.3d 231, 249, 261 Cal.Rptr. 520 ["a reduced fee award is appropriate when a claimant achieves only limited success"].)" (Robinson v. City of Chowchilla (2011) 202 Cal.App.4th 382, 393.)

"ACSC claims the award compensates Wysinger's counsel for time spent on unsuccessful issues. But "[w]here a lawsuit consists of related claims, and the plaintiff has won substantial relief, a trial court has discretion to award all or substantially all of the plaintiff's fees even if the court did not adopt each contention raised." (*Downey Cares, supra,* 196 Cal.App.3d at p. 997, 242 Cal.Rptr. 272.) "To reduce the attorneys' fees of a successful party because he did not prevail on all his arguments, makes it the attorney, and not the defendant, who pays the costs of enforcing" the plaintiff's rights. (*Sundance v. Municipal Court* (1987) 192 Cal.App.3d 268, 273, 237 Cal.Rptr. 269; see also *Greene v. Dillingham Const. N.A., Inc.* (2002) 101 Cal.App.4th 418, 423, 124 Cal.Rptr.2d 250; *Beaty v. BET Holdings, Inc.* (9th Cir.2000) 222 F.3d 607, 612 [party seeking reduction of a successful FEHA plaintiff's attorney fees must meet a high threshold].) ACSC has not shown an abuse of discretion." (Wysinger v. Automobile Club of Southern California (2007) 157 Cal.App.4th 413, 431.)

"In ruling upon a section 1021.5 fees request, the trial court will exercise " ' "its traditional equitable discretion." ' " (*RiverWatch, supra,* 175 Cal.App.4th at p. 776, 96 Cal.Rptr.3d 362.) The trial court " ' " 'must realistically assess the litigation and determine, *from a practical perspective* ' whether or not the statutory criteria have been met." ' " (*Ibid.,* italics added.) "Courts take a '*broad, pragmatic view of what constitutes a* "*successful party* " ' in order to effectuate the policy underlying section 1021.5." (*RiverWatch, supra,* at pp. 782–783, 96 Cal.Rptr.3d 362, citing *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565, 21 Cal.Rptr.3d 331, 101 P.3d 140 (*Graham*); italics added.)" (McGuigan v. City of San Diego (2010) 183 Cal.App.4th 610, 623.)

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

- Petitioner Alliance for Responsible Planning Financial Burden of Private Enforcement

County argues in opposition that the petitioner has not established with the evidence presented that the Alliance for Responsible Planning had any financial burden resulting from

enforcement such as to make the award appropriate as William Bacchi and Maryann Argyres both acknowledge that Alliance for Responsible Planning has no members and fail to identify any financial burden on Alliance for Responsible Planning for successfully prosecuting the petition for writ of mandate and successfully opposing an appeal from the trial court judgment.

There is evidence before the court that Alliance for Responsible Planning is a non-profit public benefit corporation organized for the purpose of education and advocacy regarding local land use and planning issues; petitioner is comprised entirely of volunteers and is a coalition of taxpayers, business owners, ranchers, farmers, community leaders, and others with diverse backgrounds; Alliance for Responsible Planning has no economic interest in the outcome of the litigation and has never solicited or accepted funds for its operating expenses from any large developers who might be considered as having a pecuniary interest in the outcome; declarant Brunello has acted as advisor to the Alliance Board since the organization was founded in 2014, was involved in the formation of the organization, and is familiar with is operational structure, goals and objectives; petitioner Alliance for Responsible Planning lacked the financial resources to prosecute litigation related to Measure E; and it was agreed that petitioner would pay the costs for filing fees, court reporters and expert witnesses, if needed, and counsel would represent petitioner on a fully contingent basis with the understanding he would seek to recover fees under Section 1021.5 if successful at trial. (Declaration of James L. Brunello in Support of Motion, paragraphs 7, 8, and 10.)

"As the Court of Appeal recently explained in *County of Inyo v. City of Los Angeles* (1978) 78 Cal.App.3d 82, 89, 144 Cal.Rptr. 71, 76, "An award on the 'private attorney general' theory is appropriate when the cost of the claimant's legal victory transcends his personal interest, that is, when the necessity for pursuing the lawsuit placed a burden on the plaintiff 'out of proportion to

his individual stake in the matter.' (Citation.)" (Woodland Hills Residents Assn., Inc. v. City Council (1979) 23 Cal.3d 917, 941.)

The fact that counsel for the petitioner was hired on a contingent fee basis does not establish that petitioner has no financial burden in private enforcement by petition for writ of mandate to challenge an initiative passed by the electorate.

"We reject respondents' contention that Tourgeman would not face "any expense to litigate this case" because he was being represented on a contingent-fee basis. As noted previously (see fn. 14, *ante*), section 425.17 was modeled on the private attorney general fee statute (§ 1021.5), and both statutes contain a factor considering the "financial burden" (§§ 425.17, 1021.5) of private enforcement. Under section 1021.5, "the fact that the case was pursued on a contingency fee basis [does not] undercut a plaintiff's attorney fees claim.... [Citations.])" (*Lyons v. Chinese Hospital Assn.* (2006) 136 Cal.App.4th 1331, 1351, 39 Cal.Rptr.3d 550.) On the contrary, it is well established that the existence of a contingency fee arrangement is a fact that may be used to *increase* an attorney fee award under section 1021.5. (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 579, 21 Cal.Rptr.3d 331, 101 P.3d 140 ["One of the most common fee enhancers ... is for contingency risk."].) Since the existence of a contingency arrangement is not considered to lessen the financial burden of private enforcement under section 1021.5, we conclude that an attorney's representation of a plaintiff on a contingency basis does not lessen the financial burden of private enforcement under section 425.17 either." (Tourgeman v. Nelson & Kennard (2014) 222 Cal.App.4th 1447, 1466, fn 15.)

The court rejects County's argument that the petitioner has not established with the evidence presented that the Alliance for Responsible Planning had any financial burden resulting from enforcement such as to make the award appropriate.

- Whether Petitioner's counsel's Real Property Interest in El Dorado County Bars Recovery of His Claimed Fees as the Interest Would Cause Him to Undertake the Litigation Absent an Expectation of Compensation under the Private Attorney General Statute

County argues in opposition that counsel for petitioner Alliance for Responsible Planning owns an interest in a parcel directly impacted by Measure E, therefore, counsel has an independent financial interest and could suffer significant personal financial expense due to Measure E and there is no evidence he would not have undertaken the litigation absent an expectation of compensation under the private attorney general statute.

"""" ' "An award on the 'private attorney general' theory is appropriate when the cost of the claimant's legal victory transcends his personal interest, that is, when the necessity for pursuing the lawsuit placed a burden on the plaintiff 'out of proportion to his individual stake in the matter.' [Citation.]" ' [Citation.] 'This requirement focuses on the financial burdens and incentives involved in bringing the lawsuit.' [Citation]." (*Whitley, supra*, 50 Cal.4th at p. 1215, 117 Cal.Rptr.3d 342, 241 P.3d 840.) "However, '[w]hen each of the [section 1021.5] criteria is met, the fact the primary effect of the action was to vindicate a plaintiff's personal economic interests does not foreclose an award of attorney fees.' " (*People v. Investco Management & Development LLC* (2018) 22 Cal.App.5th 443, 468, 231 Cal.Rptr.3d 595 (*Investco*), quoting *Robinson, supra*, 202 Cal.App.4th at p. 400, 134 Cal.Rptr.3d 696.)" (Early v. Becerra (2021) 60 Cal.App.5th 726, 741.)

Furthermore, where the benefits achieved in the litigation for others are very high, fees should sometimes be awarded even where the litigant's own expected benefits are significant.

"Moreover, the trial court cited *Los Angeles Police Protective League* regarding the interrelation of section 1021.5 factors. "Where the benefits achieved for others are very high it will be more important to encourage litigation which achieves those results. Accordingly, it will be more important to offer the bounty of a court-awarded fee than where the public benefits are

less significant. Thus, the courts should be willing to authorize fees on a lesser showing of need than they might where the public benefits are less dramatic. This means the court sometimes should award fees even in situations where the litigant's own expected benefits exceed its actual costs by a substantial margin." (*Los Angeles Police Protective League, supra*, 188 Cal.App.3d at p. 10, 232 Cal.Rptr. 697) ¶ Here, the benefits achieved for the electorate are "very high." This case resulted in a published decision that put to rest a challenge to the eligibility of a candidate for Attorney General under Government Code section 12503 twice mounted against candidates for this office whose only claimed disqualifying factor was that they were "admitted to practice" but "inactive" while serving in other public office." (Emphasis added.) (Early v. Becerra (2021) 60 Cal.App.5th 726, 742–743.)

County relies on Mr. Brunello's declaration submitted in opposition to County's recent motion to allow limited financial discovery and Natalie Porter's reply declaration in support of the motion. (See County's Opposition, page 2, line 26 to page 3, line 17.) County argues in the conclusion of its opposition that the County has submitted evidence that petitioner's counsel obtained significant economic benefits that sufficiently incentivized this case and should preclude an award of fees under section 1021.5 or the related lodestar multiplier. (See County's Opposition, page 12, lines 12-14.)

After due consideration of the above-cited declaration and the other evidence presented in ruling on the recent motion for discovery, the court denied the motion. The court stated: "Considering the totality of the circumstances presented, there is insufficient evidence to suggest that Alliance was motivated to litigate the action primarily for the benefit of the nonlitigant corporate officers/directors or Alliance's counsel and they were hiding behind Alliance's corporate front." The evidence submitted in this proceeding likewise fails to establish that petitioner's counsel obtained significant economic benefits that sufficiently incentivized this case.

While petitioner's counsel may have real property interests in the County by virtue of a 17% interest in Huddinge Partners, a Nevada LLC, which has some holdings of El Dorado County property, and Measure E had some potential impact on those interests, the legal victory transcends his personal interest while the benefits achieved for the public at large by obtaining a court judgment upheld on appeal in a published opinion that invalidated portions of Measure E is very high. Mr. Brunello is not barred from receiving his fee for legal services, subject to deductions as stated in this ruling.

- County Responsibility for the Attorney Fees Incurred as a Result of Respondents/Intervenors Taylor and Save Our County Actions, such as the Fees Incurred to Reply to Respondents/Intervenors Taylor's and Save Our County's Brief Opposing Petitioner's Constitutional Arguments.

The County asserts that the lodestar fee amount of $10,655 was incurred because of having to reply to the initiative proponent intervenors' opposition prior to the hearing on the petition.

Citing Perry v. Brown (2011) 52 Cal.4th 1116, petitioner argues that the county is solely responsible for all fees petitioner incurred, because the intervenor has the right to intervene to defend the initiative on behalf of the voters and the County, and, therefore, should not be responsible pay petitioner's fees. Petitioner concedes there is some authority for an intervenor being held partially responsible for the fees and further argues that if the court apportions the fees between the County and Respondents/Intervenors Taylor and Save Our County, the court should find joint and several liability for the fees.

"In a postelection challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials

who ordinarily defend the measure or appeal such a judgment decline to do so." (Perry v. Brown (2011) 52 Cal.4th 1116, 1127.)

The California Supreme Court in Perry, supra, did not hold that the governmental entity must solely shoulder the responsibility to pay for the attorney fees incurred by a party successfully challenging the initiative because of the intervening initiative proponent's opposition to the challenge. Allowing an initiative proponent to intervene does not necessarily lead to governmental liability for payment of the challenger's attorney fees incurred due to the intervenor's conduct of its dense of the validity of the initiative enacted.

"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.)

"Under California law, interveners become a party to the action with the same procedural rights, remedies and responsibilities of the original parties. (*Carlsbad Police Officers Association v. City of Carlsbad* (2020) 49 Cal.App.5th 135, 148–149, 262 Cal.Rptr.3d 646 (*Carlsbad*).) "[T]hose procedural rights and remedies include the right to seek attorney fees under section 1021.5 on equal terms with the original parties." (*Id.* at p. 149, 262 Cal.Rptr.3d 646.)" (Vosburg v. County of Fresno (2020) 54 Cal.App.5th 439, 458.)

It logically follows that having become a party to an action entitled to seek an award of attorney fees under section 1021.5 on equal terms with the original parties, the intervenor would also be subject to a claim for attorney fees under the private attorney general statute.

County's opposition lists attorney fee charges for February 7, 8, 10, 18, 24, and 25, 2017 and March 2 and 20-22, 2017 as charges solely related to the intervenors' opposition to the petition and further opposition to reply to County. The services performed on these dates are described

in petitioner's Exhibit 8 – Statement for Services. (Declaration of James L. Brunello in Support of Motion, Exhibit 8, pages 12-14.) The intervenors appear to be solely responsible for these charges in the lodestar amount of $10,655 prior to application of any multiplier.

The court denies petitioner's request for an award of these claimed attorney fees in the amount pf $10,655.

- County as Opposing Party on Appeal

"Section 1021.5 provides in pertinent part: "Upon motion, a court may award attorneys' fees to a successful party against one or more *opposing parties* in any action which has resulted in the enforcement of an important right affecting the public interest...." [Footnote omitted] (Italics added.) Thus, only an opposing party can be liable for attorney fees under section 1021.5." (Connerly v. State Personnel Bd. (2006) 37 Cal.4th 1169, 1176.)

"Generally speaking, the opposing party liable for attorney fees under section 1021.5 has been the defendant person or agency sued, which is **[*1177]** responsible for initiating and maintaining actions or policies that are deemed harmful to the public interest and that gave rise to the litigation. (See, e.g., *Graham v. DaimlerChrysler Corp., supra,* 34 Cal.4th 553, 21 Cal.Rptr.3d 331, 101 P.3d 140; *Tipton–Whittingham v. City of Los Angeles* (2005) 34 Cal.4th 604, 21 Cal.Rptr.3d 371, 101 P.3d 174; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 240 Cal.Rptr. 872, 743 P.2d 932.)" (Connerly v. State Personnel Bd. (2006) 37 Cal.4th 1169, 1176–1177.)

"Appellant argues the City at all times qualifies as an *opposing party* in this action, because Appellant originally had to sue the City in order to achieve the goal of proper funding of the retirement system. This amounted to the enforcement of an important right affecting the public interest, within the meaning of the statute. (§ 1021.5.) However, Appellant's argument disregards the shifting and changing positions of the parties when the litigation is **[*629]** viewed as a whole, whether at the trial or appellate level. As a settling party and fellow respondent in the third party

Objectors' appeal (challenging the class action settlement), the City was not an "opposing party" to the current Appellant; rather, they were allied in interest in defending the settlement, which was presumably in the best interest of all concerned, leading to their request for court approval of it, even over the objections of those third parties. ¶ In *Connerly, supra,* 37 Cal.4th 1169, 1181, 39 Cal.Rptr.3d 788, 129 P.3d 1, the court held: "Thus, in all of the above cases, those found liable for section 1021.5 fees were either real parties in interest that had a direct interest in the litigation, the furtherance of which was generally at least partly responsible for the policy or practice that gave rise to the litigation, or were codefendants with a direct interest intertwined with that of the principal defendant." By settling the case, the City attempted to end the adversarial nature of its relationship with Appellant, and to acknowledge responsibility for the harmful policies that gave rise to the litigation. (See *Connerly, supra,* at pp. 1176–1177, 39 Cal.Rptr.3d 788, 129 P.3d 1.) That course of action undermines any City liability for fees under this statute. ¶ Here, as in *Nestande,* the public treasury is not necessarily liable for private attorney general fees, simply because this was an important case that affected the public interest. "Rather, a public entity may be held liable for attorney fees only if the agency or its representatives was an 'opposing party' in the litigation. [Citations.]" (*Nestande, supra,* 111 Cal.App.4th 232, 240, 4 Cal.Rptr.3d 18.) Here, as in *Wal–Mart Real Estate,* the record shows "the real dispute" was between the Objectors and the settling parties (together, this Appellant and the City). (*Wal–Mart Real Estate, supra,* 132 Cal.App.4th 614, 625, 33 Cal.Rptr.3d 817.) ¶ In light of all these factors, including the designations and activities of all the parties and their respective interests throughout the course of events, the City does not qualify under this statutory criterion as an "opposing" party against whom fees may be awarded, vis-à-vis Appellant." (Emphasis added.) (McGuigan v. City of San Diego (2010) 183 Cal.App.4th 610, 628–629.)

Only respondents/intervenors Taylor and Save Our County appealed from the judgment. Petitioner admits in its moving papers that petitioner only filed a "protective" cross- appeal "to preserve claims in the event the Court of Appeal should reverse some or all of the trial court judgment" and the County avoided any substantive position on the merits, except for support of the trial court's ruling on Implementation Statement # 8 (CALTRANS). (Court emphasis.) (See Petitioner's Motion for Attorney fees, page 7, lines 16-19.) Petitioner's counsel described the cross-appeal as protective or conditional. (Declaration of James L Brunello in Support of Motion paragraph 39.)

The published opinion on appeal was premised solely on respondents/intervenors Taylor's and Save Our County's appeal. The Third District noted the County's involvement in the appeal in the following manner: "The County has also filed a brief, arguing, inter alia, that definitive interpretation of Measure E is unnecessary to resolve the facial challenge. The County also argues that Measure E is invalid if it compels or relies on a subsequent County act, and the County has no obligation to adopt a staff implementation program in the abstract. ¶ We agree with Alliance and the County. We note that the County also argues Measure E is preempted under state law if it unduly burdens the County's ability to provide affordable housing. As we conclude the challenged provisions are unconstitutional, we do not reach this contention." (Emphasis added.) (Alliance for Responsible Planning v. Taylor (2021) 63 Cal.App.5th 1072, 1084.)

The County was not an opposing party in the appeal. Petitioner admits that the County avoided any substantive position on the merits and even supported the trial court's ruling on Implementation Statement # 8. The Third District agreed with the County's and petitioner's positions and did not reach the County's contention that Measure E as preempted by state law.

The court denies the lodestar amount of $31,815, representing attorney fees for 90.9 hours devoted to the appeal at $350 per hour.

Reasonable Attorney Fees

"We adhere to our earlier conclusion that there is no general rule requiring trial courts to explain their decisions on motions seeking attorney fees. In cases where the award corresponds to either the lodestar amount, some multiple of that amount, or some fraction requested by one of the parties, the court's rationale for its award may be apparent on the face of the record, without express acknowledgment by the court of the lodestar amount or method. When confronted with hundreds of pages of legal bills, trial courts are not required to identify each charge they find to be reasonable or unreasonable, necessary or unnecessary. The party opposing the fee award can be expected to identify the particular charges it considers objectionable. A reduced award might be fully justified by a general observation that an attorney overlitigated a case or submitted a padded bill or that the opposing party has stated valid objections. ¶ It is the constitutional obligation of the appellate court to "determine causes ... in writing with reasons stated." (Cal. Const., art. 6, § 14.) A trial court's award of attorney fees must be able to be rationalized to be affirmed on appeal. In the absence of any explanation or comments by the trial court, we have unsuccessfully scrutinized the documents submitted by the parties to find reasons justifying the awards in this case. When a trial court makes an award that is inscrutable to the parties involved in the case, and there is no apparent reasonable basis for the award in the record, the award itself is evidence that it resulted from an arbitrary determination. It is not the absence of an explanation by the trial court that calls the award in this case into question, but its inability to be explained by anyone, either the parties or this appellate court. We are compelled to conclude that there is no reasonable connection between the lodestar amount and the trial court's award. [FN 36.] ¶ FN36. In reaching this conclusion, we do not intend

to suggest that the trial court was required to award the lodestar amount. We and contractor have identified a number of reasons that might support a reduced award. Our problem with the award here is that the award provides no evidence that trial court either adopted or rejected any particular arguments by the parties." (Gorman v. Tassajara Development Corp. (2009) 178 Cal.App.4th 44, 101.)

"The use of the lodestar method for calculating attorney fees was established in California in Serrano III. As we recently noted, "[i]n so-called fee shifting cases, in which the responsibility to pay attorney fees is statutorily or otherwise transferred from the prevailing plaintiff or class to the defendant, the primary method for establishing the amount of 'reasonable' attorney fees is the lodestar method. The lodestar (or touchstone) is produced by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate. Once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative 'multiplier' to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented." (*Lealao*, supra, 82 Cal.App.4th 19, 26, 97 Cal.Rptr.2d 797.) "The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132, 104 Cal.Rptr.2d 377, 17 P.3d 735.) Under certain circumstances, a lodestar calculation may be enhanced on the basis of a percentage-of-the-benefit analysis. (*Lealao*, supra, at pp. 49-50, 97 Cal.Rptr.2d 797.)" (Thayer v. Wells Fargo Bank, N.A. (2001) 92 Cal.App.4th 819, 833.)

"There is no hard and fast rule limiting the factors that may justify an exercise of judicial discretion to increase or decrease a lodestar calculation. (Id. at p. 40, 97 Cal.Rptr.2d 797.) In

Serrano III the Supreme Court identified seven factors as "among" those the trial court in that case properly considered. Three of those factors are inapplicable to the present case, as unlike Serrano III, this case was not against a public entity, the responsibility to pay a fee award would not fall upon the taxpayers, the plaintiffs were not represented by a non-profit public interest law firm or a government funded legal services program, and monies awarded would inure to the individual benefit of the plaintiffs' attorneys. [FN7] (See, *Serrano III*, supra, 20 Cal.3d at p. 49, 141 Cal.Rptr. 315, 569 P.2d 1303.) The remaining four factors were (1) "the novelty and difficulty of the questions involved, and the skill displayed in presenting them"; (2) "the extent to which the nature of the litigation precluded other employment by the attorneys"; (3) "the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award"; and (4) "the fact that in the court's view the two [plaintiffs'] law firms involved had approximately an equal share in the success of the litigation." (Ibid.) ¶ FN7. These factors were "the fact that an award against the state would ultimately fall upon the taxpayers; the fact that the attorneys in question received public and charitable funding for the purpose of bringing law suits of the character here involved"; and "the fact that the monies awarded would inure not to the individual benefit of the attorneys involved but the organizations by which they are employed." (*Serrano III*, supra, 20 Cal.3d at p. 49, 141 Cal.Rptr. 315, 569 P.2d 1303.)" (Thayer v. Wells Fargo Bank, N.A. (2001) 92 Cal.App.4th 819, 834.)

The declaration of James L. Brunello in support of the motion describes the legal services provided during this litigation and appeal. Attached to the declaration as Exhibit 8 is the statement for his services itemizing the 530 hours of legal services provided during the litigation and appeal and 15 hours expended in preparing the motion for attorney fees. Counsel seeks and award of $350 per hour amounting to a lodestar amount of $185,500 for the merits portion of the litigation and $5,250 for the attorney fees motion.

Petitioner also seeks a 1.7 positive multiplier. Petitioner argues that the following factors justify such a multiplier: the petitioner's counsel bears the risk of not being paid as the case was undertaken on a contingent basis; there was a long delay in being paid as the litigation and appellate process took over five years to complete after counsel commenced working on the case, including more than four years awaiting a decision on appeal after judgment was entered in favor of petitioner; and the litigation involved a number of complicated issues and reached a result that vindicated important constitutional and statutory rights.

Deducting the sums of $10,655, representing attorney fees incurred by petitioner to address matters pursued by respondents/intervenors Taylor and Save Our County in the trial court and $31,815, representing attorney fees for 90.9 hours devoted to the appeal at $350 per hour, the lodestar amount awarded to petitioner is $143,030.

Under the circumstances presented, the court finds that bearing the risk of not being paid for significant amounts of work on this litigation, the issues involved, which called for a published appellate opinion, the long delay in being paid the fees, and the important rights involved in this action justifies applying a multiplier of 1.7.

In summary, the court grants the motion in part and denies the motion in part. The court awards petitioner $243,151 in attorney fees payable by respondent County. The court also awards petitioner $5,250 in fees incurred to bring this motion with no multiplier.

County and respondents/intervenors Taylor and Save Our County have not contested the amount of costs requested. On August 16, 2021, respondents/intervenors Taylor and Save Our County were served notice of the motion, the moving papers, and a memorandum of costs requesting costs awarded against them. The court awards petitioner $510 in costs payable by the County and $1,005.50 in costs payable by respondents/intervenors Taylor and Save Our County.

TENTATIVE RUING # 3: PETITIONER ALLIANCE FOR RESPONSIBLE PLANNING'S MOTION FOR ATTORNEY FEES IS GRANTED IN PART AND DENIED IN PART AS DESCRIBED IN THE TEXT OF THE RULING. THE COURT AWARDS PETITIONER $243,151 IN ATTORNEY FEES PAYABLE BY RESPONDENT COUNTY. THE COURT ALSO AWARDS PETITIONER $5,250 IN FEES INCURRED TO BRING THIS MOTION WITH NO MULTIPLIER. THE COURT FURTHER AWARDS PETITIONER $510 IN COSTS PAYABLE BY THE COUNTY AND $1,005.50 IN COSTS PAYABLE BY RESPONDENTS/INTERVENORS TAYLOR AND SAVE OUR COUNTY. THE COURT RESERVES RULING ON THIS ISSUE OF THE FEES CLAIMED AS INCURRED TO OPPOSE THE COUNTY'S MOTION FOR DISCOVERY AND SETS A HEARING ON THE REQUEST FOR 8:30 A.M. ON FRIDAY, MAY 6, 2022, IN DEPARTMENT NINE. THE COURT WILL ONLY ENTERTAIN ORAL ARGUMENT CONCERNING THE REQUEST FOR FEES INCURRED TO OPPOSE THE MOTION FOR DISCOVERY AT THE HEARING ON MAY 6, 2022. ORAL ARGUMENT ON THE REMAINDER OF THIS MOTION WILL BE HELD UPON REQUEST OF A PARTY AT 8:30 A.M. ON FRIDAY, MARCH 25, 2022, OR ANOTHER DATE IF A LONG CAUSE HEARING IS REQUESTED. COUNTY IS TO FILE AND SERVE ITS OPPOSITION TO THE REQUEST FOR FEES INCURRED BY PETITIONER TO OPPOSE THE DISCOVERY MOTION NOT LATER THAN APRIL 25, 2022, AND THE REPLY IS TO BE FILED AND SERVED NOT LATER THAN APRIL 29, 2022. THE OPPOSITION AND REPLY ARE TO BE STRICTLY LIMITED TO THE ISSUE OF ATTORNEY FEES INCURRED FOR THE DISCOVERY MOTION. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE

TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, MARCH 25, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

4. KULYA v. CATO 21CV0348

Defendants Motion to Compel Arbitration and Stay Action.

On December 21, 2021, plaintiff filed an action against defendants Cato, Fifield, and GT Hotel Partners, Inc. asserting causes of action for fraud, negligent misrepresentation, specific performance, breach of contract, breach of implied covenant of good faith and fair dealing, and declaratory relief seeking injunctive relief arising from an alleged commercial purchase agreement to sell certain property to plaintiff.

Defendants Cato, Fifield, and GT Hotel Partners, LLC move to compel plaintiff to arbitrate the action against them asserting the follow grounds: there is an existing, valid arbitration clause initialed by plaintiff and defendants Cato and Fifield; the scope of arbitration set forth in the agreement is broad enough to encompass all claims in the complaint; although GT Partners, LLC disputes it was a party to the commercial sales agreement, it voluntarily agrees to be join in the binding arbitration process in order to have a unified process; plaintiff's filing of the action seeking, among other things, injunctive relief does not waive the defendants' right to compel arbitration; plaintiff's filing of a court action in order to file a lis pendens does not waive the defendants' right to compel arbitration; the disputes in this action fall within the broad scope of the arbitration clause; and there are no contractual exclusions to arbitration.

Plaintiff opposes the motion on the following grounds: the court must deny arbitration pursuant to the provisions of Code of Civil Procedure, § 1281.2(c), because no signatory defendant GT Hotel Partners, LLC is a third party to the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact if the matter is arbitrated by plaintiff and defendants Cato and Fifield and also litigated in court between plaintiff and defendant GT Hotel Partners, LLC; paragraph 26(C)(2) of the agreement provides for an exception to arbitration where a court action is commenced for the purposes of

recording a Lis Pendens, therefore, the motion to compel arbitration must be denied; and the scope of the arbitration provision is to be narrowly construed and plaintiff's causes of action fall outside the scope of the provision..

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.

Scope of Litigation Provision

"…any doubts regarding the arbitrability of a dispute are resolved in favor of arbitration…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].)" (Coast Plaza Doctors Hosp. v. Blue Cross of California (2000) 83 Cal.App.4th 677, 686.)

"…Consistent with the presumption favoring arbitration, other federal circuit courts have broadly construed "arising under" and "arising out of" language in arbitration provisions. (*Battaglia v. McKendry, supra,* 233 F.3d at p. 727 ["when phrases such as 'arising under' and 'arising out of' appear in arbitration provisions, they are normally given broad construction, and are generally construed to encompass claims going to the formation of the underlying agreements"]; *Gregory v. Electro–Mechanical Corp., supra,* 83 F.3d at p. 385 ["arising under" and "arising out of" clauses are broad]; *Sweet Dreams Unlimited, Inc. v. Dial–A–Mattress International, Ltd.* (7th Cir.1993) 1 F.3d 639, 641 ["arising out of" arbitration clause language extended to tort causes of action having their genesis in the contract].) The only federal circuit

that continues to strictly adhere to the Second Circuit analysis expressed by Judge Medina in *In re Kinoshita, supra,* 287 F.2d at page 953 is the Ninth Circuit. ¶ We decline to follow the Ninth Circuit rule for the following reasons. To begin with, it is a distinctly minority rule. Further, as noted, California courts have repeatedly held that language similar to that in the present arbitration clause requires that the parties arbitrate extracontractual disputes apart from strict interpretation and contract performance questions. (*Coast Plaza Doctors Hospital v. Blue Cross of California, supra,* 83 Cal.App.4th at pages 684–687, 99 Cal.Rptr.2d 809; *Izzi v. Mesquite Country Club, supra,* 186 Cal.App.3d at pp. 1315–1317, 231 Cal.Rptr. 315; *Berman v. Dean Witter & Co., Inc., supra,* 44 Cal.App.3d at pp. 1002–1003, 119 Cal.Rptr. 130.) Moreover, under both federal and state law, we are obligated to liberally construe arbitration clauses. (*Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.* (1983) 460 U.S. 1, 23, 103 S.Ct. 927, 74 L.Ed.2d 765 ["the policy of the [United States] Arbitration Act requires a liberal reading of arbitration agreements ..."]; *O'Malley v. Wilshire Oil Co.* (1963) 59 Cal.2d 482, 491, 30 Cal.Rptr. 452, 381 P.2d 188 ["A heavy presumption weighs the scales in favor of arbitrability; an order directing arbitration should be granted 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage' "]; *Vianna v. Doctors' Management Co.* (1994) 27 Cal.App.4th 1186, 1189, 33 Cal.Rptr.2d 188 [" 'arbitration agreements should be liberally interpreted, and arbitration should be ordered unless the agreement clearly does not apply to the dispute in question' "].) Under California law, we cannot give arbitration clauses the " 'relatively narrow' " construction described in *Mediterranean Enterprises, Inc. v. Ssangyong Corp., supra,* 708 F.2d at page 1464. Thus, we believe the language in the arbitration clause at issue—"[a]ny dispute ... arising from or out of this ... [a]greement shall be submitted to arbitration"—is broad enough to

cover plaintiff's tort claims." (Emphasis added.) (EFund Capital Partners v. Pless (2007) 150 Cal.App.4th 1311, 1329-1330.)

The arbitration provision of that agreement states: "**The parties agree that any dispute or claim in Law or equity arising between them out of this Agreement or any resulting transaction, which is not settled through mediation, shall be decided by neutral, binding arbitration**…" (Emphasis in original.) (Complaint, Exhibit G – Commercial Property Purchase Agreement, paragraph 26.B.)

Resolving doubts regarding the arbitrability of a dispute in favor of arbitration, indulging in every intendment to give effect to the arbitration agreement, and applying 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", the court finds that all of the claims in the compliant in this action fall within the scope of the broad arbitration provision set forth in the subject commercial property sales agreement

Contractual Lis Pendens Exception to Waiver of the Arbitration Provision of the Agreement Does Not Bar Defendants from Seeking to Compel Arbitration

The subject agreement provides for additional mediation and arbitration terms in the arbitration section, which includes the provision that states: "**PRESERVATION OF ACTIONS: The following shall not constitute a waiver nor violation of the mediation or arbitration provisions:…(ii) the filing of a court action to enable the recording of a notice of pending actions…"** (Emphasis in Original.) (Complaint, Exhibit G – Commercial Property Purchase Agreement, paragraph 26(C)(2).)

"" '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.]" (National City Police Officers' Ass'n v. City of National City (2001) 87 Cal.App.4th 1274, 1279.)

"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.)

"The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." (Civil Code, § 1644.)

Interpreting the language of the subject arbitration provision as will make the agreement reasonable, and capable of being carried into effect and construing the words of the subject agreement in their ordinary and popular sense, the court finds that the preservations of actions clause only preserve the plaintiff's right to arbitrate the claims raised in a lawsuit that the plaintiff filed where the action was filed to enable the recording of a notice of pendency of action. Under a reasonable construction of the provision, plaintiff does not waive plaintiff's right to arbitrate and does not violate the arbitration provision by filing such an action. Furthermore, the language cannot reasonably be construed to waive the rights of defendants to arbitrate the claims against them where the plaintiff files a lawsuit against them.

Plaintiff is Estopped from Asserting that Arbitration Must be Denied Pursuant to Code of Civil Procedure, § 1281.2(c)

Plaintiff essentially asserts that defendant GT Hotel Partners and LLC did not sign the agreement and it claims in its answer that it is not bound by the subject agreement, therefore, it is a third party non-signatory who cannot force plaintiff to arbitrate plaintiff's claims against

defendant GT Hotel Partners, LLC and the arbitration motion must be denied on the ground that defendant GT Hotel Partners, LLC is a third party to the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact if the matter is arbitrated by plaintiff and defendants Cato and Fifield and also litigated in court between plaintiff and defendant GT Hotel Partners, LLC

"On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: ¶ * * * (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. For purposes of this section, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition. This subdivision shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295. ¶ If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit. ¶ If the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies. ¶ If the court determines that a party to the arbitration is also

a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding." (Code of Civil Procedure, § 1281.2(c).)

The subject agreement with counteroffer was executed by individual defendants Cato and Fifield as sellers and plaintiff as the buyer. (See Complaint, Exhibits F and G.)

The arbitration provision of that agreement states: "**The parties agree that any dispute or claim in Law or equity arising between them out of this Agreement or any resulting transaction, which is not settled through mediation, shall be decided by neutral, binding arbitration**…" (Emphasis in original.) (Complaint, Exhibit G – Commercial Property Purchase Agreement, paragraph 26.B.)

Plaintiff and defendants Cato and Fifield initialed the arbitration provision of the agreement. (Complaint, Exhibit G – Commercial Property Purchase Agreement, paragraph 26.B.)

""Equitable estoppel precludes a party from asserting rights 'he otherwise would have had against another' when his own conduct renders assertion of those rights contrary to equity." (*Schwabedissen*, supra, 206 F.3d at pp. 417-418.) 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*).) As invoked by *Ventana*, the equitable estoppel doctrine applies when a party has signed an agreement to arbitrate but attempts to avoid arbitration by suing nonsignatory

defendants for claims that are " 'based on the same facts and inherently inseparable' " from arbitrable claims against signatory defendants. (*Sunkist*, supra, 10 F.3d at p. 757, quoting J.*J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.* (4th Cir.1988) 863 F.2d 315, 320-321 (*J.J.Ryan*) ["When the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement."].) Courts applying equitable estoppel against a signatory have "looked to the relationships of persons, wrongs and issues, in particular whether the claims that the nonsignatory sought to arbitrate were ' " 'intimately founded in and intertwined with the underlying contract obligations.' " ' " (*Choctaw Generation Ltd. Partnership v. American Home Assur. Co.* (2d Cir.2001) 271 F.3d 403, 406 (*Choctaw*).) ¶ In *Sunkist*, the court determined that a plaintiff who " ultimately must rely on the terms of [an] agreement in its claims against the [nonsignatory defendant]," should be "equitably estopped from repudiating the arbitration clause of the agreement." (*Sunkist*, supra, 10 F.3d at p. 757.) "The fundamental point," as explained by *NORCAL*, "is that respondent was not entitled to make use of the [contract containing an arbitration clause] as long as it worked to her advantage, then attempt to avoid its application in defining the forum in which her dispute ... should be resolved." (*NORCAL*, supra, 84 Cal.App.4th at p. 84, 100 Cal.Rptr.2d 683.) The doctrine thus prevents a party from playing fast and loose with its commitment to arbitrate, honoring it when advantageous and circumventing it to gain undue advantage. (Cf. *IDS Life Ins. Co. v. SunAmerica, Inc.* (7th Cir.1996) 103 F.3d 524, 530 [where a party to an arbitration agreement attempts to avoid that agreement by suing a "related party with which it has no arbitration agreement, in the hope that the claim against the other party will be adjudicated first and have preclusive effect in the arbitration. Such a maneuver should not be allowed to succeed

..."].)" (Emphasis added.) (Metalclad Corp. v. Ventana Environmental Organizational Partnership (2003) 109 Cal.App.4th 1705, 1713-1714.)

Plaintiff has conceded that the claims against all three defendants involve the same transaction, between all the parties, the same set of facts, and same set of legal questions. (See Opposition, page 4, lines 17-19.)

Plaintiff has also conceded in paragraph 6 of the complaint that defendant GT Hotel Partners, LLC acted as the agent, employee, and/or representative of defendants Cato and Fifield, and was acting within the course and scope of its agency and employment with the full knowledge, consent permission, authorization, and ratification, either express or implied, of defendants Cato and Fifield in performing the acts alleged in the complaint.

Plaintiff is clear to attempt to avoid arbitration by suing a nonsignatory defendant for claims that are based on the same facts and inherently inseparable from arbitrable claims against signatory defendants. Plaintiff is equitably estopped from claiming defendant GT Hotel Partners, LLC's involvement in the case is grounds to deny arbitration, particularly since defendant GT Hotel Partners, LLC seeks to compel the arbitration and has agreed to be bound by the arbitration proceedings. (See Defendants' Memorandum of Points and Authorities in Support of Motion to Compel Arbitration, page 15, lines 21-24.)

Furthermore, as an independent rationale to grant the motion, plaintiff's allegations that defendant GT Hotel Partners, LLC acted as the agent, employee, and/or representative of defendants Cato and Fifield also allows defendant GT Hotel Partners, LLC to compel arbitration of plaintiff's claims against it.

"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.) One such exception provides that when a plaintiff

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.)

In summary, defendants' motion to compel arbitration and stay this action pending arbitration is granted.

TENTATIVE RULING # 4: DEFENDANTS' MOTION TO COMPEL ARBITRATION IS GRANTED. THIS ACTION IS STAYED PENDING 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 TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, MARCH 25, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

5. MIDLAND CREDIT MANAGEMENT v. HIRSCH PCL-20210071

Motion to Compel Arbitration and Stay Proceedings.

On January 28, 2021, plaintiff filed an action against defendant for an alleged debt owed on a credit card account. Plaintiff and defendant appeared at the case management conference on June 7, 2021, and the court set the initial court trial date as November 7, 2022, which was estimated to be a one-day trial. On October 6, 2021, the court, on its own motion, vacated the trial date, set a new trial date for March 30, 2022, and set an issues conference date for March 18, 2022. During the mandatory settlement conference on January 26, 2022, the court set a trial setting conference for February 28, 2022. At the February 28, 2022, trial setting conference defendant advised the court that she had submitted a motion to compel arbitration. Plaintiff's counsel stated he was unaware of any motion having been served on his office. The court continued the trial setting conference to March 28, 2022.

The defendant's motion to compel arbitration was filed on February 25, 2022.

Defendant moves to compel arbitration on the ground that the credit card agreement provides that if either plaintiff or defendant make a demand for arbitration, the parties must arbitrate any dispute of claim between them that directly or indirectly arises from or relates to the subject account, the account agreement, or the parties' relationship.

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.)" (Emphasis added.) (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.)

The complaint alleges that the subject credit account was established by Synchrony Bank and all rights, title and interest on the account was assigned to plaintiff. (Complaint, paragraph 5.)

Attached to the moving papers is an unauthenticated copy of the purported PayPal Cashback MasterCard agreement with Synchrony Bank. The purported agreement contained an arbitration provision on pages 5 and 6 consisting of 14 paragraphs.

Paragraph 1 provides: "If either you or we make a demand for arbitration, you and we must arbitrate any dispute of claim between you (including any other user of your account), and us (including our parents, affiliates, agents, employees, officers, and assignees) that directly or indirectly arises from or relates to your account, your account Agreement or our relationship, except as noted below. In addition, PayPal, Inc. and/or any assignee, agent, or service provider of ours that collects amounts due on your account are intended beneficiaries of this Arbitration section and may enforce it in full (notwithstanding any state law to the contrary).(Emphasis added.)

Paragraph 2 provides: "The Arbitration section broadly covers claims based upon contract…"

Paragraph 7 provides: "The party who wants to arbitrate must notify the other party in writing. This notice can be given after the beginning of a lawsuit or in papers filed in the lawsuit…"

Unfortunately, the unauthenticated purported agreement is not admissible due the lack of proper authentication as the subject agreement.

"Unless otherwise ordered or specifically provided by law, all moving and supporting papers shall be served and filed at least 16 court days before the hearing…" (Code of Civil Procedure, § 1005(b).)

The proof of service declares that notice of the hearing and the moving papers were caused to be sent to plaintiff's counsel by mail on February 25, 2022.

The proof of service is not executed under penalty of perjury and plaintiff executed the statement of service, which renders the proof of service invalid. (See Code of Civil Procedure, § 1013a.)

There is no opposition in the file.

Absent valid proof of adequate service of notice and the moving papers, the court has no alternative other than to deny the motion without prejudice due to lack of proof of service.

TENTATIVE RULING # 5: DEFENDANT'S MOTION TO COMPEL ARBITRATION IS DENIED WITHOUT PREJUDICE DUE TO LACK OF PROOF OF SERVICE. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY,

MARCH 25, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

6. SATO v. FOLSOM FAMILY AND SPORTS MEDICAL PC-20190059

Plaintiffs' Motion to Compel Further Responses to Discovery.

Plaintiff Dr. Mimi K. Sato moves to compel responses to the following identical discovery propounded on each of the two defendants Dr. Matossian and Folsom Family and Sports Medical Group, Inc. (Folsom Family): special interrogatories, Set One, numbers 1-55; Requests of Admission, Set One, numbers 1-64 and second request number 17; Form Interrogatories, Set One, number 17.1 (Dr. Matossian); Form Interrogatories, Set Two, number 17.1 (Folsom Family); Requests for Production, Set Two, numbers 1-9 and 11-24 (Folsom Family); and Requests for Production, Set One, numbers 1-9 and 11-24 (Dr. Matossian).

Plaintiff argues that further responses to the discovery should be compelled for the following reasons: defendants only provided improper boilerplate objections to the special interrogatories without a single substantive answer to any special interrogatory; defendants only provided an improper statement that form interrogatory, number 17.1 requesting information related to all responses to the requests for admission that were not an unqualified admission does not apply, was unresponsive to the extent that further responses to the requests for admission are ordered and those further responses do not amount to an unqualified admission; defendants only provided improper boilerplate objections to the requests for admission without a single substantive answer to any request for admission; and defendants only provided improper boilerplate objections to 18 of the 23 requests for production serving as an incomplete joint production.

Plaintiffs further request an award of sanctions against defendants in the amount of $15,882.50.

Defendants initially opposed the motion on the following grounds: the motions to compel both defendants to provide further responses to requests for production are untimely; that it was

improper to file a consolidated motion seeking further responses concerning multiple types of discovery propounded; and the notice of motion is defective. Defendants explain that no substantive opposition on the merits was asserted, because defendants believe that assertion of such an opposition on the merits at the same time as procedural and untimely filing objections are asserted would result in defendants waiving those objections. Defendants requested that sanctions be denied to plaintiffs, because there were inadequate meet and confer activities by plaintiffs.

Plaintiffs replied to the initial opposition: defendants had actual notice of the motion, the relief sought, and grounds asserted therein on October 26, 2021, and by defense counsel's own admission, defense counsel has been working on the motion since that day; there is no dispute that the timeliness objection is not asserted against the relief sought concerning discovery propounded other than as it relates to the requests for production; the court should rule on the merits as an unopposed motion, because defendants have refused to oppose the motion on the merits; and sanctions in the amount of $18,322.50 are appropriately imposed on defendants for refusal to respond to 95% of plaintiffs' discovery requests.

The hearing on March 4, 2022, the court denied plaintiff's motion for relief from untimely motion to compel further responses to requests for production, denied the motion for further responses to requests for production as untimely, and overruled the procedural, notice, and meet and confer objections to the other motions to compel discovery. The court ordered the hearing on the consolidated discovery motion continued to March 25, 2022, to allow the defendants sufficient time to file an opposition on the merits and to allow plaintiffs to file a reply addressing that opposition on the merits. The court further directed that the additional opposition on the merits was to be filed and served by March 11, 2022, and the reply to that opposition filed and served by March 17, 2022.

On March 11, 2022, defendants Dr. Matossian and Folsom Family and Sports Medical Group, Inc. filed a further opposition. Defendants argue: the motion to compel further responses and production related to the requests for production was previously denied by the court at the prior hearing; plaintiff's 66 requests for admission are improper, because the requests do not ask defendant to admit the truth of specified matters of fact, opinions relating to fact, or the application of law to fact; plaintiffs have failed to demonstrate that the requests for admission will narrow the issues and save the time and expense of preparing for unnecessary proof at trial, because what truth being asked in each request is unknown; the requests for admission are intentionally vague, ambiguous, and overbroad, contain subparts, and are compound and/or conjunctive; plaintiffs' 55 special interrogatories are improper as they don't ask about contentions, or ask about facts, witnesses, or writings upon which a contention is based; the special interrogatories are vague, ambiguous, and call for a legal conclusion; some questions invade the privacy of third party non-litigants; most of the special interrogatories improperly contain sub-parts or are compound and/or conjunctive containing ambiguous terms resulting in ambiguity and confusion; the special interrogatories are intentionally vague and overbroad; and plaintiffs' request for sanctions should be denied.

Defendants request an award of sanctions in the amount of $12,750. .

There was no reply to the further opposition in the courts file at the time this ruling was prepared.

The separate statements in support of the motion to compel further responses to special interrogatories and requests for admission are 78 pages in length.

The separate statements in opposition to the motion to compel further responses to special interrogatories and requests for admission are 147 pages in length.

During this discovery dispute the court also must review and rule on a motion for relief from untimely motion to compel further responses to requests for production and various procedural, notice and meet and confer objections to the other motions to compel discovery. The motions involved various declarations, moving papers, opposition papers, and replies that together amounted to a voluminous number of pages to review.

Sanctions

The issue of sanctions will be determined in the final ruling on the merits of the motion.

Discovery Referee

"When the parties do not consent, the court may, upon the written motion of any party, or of its own motion, appoint a referee in the following cases pursuant to the provisions of subdivision (b) of Section 640: ¶ * * * (5) When the court in any pending action determines that it is necessary for the court to appoint a referee to hear and determine any and all discovery motions and disputes relevant to discovery in the action and to report findings and make a recommendation thereon." (Code of Civil Procedure, § 639(a)(5).) "Unless both parties have agreed to a reference, the court should not make blanket orders directing all discovery motions to a discovery referee except in the unusual case where a majority of factors favoring reference are present. These include: (1) there are multiple issues to be resolved; (2) there are multiple motions to be heard simultaneously; (3) the present motion is only one in a continuum of many; (4) the number of documents to be reviewed (especially in issues based on assertions of privilege) make the inquiry inordinately time-consuming. ¶ In making its decision, the trial courts need consider the statutory scheme is designed only to permit reference over the parties' objections where that procedure is necessary, not merely convenient. (§ 639, subd. (e).) Where one or more of the above factors unduly impact the court's time and/or limited resources, the court is clearly within its discretion to make an appropriate reference. ¶ On the other hand, certain factors will always

militate against reference. Resolution of legal issues underlying discovery requests which are complex, unsettled or of first impression, lie peculiarly within the purview of the court. Further, where there are parties to the litigation who are not involved in these particular discovery proceedings, but who will be affected by the final rulings, it is the trial court which is best able to determine who these parties are and to what extent they may be affected, and best ensure they are properly noticed and their interests protected." (Taggares v. Superior Court (1998) 62 Cal.App.4th 94, 105-106.)

"A discovery referee must not be appointed under Code of Civil Procedure section 639(a)(5) unless the exceptional circumstances of the particular case require the appointment." (Rules of Court Rule. 3.920(c).)

The court is inclined to appoint a discovery referee for all purposes in this case as it appears necessary due to the following exceptional circumstances presented in this case: there are essentially multiple motions to be heard simultaneously; there are multiple issues to be resolved; the present motion is only one in a continuum of many; the number of documents to be reviewed make the inquiry inordinately time-consuming; and these factors unduly impact the court's time and limited resources.

"If the referee is appointed under section 639(a)(5) to hear and determine discovery motions and disputes relevant to discovery, the order must state that the referee is authorized to set the date, time, and place for all hearings determined by the referee to be necessary; direct the issuance of subpoenas; preside over hearings; take evidence; and rule on objections, motions, and other requests made during the course of the hearing." (Rules of Court, Rule 3.922(e).)

Appearances are required. If you agree to the discovery referee, then you can stipulate to the referee. Or the parties can provide the court three names for the referee; or, the court can assign

a discovery referee. If one party does not agree to the appointment of a discovery referee, you may have an oral argument.

TENTATIVE RULING # 6: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, MARCH 25, 2022, IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

7. ROSSI v. TURNEY PC-20190445

Hearing Re: Default Judgment.

On August 20, 2019, the plaintiffs filed a complaint against defendants to quiet title, for partition by sale, and for an accounting to determine the allocations and distribution of the proceeds of sale. On December 9, 2020, default was entered against all unknown persons claiming an interest in the property. On September 17, 2020, default was entered against Carol Turney, Jeffrey Joseph Turney, Ross Emory Turney, Erin F. Turney-Cobb, and Michelle Ann Turney-Gatson. On June 16, 2021, default was entered against Kevin S. Turney. On June 10, 2020, default was entered against John Kevin Turney and Ronald Turney. On December 20, 2019, default was entered against Michael Turney. On January 13, 2020, default was entered against Sherine Turney. On November 14, 2019, default was entered against Lawrence Dale Turney and Eugene Lee Turney, Jr. On November 16, 2019, default was entered against Constance J. Turney-Morevak. The court entered default against Doe Defendant 1, Michael D. Turney on July 27, 2021. On January 10, 2022, the court entered default judgments against Delmar Ray Turney, Joseph J. Turney, Frank F. Turney, Sayles A. Turney, and Ross Turney.

On April 5, 2021 plaintiffs filed a request for entry of a court judgment against Carol Turney, Joseph J. Turney, Delmar Ray Turney, Jr., Eugene Lee Turney, Eugene Lee Turney, Jr., Lawrence Dale Turney, Constance J. Turney-Morevak, John Kevin Turney, Sayles A. Turney, Ross Emory Turney, Ross Turney, Ronald Turney, Sherine Turney, Kevin S. Turney, Erin F. Turney-Cobb, Michelle Ann Tureny-Gatson, Michael Turney, Roberta Sylvia Turney, Winston Alton Turney, Patricia Turney-Borgman, Scott Turney, Stephen Turney, Wilfred Ray Turney, Orville Ross Turney, Jennifer Louise Tourney, Jeffrey Joseph Turney, Frank F. Turney, and Chris Lee Turney. On August 2, 2021, plaintiffs filed a request for entry of a court judgment against Doe Defendant 1, Michael D. Turney.

On September 22, 2021, a paralegal in plaintiff's counsel's office filed a declaration.

A supplemental memorandum of points and authorities was filed on January 18, 2022.

Although the court is unable to find orders for entry of the default of Chris Lee Turney, Roberta Silvia Turney, Ross Turney, Winston Alton Turney, Patricia Turney-Borgman, Scott Turney, Stephen Turney, Wilfred Ray Turney, Orville Ross Turney, Jennifer Louise Tourney, and Eugene Lee Turney, plaintiffs have adequately addressed this issue in their supplemental memorandum of points and authorities.

Plaintiff states in the supplemental memorandum of points and authorities filed on January 18, 2022, that Patricia Turney-Borgman, Scott Turney, Stephen Turney, and Jennifer Louise Tourney entered appearances in the case and the parties have settled; and it is anticipated that in accordance with the terms of the settlement the court will enter judgment to quiet title in favor of plaintiffs and against these Turney defendants conditioned upon payment of the amount of $7,000 to each of them.

Plaintiffs have submitted proof of service of notice of the continued hearing on the request for default judgment, which declares that counsel for the above-described Turney Defendants were served that notice by mail on September 4, 2021.

Plaintiff states in the supplemental memorandum at page 2, lines 20-24 those plaintiffs prepared to dismiss defendants Chris Lee Turney, Roberta Silvia Turney, Ross Turney, Winston Alton Turney, Wilfred Ray Turney, and Orville Ross Turney at the hearing as unnecessary, because while they are believed to be related in some way to the defendants on title to the subject property, all are believed to be deceased.

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.)

"In general, "after a plaintiff has obtained a default [against a defendant who failed to file a timely response to the complaint], the defendant no longer has any right to participate in the case.... Under section 764.010, by contrast, the court must 'in all cases' 'hear such evidence as may be offered respecting the claims of *any* of the defendants' ... before it can render judgment. 'Any' defendant has to include a defendant whose default has been taken, and 'all cases' must mean even cases in which a default has occurred. If a defendant shows up before judgment is entered, the court must 'hear such evidence' as this party may offer about its claims, even if the defendant is in default. We can see no other way of interpreting this statute." (*Harbour Vista, supra,* 201 Cal.App.4th at p. 1504, 134 Cal.Rptr.3d 424, citation omitted.)" (Nickell v. Matlock (2012) 206 Cal.App.4th 934, 941-942.)

On the other hand, the defendant is not entitled to notice of the hearing or participation in any other hearings. ""[I]t is not true ... that allowing a defendant to participate in a quiet title judgment hearing nullifies the legal effect of a default.... [S]ection 764.010 does not prohibit a quiet title plaintiff from taking a defendant's default. Once that happens, the defendant is severely disadvantaged. The plaintiff is no longer required to serve documents on it or give notice of any future court dates.... This cuts the defendant off from the most readily available source of information about the case. The defendant also cannot participate in any other hearings or conferences with the court. In fact, the most likely outcome is that the defaulting defendant will not learn of the hearing to adjudicate title until it is too late to attend." (*Harbour Vista, supra,* 201 Cal.App.4th at pp. 1504–1505, 134 Cal.Rptr.3d 424, citation omitted.)" (Nickell v. Matlock (2012) 206 Cal.App.4th 934, 942.)

Appearances are required at the evidentiary hearing for plaintiffs to submit evidence that proves their case. The court will set an evidentiary hearing.

TENTATIVE RULING # 7: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, MARCH 25, 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. JANUSIEWICZ v. PIKE PCU-20150239

Hearing Re: Claim of Exemption.

On July 16, 2016, the court entered a default judgment in this action against defendants in the amount of $11,753.37. Plaintiff levied on defendant Thomas Pike's (a.k.a. Onyx Pike) wages.

The judgment debtor claims all his earnings are exempt because they are necessary for the support of himself and his family. Judgment debtor Pike is not willing to have anything withheld to pay on this judgment debt. The judgment debtor claims a minor daughter as his only dependent.

The judgment creditor opposes the claim on the following grounds: the tax, FICA, and SDI payroll deductions in the amount of $1,499.83 is excessive as shown by attached State and Federal tax withholding schedules of maximum withholding for judgment debtor Pike's weekly income as a single person and calculation of FICA as 6.5% of judgment debtor Pike's income and SDI as 1.2% of judgment debtor Pike's income; judgment debtor Gionannini continues to cohabitate with judgment debtor Pike, yet her income and contribution to the expenses is not included in the calculations. The judgment creditor will accept $75 per weekly pay period.

The public policy of the state's wage exemption statutes is to ensure that the debtor and his or her family will retain enough money to maintain a basic standard of living. (Barnhill v. Robert Saunders & Co. (1981) 125 Cal.App.3d 1, 6.) The exemption claimant has the burden of proof. (Code of Civil Procedure, § 703.580(b).) Absent the judgment debtor establishing his entire monthly net income is necessary for support of himself and his family, the amount subject to garnishment is 25% of his net monthly income (See 15 U.S.C. § 1673; and Code of Civil Procedure, § 706.050.), which amounts to $676.75 per month.

The judgment debtor claims a minor daughter as the only person dependent on the judgment debtor for support. Judgment debtor Pike claims in the verified financial statement that he

received $3,321.10 in monthly income including his last unemployment payment and incurs $3,330 in expenses each month.

The verified opposition states that co-judgment debtor Gionannini cohabitates with debtor. To the extent that the co-judgment debtor contributes to the household expenses, such as rent, food, utilities, etc., that amount must be included in the financial statement as other money judgment debtor Pike receives each month. This needs to be clarified by judgment debtor Pike under penalty of perjury.

TENTATIVE RULING # 8: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, MARCH 25, 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. PAINTER v. BENTON PC-20210202

Defendants Arnest's and Filo Real Estate, Inc.'s Motion to Strike Portions of 2nd Amended Complaint.

Defendants Arnest and Filo Real Estate, Inc. demurred to the 9th cause of action of the 1st amended complaint for third party tort of another on the ground that the complaint admits that plaintiffs are seeking damages against all the defendants, including Arnest and Filo Real Estate, Inc., under a theory that they are joint tortfeasors, therefore, the tort of another doctrine does not apply.

Defendants Arnest and Filo Real Estate, Inc. also moved to strike portions of the 1st amended complaint that sought recovery of attorney fees incurred in this action, punitive damages, emotional distress damages, and non-economic damages.

After hearing oral argument on the demurrer and motion to strike, on November 5, 2021, the court, among other things, denied the motion to strike the claim for attorney fees asserted under the tort of another doctrine.

On November 23, 2021, plaintiff filed a 2nd amended complaint asserting causes of action against defendants to quiet title, for declaratory relief, cancellation of deed, breach of contract, breach of fiduciary duty by failure to use reasonable care, breach of fiduciary duty by breach of loyalty, negligence, and requesting a preliminary injunction and other equitable relief.

The action arises from an alleged dispute related to the plaintiffs having purchased the subject real property from defendants, plaintiffs' alleged failure to pay a portion of the down payment in the amount of $45,000 when due and owing, and the plaintiffs allegedly deeding back title to the defendants as provided by the terms of an addendum to the sale/financing agreement, which plaintiffs contend was illegal and void as it allowed defendants to obtain title to the property without resort to the allegedly mandated judicial or non-judicial foreclosure procedure.

On December 22, 2021, defendants Arnest and Filo Real Estate, Inc. filed the instant motion to strike the prayer for attorney fees on the ground that the 2nd amended complaint states a tort cause of action for wrongful eviction against defendants, including defendants Ott and Benton, which bars any claim that the plaintiffs can recover attorney fees under the tort of another theory as all defendants are allegedly joint tortfeasors concerning the alleged wrongful eviction.

Plaintiff opposes the motion to strike on the following grounds: defendants have not shown that the allegations of the 2nd amended complaint state a mislabeled cause of action against defendants Benton and Ott for wrongful eviction as joint tortfeasors with the other defendants; the tort of another doctrine still applies under the allegations of the 2nd amended complaint; and the present motion to strike is a procedurally defective motion for reconsideration of the court's prior ruling denying defendants' motion to strike the attorney fees prayer in the 1st amended complaint.

Defendants Arnest and Filo Real Estate, Inc. replied: this motion is not a second bite as the defendants have now identified the mislabeled tort asserted against purported joint tortfeasors Ott, Benton, Arnest, and Filo Real Estate, Inc. as an unlawful eviction tort cause of action; the gravamen of the 2nd amended complaint is unlawful eviction, therefore, the prayer for attorney fees against defendants Arnest and Filo Real Estate, Inc. should be stricken; as joint tortfeasors, the Vacco opinion applies; and attorney fees cannot be recovered against defendants Arnest and Filo Real Estate, Inc.

Motion for Reconsideration

Defendants Arnest and Filo Real Estate, Inc. argued in the demurrer to the 1st amended complaint that the 1st amended complaint, in reality, asserts tort causes of action against the seller defendants Benton and Ott as plaintiff has alleged that the seller defendants refused to grant plaintiffs an extension of time to make the $45,000 payment; they never provided plaintiffs

with a notice of default and notice of trustee's sale; plaintiffs were never given the opportunity to sell the property to satisfy their down payment obligation; and in support of the cause of action for declaratory relief against defendants Benton and Ott, it is alleged that the controversy has caused plaintiffs immediate and substantial harm as plaintiff Painter no longer holds title to the property, defendant is pursuing eviction of plaintiffs, plaintiff stands to lose plaintiff's equity in the property, and plaintiff stands to lose plaintiff's down payment on the property. (1st Amended Complaint, paragraphs 53-56 and 74.)

Defendants Arnest and Filo Real Estate, Inc. contended in that demurrer/motion to strike proceeding that these allegations clearly are not breaches of contract but are torts. Defendants Arnest and Filo Real Estate, Inc. did not assert the tort theory they contend was raised by these allegations during the demurrer and motion to strike directed at the 1st amended complaint.

The court granted leave to amend the complaint to address the fact that the tort of another cause of action did not exist and to incorporate those allegations into the 2nd amended complaint. The 2nd amended complaint was apparently filed to address that issue.

Citing paragraphs 53-56 and 74 of the 2nd amended complaint, defendants Arnest and Filo Real Estate, Inc. essentially argue that that the 2nd amended complaint states a mislabeled tort cause of action for wrongful eviction against defendants, including defendants Ott and Benton, which bars any claim that the plaintiffs can recover attorney fees under the tort of another theory as all defendants are allegedly joint tortfeasors concerning the alleged wrongful eviction.

For an interested party to obtain reconsideration of a prior ruling or order, the applicant is required to file the motion within 10 days after service upon the party of the written notice of entry of the order and the application must be based upon new or different facts, circumstances, or law. (Code of Civil Procedure, § 1008(a).)

"Section 1008's purpose is " 'to conserve judicial resources by constraining litigants who would endlessly bring the same motions over and over, or move for reconsideration of every adverse order and then appeal the denial of the motion to reconsider.' " (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1067 (2011–2012 Reg. Sess.), as amended Apr. 25, 2011, p. 4.) To state that purpose strongly, the Legislature made section 1008 expressly jurisdictional, as subdivision (e) explains: "This section specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions, and applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final. No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section." (§ 1008, subd. (e).) To deter parties from filing noncompliant renewed applications, the Legislature provided that "[a] violation of this section may be punished as a contempt and with sanctions as allowed by Section 128.7." (§ 1008, subd. (d).) ¶ We have recognized only one exception to section 1008's "jurisdiction[al]" (*id.,* subd. (e)) exclusivity. In *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1096–1097, 29 Cal.Rptr.3d 249, 112 P.3d 636 (*Le Francois*), we held the statute "do[es] not limit a *court's* ability to reconsider its previous interim orders on its own motion," even while it "prohibit[s] a *party* from making renewed motions not based on new facts or law...." We construed section 1008 in this manner to avoid serious doubts about its validity under the California Constitution's separation of powers clause. (Cal. Const., art. III, § 3.) " '[T]he Legislature,' " we explained, " 'generally may adopt reasonable regulations affecting a court's inherent powers or functions, so long as the legislation does not "defeat" or "materially impair" a court's exercise of its constitutional power or the fulfillment of its constitutional function.' " (*Le Francois,* at p. 1103, 29 Cal.Rptr.3d 249, 112 P.3d 636, quoting *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 58–59, 51 Cal.Rptr.2d 837, 913

P.2d 1046.) "One of the core judicial functions that the Legislature may regulate but not usurp is 'the essential power of the judiciary to resolve "specific controversies" between parties.' " (*Le Francois,* at p. 1103, 29 Cal.Rptr.3d 249, 112 P.3d 636, quoting *People v. Bunn* (2002) 27 Cal.4th 1, 15, 115 Cal.Rptr.2d 192, 37 P.3d 380.) To limit a court's ability to correct its own rulings, we reasoned, " 'would directly and materially impair and defeat' " that " 'core power.' " (*Le Francois,* at p. 1104, 29 Cal.Rptr.3d 249, 112 P.3d 636.)" (Even Zohar Const. & Remodeling, Inc. v. Bellaire Townhouses, LLC (2015) 61 Cal.4th 830, 839-840.)

The November 5, 2021, minute order ruling on the submitted demurrer and motion to strike was served by the court clerk on the parties' counsels of record by mail on November 8, 2021. The instant motion to strike was filed more than ten days thereafter on December 22, 2021.

Requirement to File Affidavit in Support of Motion

"When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown." (Emphasis added.) (Code of Civil Procedure, § 1008(a).)

"Section 1008, subdivision (a) requires that a motion for reconsideration be based on new or different facts, circumstances, or law. A party seeking reconsideration also must provide a satisfactory explanation for the failure to produce the evidence at an earlier time. (*Garcia v.*

Hejmadi (1997) 58 Cal.App.4th 674, 689, 68 Cal.Rptr.2d 228.)" (New York Times Co. v. Superior Court (2005) 135 Cal.App.4th 206, 212.)

Defendants Arnest and Filo Real Estate, Inc. have not filed any declaration in support of the motion for reconsideration and this would justify denial of this motion if it were effectively a motion for reconsideration of the motion to strike portions of the 1st amended complaint.

Whether Motion to Strike Attorney Fees from the Prayers of the 2nd Amended Complaint is a Motion for Reconsideration of the Ruing on The Motion to Strike the Attorney Fees Prayer in the 1st Amended Complaint

Citing paragraphs 53-56 and 74 of the 1st amended complaint, defendants Arnest and Filo Real Estate, Inc. argued in the demurrer to the 1st amended complaint that the 1st amended complaint asserts tort causes of action against the seller defendants Benton and Ott

Defendants Arnest and Filo Real Estate, Inc. contended that these allegations clearly are not breaches of contract but are torts. Defendants Arnest and Filo Real Estate, Inc. did not assert the tort theory they contend was raised by these allegations during the demurrer and motion to strike directed at the 1st amended complaint.

The 2nd amended complaint alleges: the seller defendants refused to grant plaintiffs an extension of time to make the $45,000 payment; they never provided plaintiffs with a notice of default and notice of trustee's sale; plaintiffs were never given the opportunity to sell the property to satisfy their down payment obligation; shortly after December 31, 2020, defendants Ott and Benson began demanding plaintiff Painter to execute a deed back to them pursuant to the Second Addendum to the sales contract; but for the 2nd addendum to the purchase agreement, which was drafted by defendant Arnest, defendants Ott and Benton would not have been able to make this demand of plaintiff Painter; after weeks of constant demands and threats of legal action, plaintiff Painter executed a grant deed back to defendants Ott and Benton pursuant to

the language of the Second addendum, which stated: "If the remainder of the down payment is not paid in full by 12/31/2020, the buyer shall be in breach of contract, all down payment moneys previously paid shall be considered forfeited to the buyer, deed shall return to the seller, and buyer shall have 30-days to vacate premises."; the second addendum sets forth a three step procedure. – First, all down payment moneys previously paid shall be considered forfeited to buyer [plaintiffs], Second, the deed shall return to the seller, and Third, the buyer shall have 30 days to vacate; despite having executed a deed back to defendants Ott and Benton, defendants refused to provide plaintiffs with their down payment moneys; and in support of the cause of action for declaratory relief against defendants Benton and Ott, it is alleged that the controversy has caused plaintiffs immediate and substantial harm as plaintiff Painter no longer holds title to the property, defendant is pursuing eviction of plaintiffs, plaintiff stands to lose plaintiff's equity in the property, and plaintiff stands to lose plaintiff's down payment on the property. (2nd Amended Complaint, paragraphs 53-61 and 74.)

The court also reviewed paragraphs 57-61 of the 1st amended complaint and found that the allegations in those paragraphs are identical to the paragraphs cited above in the 2nd amended complaint.

At best, the above cited alleged facts of the 2nd amended complaint state a cause of action for breach of the purchase agreement by the seller defendants, defendants Ott and Benton, failing to refund to plaintiffs all down payments previously paid in breach of the agreement as plaintiffs had reconveyed the property back to the seller defendants Ott and Benton as provided in the agreement; and for declaratory relief concerning the validity, rights, and obligations of the second addendum of the purchase agreement. Not only are there no new allegations of fact to that could conceivably be a mislabeled tort action for wrongful/unlawful eviction against the seller defendants Ott and Benton, but there are also no allegations of fact that could conceivably be a

mislabeled tort action for wrongful/unlawful eviction against the seller defendants Ott and Benton.

The instant motion to strike portions of the 2nd amended complaint is merely an attempt to seek an untimely reconsideration of the prior motion to strike without any new or different facts, circumstances, or law, or any explanation as to why the theory of a mislabeled alleged tort of unlawful eviction was not raised in the first motion to strike and demurrer proceeding.

The court finds that the failure to meet the requirements for reconsideration of the motion to strike the attorney fees provision is an independent reason to deny this motion.

The court will also address the merits of the motion.

Motion to Strike Principles

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

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

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

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

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

With the above-cited principles in mind, the court will rule on the motion to strike portions of the 1st amended complaint.

Tort of Another Doctrine

""Ordinarily, pursuant to the American rule, a party must pay for its own attorney fees unless a contract or statute provides authority for recovery of attorney fees from a litigation opponent. The tort of another doctrine holds that "[a] person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures thereby suffered or incurred." (*Prentice v. North American Title Guaranty Corp.* (1963) 59 Cal.2d 618, 620 [30 Cal.Rptr. 821, 381 P.2d 645] (*Prentice*).) The tort of another doctrine is not really an exception to the American rule, but simply "an application of the usual measure of tort damages." (*Sooy v. Peter* (1990) 220 Cal.App.3d 1305, 1310 [270 Cal.Rptr. 151] [equating recovery of attorney fees as damages to medical fees recovered in personal injury action]; see § 3333 ["the measure of damages ... is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not"].)" (Mega RV Corp. v. HWH Corp. (2014) 225 Cal.App.4th 1318, 1337–1338.)

The Tort of Another Doctrine is a doctrine allowing recovery of damages consisting of attorney fees and litigation expenses that were incurred when the plaintiff is required to employ counsel to prosecute or defend an action against a third party because of the tort of the defendant. Therefore, there must be an underlying tort by the defendant against whom the tort of another claim is asserted.

"Under the American rule, as a general proposition each party must pay his own attorney fees. This concept is embodied in section 1021 of the Code of Civil Procedure, [Footnote omitted.] which provides that each party is to bear his own attorney fees unless a statute or the agreement of the parties provides otherwise. ¶ Several exceptions to this general rule have been created by the courts. * * * A fourth established exception, sometimes referred to as the "tort of another" or "third party tort" exception, allows a plaintiff attorney fees if he is required to employ counsel to prosecute or defend an action against a third party because of the tort of the defendant. (*Prentice v. North Amer. Title Guar. Corp.* (1963) 59 Cal.2d 618, 620-621, 30 Cal.Rptr. 821, 381 P.2d 645.) This rule is embodied in the Restatement of Torts and is generally followed in the United States. (Rest.2d Torts, § 914, subd. (2), and appen.) ¶ All these exceptions were created by the courts pursuant to their inherent equitable powers, although statutory authorization for the award of fees has followed in some cases, such as recent statutes which recognize the "private attorney general" doctrine. (§ 1021.5.)" (Gray v. Don Miller & Associates, Inc. (1984) 35 Cal.3d 498, 504-505.)

The appellate court in Vacco Industries, Inc. v. Van Den Berg (1992) 5 Cal.App.4th 34 held that a plaintiff who successfully prosecuted an action against alleged joint tortfeasors could not recover attorney fees as damages against any tortfeasor under the claim of tort of another. The appellate court stated: "…the award is also substantively incorrect. Therefore, this is not a matter which can be resolved by returning it to the trial court for application of the proper procedure.

In *Prentice v. North Amer. Title Guar. Corp., supra,* 59 Cal.2d 618, 30 Cal.Rptr. 821, 381 P.2d 645, a paid escrow holder had made it necessary for a vendor of land to file a quiet title action against a third person. The court found that the attorney's fees incurred by the vendor in prosecuting that action were part of the damages sustained by the vendor and were recoverable in the negligence action against the escrow holder. The court held that this circumstance created an exception to the rule of Code of Civil Procedure section 1021. [FN 26.] That section "undoubtedly prohibits the allowance of attorney fees against a defendant in an ordinary two-party lawsuit. [Citations.] ... [¶] [However, the section is not applicable to cases where a defendant has wrongfully made it necessary for a plaintiff to sue a third person. [Citations.] In this case we are not dealing with 'the measure and mode of compensation of attorneys' but with damages wrongfully caused by defendant's improper actions." (*Prentice, supra,* 59 Cal.2d at pp. 620–621, 30 Cal.Rptr. 821, 381 P.2d 645.) ¶ FN 26. Code of Civil Procedure section 1021 provides in pertinent part: "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys ... is left to the agreement ... of the parties."" ¶ This rationale has been used, for example, to award fees (1) against a broker in favor of a prospective purchaser of real estate who had been induced to file an action for specific performance against the sellers by the fraudulent misrepresentations made by the broker (*Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 505–507, 198 Cal.Rptr. 551, 674 P.2d 253) and (2) against an insurance company for its bad faith failure to pay benefits due under a policy of disability insurance (*Brandt v. Superior Court, supra,* 37 Cal.3d 813, 817, 210 Cal.Rptr. 211, 693 P.2d 796.) ¶ The pleadings and the evidence demonstrated that Van Den Berg and Eastlack, working together with their newly acquired corporate vehicle, Kamer, jointly committed the tortious acts of which Vacco complained. <u>There is nothing about their relationship or their conduct that justifies singling out Van Den Berg as the one whose conduct caused Vacco to</u>

have to prosecute a legal action against the other two. Yet, this is the justification which Vacco offers for the imposition of *Prentice* fees against Van Den Berg. The rule of *Prentice* was not intended to apply to one of several joint tortfeasors in order to justify additional attorney's fee damages. If that were the rule there is no reason why it could not be applied in every multiple tortfeasor case with the plaintiff simply choosing the one with the deepest pocket as the "*Prentice* target." Such a result would be a total emasculation of Code of Civil Procedure section 1021 in tort cases. ¶ As *Prentice* originally emphasized, there is no basis for awarding attorney's fees to a successful party in what is essentially a "two party" lawsuit. That is precisely what is presented here. Van Den Berg and his two co-defendants jointly engaged in tortious misconduct for which they were sued by plaintiffs. There is no justification for the application of the third party tortfeasor doctrine as a basis for awarding attorney's fees to plaintiffs. Thus, quite apart from the procedural infirmity, this is not a proper case for an award of fees as damages." (Emphasis added.) (Vacco Industries, Inc. v. Van Den Berg (1992) 5 Cal.App.4th 34, 56–57.)

The appellate court in Mega RV Corp. v. HWH Corp. (2014) 225 Cal.App.4th 1318 distinguished the situation where there is a commonplace, alleged joint tortfeasor action for personal injuries wherein the defendant/cross-complainant claims he is entitled complete exoneration on the underlying case from the situation wherein a party is found liable for the conduct of another defendant and is entitled to complete indemnity from that other defendant due to the other defendant's breach of a duty owed to the innocent defendant that is held liable under theories of derivative liability, such as the employer or principal of an employee/agent defendant whose conduct caused the damages. The appellate court stated: "The tort of another doctrine applies to economic damages (i.e., attorney fees incurred in litigation with third parties) suffered as a result of an alleged tort. [FN 17.] As such, "nearly all of the cases which have applied the [tort of another] doctrine involve a clear violation of a traditional tort duty between the

tortfeasor who is required to pay the attorney fees and the person seeking compensation for those fees." (*Sooy v. Peter, supra,* 220 Cal.App.3d at p. 1310, 270 Cal.Rptr. 151; see *id*. at pp. 1311–1312, 270 Cal.Rptr. 151; see also, e.g., *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 502, 507–508 [198 Cal.Rptr. 551, 674 P.2d 253] [real estate broker breaches fiduciary duty to buyer]; *Prentice, supra,* 59 Cal.2d at pp. 619–621, 30 Cal.Rptr. 821, 381 P.2d 645 [escrow agent breaches duty of due care to seller]; *Heckert v. MacDonald* (1989) 208 Cal.App.3d 832, 834–835, 837–838, [256 Cal.Rptr. 369] [real estate broker breaches fiduciary duty to seller]…¶ FN 17. The tort of another doctrine is not particularly relevant in cases involving physical injury or property damage. To state the obvious, a tortfeasor who causes physical damage to a person or property (for instance, in a car accident) would be subject to a negligence lawsuit by the affected individual. The plaintiff in this hypothetical case could not recover her attorney fees from the tortfeasor under the tort of another doctrine. The attorney fees in this straightforward negligence case would be "attorney fees qua attorney fees." (*Sooy v. Peter, supra,* 220 Cal.App.3d at p. 1310, 270 Cal.Rptr. 151.) To hold otherwise would obliterate the American rule in tort cases. Nor does the tort of another doctrine apply as between multiple alleged tortfeasors (e.g., what if our hypothetical plaintiff unsuccessfully sued additional defendants in the car crash case, who sought recovery of their attorney fees from the true tortfeasor?). "The extension of the *Prentice* rule to the commonplace case of an exonerated alleged tortfeasor would go a long way toward abrogation of the American rule.... It would substantially expand the notion of duty under the law of torts to compensation of the litigation expenses incurred by all persons, however connected to any tortious event, whom the injured plaintiff elects to sue who succeed in establishing lack of liability." (*Watson v. Department of Transportation* (1998) 68 Cal.App.4th 885, 894 [80 Cal.Rptr.2d 594].)" (Emphasis added.) (Mega RV Corp. v. HWH Corp. (2014) 225 Cal.App.4th 1318, 1339–1340.)

The only causes of action asserted against the seller defendants in the 2nd amended complaint are the following: to quiet title on the ground that the contract provision that if the down payment was not paid in full by December 31, 2020, the buyer is in breach of contract, all moneys previously paid are considered forfeited to the buyer, and the deed shall return to the seller with the buyer to vacate the premises within 30 days is an allegedly illegal and unenforceable provision that resulted in plaintiff Painter executing a deed reconveying the property to the sellers (2nd Amended Complaint, paragraphs 37, 59 and 66.); declaratory relief seeking a determination as to the scope, enforceability, and validity of the 2nd addendum to the purchase agreement, which contained the provision concerning plaintiff's failure to pay the down payment in full prior to December 31, 2020 (2nd Amended Complaint paragraphs 37, 59, and 76.); to cancel the deed reconveying the property to the sellers, as it was part of a contract that had the aforementioned provision that was allegedly void and unenforceable (2nd Amended Complaint, paragraphs 78 and 79.); for breach of the contract for purchase of the property by failure to return to plaintiffs the down payment moneys previously paid (2nd Amended Complaint, paragraph 86.); and to impose a preliminary injunction and other equitable relief as plaintiffs allegedly remain the rightful owners of the property, because the deed reconveying the property to the seller defendants is of no force or effect due to an alleged void contract provision (2nd Amended Complaint, paragraph 100.).

A stated earlier in this ruling, there does not appear to be any mislabeled wrongful eviction tort cause of action in the 2nd amended complaint that plaintiffs are pursuing against seller defendants Benton and Ott as joint tortfeasors with defendants Arnest and Filo Real Estate, Inc. Furthermore, none of the causes of action plead against the seller defendants could be liberally construed as any tort cause of action against the seller defendants.

On the other hand, the 2nd amended complaint does assert a cause of action in tort in the negligence cause of action pled against the real estate agent/realtor defendants Arnest and Filo Real Estate, Inc., who allegedly acted in a dual agent capacity in the transaction and allegedly breached their duty of due care to discuss the agreement's 2nd addendum with plaintiffs, failed to explain to plaintiffs the ramifications of the term contained in that addendum, failed to discuss and/or explain the 3rd addendum with plaintiffs, failed to explain to plaintiffs the ramifications of the term contained in that addendum, did not act as a reasonably careful real estate agent, negligently drafted the 2nd addendum that allegedly contains the alleged illegal financing term, and negligently drafted the 2nd addendum to benefit the sellers, whose interest was contrary to plaintiffs'. (2nd Amended Complaint, paragraphs 13 and 107.)

Taking the allegations of the 2nd amended complaint as true for the purposes of the motion to strike, the court finds that the allegations establish a claim for attorney fees arising under the tort of another doctrine.

The motion to strike is denied.

TENTATIVE RULING # 9: DEFENDANTS ARNEST'S AND FILO REAL ESTATE, INC.'S MOTION TO STRIKE PORTIONS OF 2ND AMENDED COMPLAINT IS DENIED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE

PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, MARCH 25, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

10. MCDERMOTT v. TRINITY FINANCIAL SERVICES PC-20210522

Demurrer to 1st Amended Complaint.

TENTATIVE RULING # 10: THIS MATTER IS CONTINUED TO 8:30 A.M. ON FRIDAY, APRIL 15, 2022 IN DEPARTMENT NINE.