1. PEOPLE v. KRYLOV PC-20200443

Claim Opposing Forfeiture.

On August 21, 2020, claimant Krylov filed a verified Judicial Council Form MC-200 claim opposing forfeiture of $25,510 in response to a notice of administrative proceedings.

On October 2, 2020, the People filed a petition for forfeiture of currency in the amount of $25,510 that was seized by the El Dorado County Sheriff's Department. The petition states: the funds and other property are currently in the hands of the El Dorado County District Attorney's Office; and the property became subject to forfeiture pursuant to Health and Safety Code, § 11470(f), because that money was a thing of value furnished or intended to be furnished by a person in exchange for a controlled substance, the proceeds was traceable to such an exchange, and the money was used or intended to be used to facilitate a violation of various provisions of the Health and Safety Code. The People pray for judgment declaring that the money is forfeited to the State of California.

The proof of service of the petition declares that on August 17, 2020, the petition was served on the claimant by mail to his address of record.

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

the forfeiture occurred within five years of the seizure of the property, or the filing of a petition under this chapter, or the issuance of an order of forfeiture of the property, whichever comes first." (Health and Safety Code, § 11470(f).)

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

"(a)(1) Any person claiming an interest in the property seized pursuant to Section 11488 may, unless for good cause shown the court extends the time for filing, at any time within 30 days from the date of the first publication of the notice of seizure, if that person was not personally served or served by mail, or within 30 days after receipt of actual notice, file with the superior court of the county in which the defendant has been charged with the underlying or

related criminal offense or in which the property was seized or, if there was no seizure, in which the property is located, a claim, verified in accordance with Section 446 of the Code of Civil Procedure, stating his or her interest in the property. An endorsed copy of the claim shall be served by the claimant on the Attorney General or district attorney, as appropriate, within 30 days of the filing of the claim…" (Health and Safety Code, § 11488.5(a)(1).)

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

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

that it would be or was used for the purpose charged. Forfeiture shall be ordered when, at the hearing, the state or local governmental entity has shown that the assets in question are subject to forfeiture pursuant to Section 11470, in accordance with the burden of proof set forth in subdivision (i) of Section 11488.4." (Health and Safety Code, § 11488.5(d).)

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

"(i)(1) With respect to property described in subdivisions (e) and (g) of Section 11470 for which forfeiture is sought and as to which forfeiture is contested, the state or local governmental entity shall have the burden of proving beyond a reasonable doubt that the property for which forfeiture is sought was used, or intended to be used, to facilitate a violation of one of the offenses enumerated in subdivision (f) or (g) of Section 11470." (Health and Safety Code, § 11488.4(i)(1).)

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

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

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

"(5) If there is an underlying or related criminal action, and a criminal conviction is required before a judgment of forfeiture may be entered, the issue of forfeiture shall be tried in

conjunction therewith. Trial shall be by jury unless waived by all parties. If there is no underlying or related criminal action, the presiding judge of the superior court shall assign the action brought pursuant to this chapter for trial." (Health and Safety Code, § 11488.4(i)(5).)

At the hearing on January 15, 2021, the People advised the court that a criminal action was filed against respondent/claimant and three co-defendants. Claimant's counsel filed a CMC statement on August 12, 2021, requesting the matter be continued while the criminal case is pending. The court continued the hearing to December 3, 2021.

On December 3, 2021, the court was advised that the criminal proceeding remained pending. Claimant's counsel requested a continuance of the hearing and the People stipulated to the continuance. The court continued the hearing to April 15, 2022.

TENTATIVE RUING # 1: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, APRIL 15, 2022, IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY, THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

2. PEOPLE v. $33,700 IN U.S. CURRENCY PC-20210071

Petition for Forfeiture.

On February 16, 2021, the People filed a petition for forfeiture of cash in the amount of $36,000 seized by the El Dorado County Sheriff's Department. The petition states: the funds are currently in the hands of the El Dorado County District Attorney's Office; the property became subject to forfeiture pursuant to Health and Safety Code, § 11470(f), because that money was a thing of value furnished or intended to be furnished by a person in exchange for a controlled substance, the proceeds was traceable to such an exchange, and the money was used or intended to be used to facilitate a violation of various provisions of the Health and Safety Code; and that a criminal case alleging violations of Health and Safety Code, §§ 11360 and 11366 was filed on January 31, 2020. The People pray for judgment declaring that the money is forfeited to the State of California.

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

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

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

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

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

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

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

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

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

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

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

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

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

At the hearing on April 9, 2021, the People advised the court that the preliminary hearing on the criminal charges was continued to June 11, 2021.

"(c) The Attorney General or district attorney shall make service of process regarding this petition upon every individual designated in a receipt issued for the property seized. In addition, the Attorney General or district attorney shall cause a notice of the seizure, if any, and of the intended forfeiture proceeding, as well as a notice stating that any interested party may file a verified claim with the superior court of the county in which the property was seized or if the property was not seized, a notice of the initiation of forfeiture proceedings with respect to any interest in the property seized or subject to forfeiture, to be served by personal delivery or by registered mail upon any person who has an interest in the seized property or property subject to forfeiture other than persons designated in a receipt issued for the property seized. Whenever a notice is delivered pursuant to this section, it shall be accompanied by a claim form as described in Section 11488.5 and directions for the filing and service of a claim." (Emphasis added.) (Health and Safety Code, § 11488.4(c).)

Proofs of service were filed on April 28, 2021, which declare that notice of the proceedings, a copy of the petition, and blank forms for making claims in opposition were served by certified mail on the two respondents on April 29, 2021.

There are no responses or claims in the court's file.

The court was informed by the People at the hearing on August 27, 2021, that defendants'/claimants' next hearing was set in late September 2021 and the People requested a continuance of the hearing. The hearing was continued to December 3, 2021.

The People appeared at the December 3, 2021, hearing, stated that a related matter is pending, and requested another continuance of this hearing.

Respondents/Claimants did not appear at the December 3, 2021, hearing.

The court continued the hearing to April 15, 2022.

The respondents/claimants have not been defaulted.

There is no proof of service of notice of the continuance of the hearing to April 15, 2022, in the court's file. Absent proof of service of notice of the continuance, the court can not consider the merits of the matter.

TENTATIVE RULING # 2: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, APRIL 15, 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. FINANCIAL PACIFIC LEASING, INC. v. CURTIS 22CV0116

Application for Writ of Possession.

Plaintiff filed an action against defendant for breach of written agreement, claim and delivery, conversion, account stated, unjust enrichment, and breach of personal guaranty related to the purchase of equipment under a written financing agreement. Plaintiff applies for the issuance of a prejudgment writ of possession.

The Assistant Vice-President Collections Manager of plaintiff declares the following in support of the application: in or about January 18, 2017 plaintiff and defendant entered into an agreement to finance the purchase of a 2016 John Deere 35G (John Deere Equipment); defendant received the John Deere Equipment on January 18, 2017 as established in the executed delivery and acceptance authorization attached as Exhibit 1; that same date, the defendant executed the pre-funding acceptance agreement attached as Exhibit 2; thereafter plaintiff performed or was excused from performing all terms of the agreement required to be performed by plaintiff; plaintiff perfected its interest in the John Deere Equipment by filing the UCC-1 Financing Statement with the Secretary of State, which is attached as Exhibit 3; defendant breached the terms of the agreement on September 1, 2021 by failure to make the monthly payment due and owing and has failed to become current in the payments under the agreement; plaintiff declared the entire amount remaining to be paid on the agreement immediately due and payable pursuant to the terms of the agreement; the unpaid amount that is currently due and payable is $6,821.80, plus interest of 18% per annum; pursuant to the terms of the agreement defendant also owes $1,705.46 in late charges, returned check charges of $70, and all expenses incurred to enforce the agreement, including reasonable attorney fees; to induce plaintiff to furnish the John Deere Equipment defendant executed a

personal guaranty, which makes him individually liable for the sum of $8,597.26 plus interest related to the John Deere Equipment agreement; on November 15, 2020 plaintiff and defendant entered into an agreement to finance the purchase of a 2016 International Prostar Truck (International Truck Equipment); defendant received the International Truck Equipment on that same date as established in the executed delivery and acceptance authorization attached as Exhibit 4; that same date, the defendant also executed the pre-funding acceptance agreement attached as Exhibit 5; thereafter plaintiff performed or was excused from performing all terms of the agreement required to be performed by plaintiff; plaintiff obtained a certificate of title for the International Truck Equipment from the DMV thereby perfecting its ownership interest in the truck; the lien and title information report is attached as Exhibit 5; defendant breached the terms of the agreement on September 15, 2021 by failure to make the monthly payment due and owing and has failed to become current in the payments under the agreement; plaintiff declared the entire amount remaining to be paid on the agreement immediately due and payable pursuant to the terms of the agreement; the unpaid amount that is currently due and payable is $67,979.28, plus interest of 18% per annum; pursuant to the terms of the agreement defendant also owes $3,022.50 in late charges, returned check charges of $35, and all expenses incurred to enforce the agreement, including reasonable attorney fees; to induce plaintiff to furnish the International Truck Equipment defendant agreed to execute a personal guaranty, which makes him individually liable for the sum of $71,036.78 plus interest related to the International Truck Equipment agreement; declarant is informed an believes that defendant has possession of the International Truck and John Deere equipment and at the commencement of this action the equipment was located to specific addresses in El Dorado County, or at such other location known to defendant; due to defendant's defaults, plaintiff is entitled to immediate possession of the John Deere and International Truck

equipment pursuant to the provisions of the two agreements; despite plaintiff's demands for return of the equipment, defendant wrongfully retained possession; the subject property has not been taken for tax, assessment, or fine pursuant to a statute and has not been seized under an execution against defendant's property; declarant is informed and believes that the fair market value of the John Deere equipment is $8,000-$12,000, based upon its original price, age, forecast of the current market values, comparable equipment for sale online and in advertisements, and discussions with plaintiff's re-marketing department; and declarant is informed and believes that the fair market value of the International truck equipment is $20,000 to $26,000, based upon its original price, age, forecast of the current market values, comparable equipment for sale online and in advertisements, and discussions with plaintiff's re-marketing department.

The plaintiff must serve upon the defendant with a copy of the summons and complaint, a notice of the application and hearing date, and a copy of the application for writ of possession and the affidavits in support of the application. (Code of Civil Procedure, § 512.030.)

At the time this ruling was prepared there was no proof of service in the court's file that declares that defendant was served the summons, complaint, and documents related to the hearing on the application for writ of possession on April 15, 2022. There is no opposition to the application in the court's file.

The court can not rule on the merits of the application absent the mandated proof of service.

A writ of possession shall issue if both of the following are found: (1) the plaintiff has established the probable validity of the claim to possession of the property; and (2) the plaintiff has provided an undertaking as required by Section 515.010. (Code of Civil Procedure, § 512.060(a).) " 'A claim has "probable validity" where it is more likely than not that the plaintiff

will obtain a judgment against the defendant on that claim.' (C.C.P. 511.090.) The definition of 'probable validity' calls for the establishment of a prima facie case by the plaintiff, who has the burden of proof on this issue; and the plaintiff will not be entitled to the writ if the defendant shows that there is a reasonable probability of a successful defense to the action. (Legislative Com. Comment to C.C.P. 512.060.) Thus, if the defendant appears, the court must consider the relative merits of the positions of both parties and determine the probable outcome of the litigation. (Law Rev. Com. Comment to C.C.P. 511.090.)" (6 Witkin, California Procedure (5th ed. 2008) Provisional Remedies, § 261, page 208.) If the basis of the plaintiff's claim is a written instrument, a copy of that instrument shall be attached. (Code of Civil Procedure, § 512.010(b)(1).)

"Except as provided in subdivision (b), the court shall not issue a temporary restraining order or a writ of possession until the plaintiff has filed an undertaking with the court. The undertaking shall provide that the sureties are bound to the defendant for the return of the property to the defendant, if return of the property is ordered, and for the payment to the defendant of any sum recovered against the plaintiff. The undertaking shall be in an amount not less than twice the value of the defendant's interest in the property or in a greater amount. The value of the defendant's interest in the property is determined by the market value of the property less the amount due and owing on any conditional sales contract or security agreement and all liens and encumbrances on the property, and any other factors necessary to determine the defendant's interest in the property." (Code of Civil Procedure, § 515.010(a).)

"If the court finds that the defendant has no interest in the property, the court shall waive the requirement of the plaintiff's undertaking and shall include in the order for issuance of the writ the amount of the defendant's undertaking sufficient to satisfy the requirements of subdivision (b) of Section 515.020." (Code of Civil Procedure, § 515.010(b).)

"The defendant may prevent the plaintiff from taking possession of property pursuant to a writ of possession or regain possession of property so taken by filing with the court in which the action was brought an undertaking in an amount equal to the amount of the plaintiff's undertaking pursuant to subdivision (a) of Section 515.010 or in the amount determined by the court pursuant to subdivision (b) of Section 515.010." (Code of Civil Procedure, § 515.020(a).)

"The undertaking shall state that, if the plaintiff recovers judgment on the action, the defendant shall pay all costs awarded to the plaintiff and all damages that the plaintiff may sustain by reason of the loss of possession of the property. The damages recoverable by the plaintiff pursuant to this section shall include all damages proximately caused by the plaintiff's failure to gain or retain possession." (Code of Civil Procedure, § 515.020(b).)

"The defendant's undertaking may be filed at any time before or after levy of the writ of possession. A copy of the undertaking shall be mailed to the levying officer." (Code of Civil Procedure, § 515.020(c).)

While it appears that plaintiff has established a prima facie case that it is more likely than not that the plaintiff will obtain a judgment against the defendant on the claim and defendant has not shown that there is a reasonable probability of a successful defense to the action. (See Code of Civil Procedure, § 512.060(a) and 6 Witkin, California Procedure (4th ed. 1997) Provisional Remedies, § 263, page 210.) The lack of proof of service of the summons, complaint, notice of this proceeding and the documents filed in support of the application leaves this court with no alternative other than to deny the application without prejudice for lack of proof of service. To rule on the application in the absence of proof of service on defendant would violate defendant's fundamental right to due process as defendant would have no notice of the proceeding and no opportunity to be heard.

TENTATIVE RULING # 3: PLAINTIFF'S APPLICATION FOR WRIT OF POSSESSION IS DENIED WITHOUT PREJUDICE FOR 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, APRIL 15, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

4. RUSSELL v. GUMINA PC-20210360

Hearing Re: Default Judgment.

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

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

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

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

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

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

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

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

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

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

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

- Proof of General and Special Damages

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

"A survivor claim is also a statutory cause of action; however, unlike a wrongful death claim, the survival statutes do not *create* a cause of action but merely prevent the abatement of the decedent's cause of action and provide for its enforcement by the decedent's personal representative or successor in interest. (§§ 377.20, 377.30; *Grant v. McAuliffe* (1953) 41 Cal.2d 859, 864, 264 P.2d 944.) Damages for a survivor claim include punitive damages and all the decedent's losses incurred prior to death, but exclude any award for the decedent's pain or suffering. (§ 377.34.) ¶ There is but one survivor cause of action belonging to the decedent that is brought on behalf of the decedent by the decedent's personal representative or successor in interest. (§§ 377.20, 377.30.)" (San Diego Gas & Elec. Co. v. Superior Court (2007) 146 Cal.App.4th 1545, 1553.)

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

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

- Proof of Punitive Damages

In assessing punitive damages, the damages awarded must bear a reasonable relationship to the net assets of the defendants. (Little v. Stuyvesant Life Ins. Co. (1977) 67 Cal.App.3d 451, 469.) The factors to consider in determining the amount of punitive damages include the nature of defendant's acts and the wealth of the defendant. (Michaelson v. Hamada (1994) 29 Cal.App.4th 1566, 1593.) The amount awarded must be supported by substantial evidence of the defendant's financial condition. (Adams v. Murakami (1991) 54 Cal. 3d 105, 116.) In the absence of evidence of defendant's net worth, the court can not properly assess an amount for punitive damages. Without such evidence, the amount imposed would be based on mere speculation. Sound public policy should preclude awards based on mere speculation. (Adams, supra at page 114.)

While a statement of damages that includes a claim for punitive damages sets the limit on the amount of punitive damages the court may award, the court must still determine under the law the amount of punitive damages that appears just under the evidence produced at the default prove-up hearing. (Code of Civil Procedure, § 585(b) and 6 Witkin, California Procedure (5th ed. 2008) Proceedings Without Trial, § 169, pages 609-610.) "Only evidence in support of the allegations of the complaint is admissible. (*Jackson v. Bank of America* (1986) 188 C.A.3d 375, 387, 233 C.R. 162.) If the evidence is sufficient to support those allegations, the court must enter judgment for the plaintiff. (*Csordas v. United Slate Tile & Composition Roofers*

(1960) 177 C.A.2d 184, 186, 2 C.R. 133.) If the evidence does not support the allegations, the court will deny a default judgment. (*Taliaferro v. Hoogs* (1963) 219 C.A.2d 559, 560, 33 C.R. 415.) (See *Johnson v. Stanhiser* (1999) 72 C.A.4th 357, 361, 85 C.R.2d 82 [at prove-up hearing trial judge erroneously applied preponderance of evidence standard in determining whether plaintiff was entitled to damages; correct standard requires that plaintiff merely establish prima facie case, which plaintiff did through sworn supplemental statement and numerous exhibits detailing relationship with defendant]; *Kahn v. Lasorda's Dugout* (2003) 109 C.A.4th 1118, 1124, 135 C.R.2d 790 [trial court has discretion to accept copy of promissory note where original is lost].)" (6 Witkin, California Procedure (5th ed. 2008) Proceedings Without Trial, § 170, pages 610-611.) Plaintiff must produce evidence of the net worth of the defendant for the court to determine an appropriate punitive damages amount.

There is no evidence of defendant's financial condition in the court's file and absent evidence of defendant's net worth, the court can not properly assess an amount for punitive damages. Unless the plaintiff presents evidence of defendant's net worth at the hearing, the court will have no alternative other than to deny the request for a judgment awarding punitive damages.

TENTATIVE RULING # 4: THERE ARE NO EVIDENCE TO PROVE GENERAL DAMAGES, SPECIAL DAMAGES, OR PUNITIVE DAMAGES. PLAINTIFF PROVIDE EVIDENCE PRIOR TO THE PROVE-UP HEARING ON APRIL 29, 2022. THE PROVE-UP HEARING IS CONTINUED TO MAY 6, 2022, AT 8:30 a.m. in DEPARTMENT 9.

5. PETITION OF J.G. WENTWORTH ORIGINATIONS, LLC 22CV0151

Petition to Approve Transfer of Payment Rights.

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

On April 6, 2022, an amended transfer agreement was filed as Exhibit A, which modified the agreement to sell total monthly payments amounting to $546,220.68, which petitioner states has a present value of $298,812.27. The payee will be paid $28,000.

The proof of service of this amended agreement declares that the amended transfer agreement was served by regular mail and overnight mail on the interested persons.

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

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

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

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

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

subject of the proposed transfer were intended to provide for the necessary living expenses of the payee and whether the payee still needs the future structured settlement payments to pay for future necessary living expenses. ¶ (7) Whether the payee is, at the time of the proposed transfer, likely to require future medical care and treatment for the injuries that the payee sustained in connection with the incident that was the subject of the settlement and whether the payee lacks other resources, including insurance, sufficient to cover those future medical expenses. ¶ (8) Whether the payee has other means of income or support, aside from the structured settlement payments that are the subject of the proposed transfer, sufficient to meet the payee's future financial obligations for maintenance and support of the payee's dependents, specifically including, but not limited to, the payee's child support obligations, if any. The payee shall disclose to the transferee and the court his or her court-ordered child support or maintenance obligations for the court's consideration. ¶ (9) Whether the financial terms of the transaction, including the discount rate applied to determine the amount to be paid to the payee, the expenses and costs of the transaction for both the payee and the transferee, the size of the transaction, the available financial alternatives to the payee to achieve the payee's stated objectives, are fair and reasonable. ¶ (10) Whether the payee completed previous transactions involving the payee's structured settlement payments and the timing and size of the previous transactions and whether the payee was satisfied with any previous transaction. ¶ (11) Whether the transferee attempted previous transactions involving the payee's structured settlement payments that were denied, or that were dismissed or withdrawn prior to a decision on the merits, within the past five years. ¶ (12) Whether, to the best of the transferee's knowledge after making inquiry with the payee, the payee has attempted structured settlement payment transfer transactions with another person or entity, other than the transferee, that were denied, or which were dismissed or withdrawn prior to a decision on

the merits, within the past five years. ¶ (13) Whether the payee, or his or her family or dependents, are in or are facing a hardship situation. ¶ (14) Whether the payee received independent legal or financial advice regarding the transaction. The court may deny or defer ruling on the petition for approval of a transfer of structured settlement payment rights if the court believes that the payee does not fully understand the proposed transaction and that independent legal or financial advice regarding the transaction should be obtained by the payee. ¶ (15) Any other factors or facts that the payee, the transferee, or any other interested party calls to the attention of the reviewing court or that the court determines should be considered in reviewing the transfer." (Insurance Code, §10139.5(b).)

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

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

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

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

The court continued the hearing from March 11, 2022, to April 15, 2022, upon petitioner's request. The proof of service filed on April 1, 2022, declares that notice of continuance of the

hearing to April 15, 2022, was served by regular mail and overnight mail on the interested persons. The payee has to give a declaration or testify under oath.

TENTATIVE RULING # 5: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, APRIL 15, 2022, IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY, THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

6. SV ADVENTURES, INC. v. MOUNTAIN MIKES PIZZA, LLC 21CV0381

OSC Re: Preliminary Injunction.

The action involves a dispute between former franchisee plaintiffs and franchisor defendant. Plaintiffs contend that defendant Mountain Mikes Pizza, LLC has submitted an arbitration claim with the American Arbitration Association (AAA) in Orange County and amended the arbitration claim to include trademark infringement claims. Plaintiff seeks issuance of a preliminary injunction enjoining any further proceedings in the arbitration proceeding.

At the February 18, 2022, hearing on the plaintiff's ex parte application for a TRO and to set a hearing for a preliminary injunction preventing an arbitration, the court denied the request for a TRO and set the hearing on the preliminary injunction for 8:30 a.m. on Friday, March 18, 2022, in Department Nine.

Plaintiffs argue that the preliminary injunction should be issued for the following reasons: the arbitration provision of the franchise agreement is procedurally and substantively unconscionable; the arbitration proceeding that was filed constitutes a pre-litigation jury waiver of matters not subject to the arbitration agreement; the arbitration proceeding is not properly venued in Orange County; and plaintiffs will be irreparably damaged if they are forced to litigate their claims by arbitration in Orange County.

The proofs of service filed on March 3, 2022, declare that on February 24, 2022, defendant's agent for proof of service was personally served the notice of motion and motion re: why arbitration should be enjoined and the moving papers; and on February 24, 2022, the same documents were served by email to defense counsel.

Defendant filed the opposition papers a mere four court days prior to the hearing date of March 18, 2022, and on March 17, 2022, the day before the hearing, filed additional

declarations in opposition to the OSC. The documents filed on March 17, 2022, appear to be identical to documents previously filed on March 14, 2022. The court continued the hearing to April 15, 2022, in order to consider those documents. The court did not grant defendant leave to file additional opposition and additional supporting documents in opposition. On April 1, 2022, defendant filed another opposition and supporting documentation. The court will not consider any additional opposition and documentation filed after March 17, 2022.

Defendant opposes the motion on the following grounds: plaintiffs are unlikely to prevail, because the parties have agreed in Paragraph 17.F. of the arbitration provision that the arbitrator must decide the issue of enforceability of the arbitration agreement (Adyani Declaration in Opposition, Exhibit 2.), which is a clear delegation clause that leaves the court with no jurisdiction to decide the enforceability of the arbitration provision; the proper venue for determination of the enforceability of the arbitration is the arbitration and not the court; the unconscionability argument is primarily premised upon the claim that defendant did not provide plaintiffs with a copy of the franchise agreement, which is false, because they received a copy from the prior franchisee, therefore, plaintiffs are not likely to prevail on a claim that the franchise agreement is procedurally unconscionable; plaintiffs also obtained the information in the other franchise agreements they entered into regarding their other Mountain Mike Pizza restaurants; a "take it or leave it" arbitration provision is not per se procedurally unconscionable, therefore, the agreement must also be procedurally unconscionable in another manner in order for the court to determine the arbitration provision is procedurally unconscionable; the agreement is not substantively unconscionable as the venue provision and other provisions do not shock the conscience; plaintiff has not offered any evidence of irreparable harm; there is no requirement for plaintiffs to initial the arbitration provision in order to agree to it; a class waiver is not substantively unconscionable; arbitrating the dispute near

defendants offices does not shock the conscience; the arbitration agreement is mutual and there are no non-mutual provisions; the jury waiver is not substantively unconscionable; even if there are unconscionable terms, the court can sever those terms and enforce the remaining terms of the arbitration agreement; and defendants have not established irreparable injury.

On March 11, 2022, plaintiffs filed their reply to the opposition.

After the initial opposition and initial declarations in opposition were filed, on March 25, 2022, plaintiff's counsel filed a supplemental (Reply) declaration in support of the issuance of a preliminary injunction.

Plaintiff replies: there is no delegation clause in the subject agreement requiring the arbitrator to determine the validity and scope of the arbitration clause; the arbitration agreement is procedurally unconscionable, because it is a contract of adhesion and the arbitration clause is buried in 57 pages of agreement, attachments and exhibits; various provisions of the agreement are substantively unconscionable; plaintiffs will be irreparably harmed by either proceeding both in court and in arbitration or being forced to arbitrate when it is likely that the arbitration provision is not enforceable, thereby losing their right to a jury trial, right to appeal, right to engage in discovery, forced the to try their case hundreds of miles away, and require them to engage in a prohibitively expensive proceeding that will probably cost these small business owners $15,000; defendant has not presented any evidence of or claim it will be harmed if the arbitration is enjoined and the case litigated in El Dorado County; and defendant admits that seven of defendant's twelve trademark claims can not be arbitrated as they are claims that involve alleged trademark infringement after the franchise agreement expired.

Preliminary Injunction Principles

A preliminary injunction shall not be granted without notice to the opposing parties. (Code of Civil Procedure, § 527(a).)

"An injunction may be granted in the following cases: ¶ (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually. ¶ (2) When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action. ¶ (3) When it appears, during the litigation, that a party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render the judgment ineffectual. ¶ (4) When pecuniary compensation would not afford adequate relief. ¶ (5) Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief. ¶ (6) Where the restraint is necessary to prevent a multiplicity of judicial proceedings. ¶ (7) Where the obligation arises from a trust." (Emphasis added.) (Code of Civil Procedure, § 526(a).)

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

A preliminary injunction may be granted upon a verified complaint or upon affidavits which show that sufficient grounds exist for the issuance of such an injunction. (Code of Civil Procedure, § 527(a).) In deciding whether to issue a preliminary injunction, two factors must be weighed: the likelihood of the moving party ultimately prevailing on the merits and the relative

interim harm to the parties from the issuance of a preliminary injunction. (Butt v. State of California (1992) 4 Cal.4th 668, 677-678.) "The latter factor involves consideration of such things as the inadequacy of other remedies, the degree of irreparable harm, and the necessity of preserving the status quo. The determination whether to grant a preliminary injunction generally rests in the sound discretion of the trial court. (Citation omitted.)" (Abrams v. St. John's Hospital & Health Center (1994) 25 Cal.App.4th 628, 636.)

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

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

"The trial court considers two interrelated factors when deciding whether to issue preliminary injunctions: the interim harm the applicant is likely to sustain if the injunction is denied as compared to the harm to the defendant if it issues, and the likelihood the applicant will prevail on the merits at trial. (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286, 219 Cal.Rptr. 467, 707 P.2d 840; *IT Corp. v. County of Imperial, supra,* 35 Cal.3d at pp. 69–70, 196 Cal.Rptr. 715, 672 P.2d 121.) However, before the trial court can exercise its discretion the applicant must make a prima facie showing of entitlement to injunctive relief. The applicant

must demonstrate a real threat of immediate and irreparable injury (6 Witkin, Cal.Procedure (3d ed. 1985) Provisional Remedies, § 254; *E.H. Renzel Co. v. Warehousemen's Union* (1940) 16 Cal.2d 369, 373, 106 P.2d 1) due to the inadequacy of legal remedies. (6 Witkin, *op. cit. supra,* § 253.)" (Triple A Machine Shop, Inc. v. State of California (1989) 213 Cal.App.3d 131, 138.)

""To obtain a preliminary injunction, a plaintiff ordinarily is required to present evidence of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending an adjudication of the merits." (*White v. Davis, supra,* 30 Cal.4th at p. 554, 133 Cal.Rptr.2d 648, 68 P.3d 74; see generally Code Civ. Proc. § 526, subd. (a)(2) [preliminary injunction may issue when it appears the plaintiff would suffer great or irreparable injury from the commission or continuance of some act during the litigation].) While the mere possibility of harm to the plaintiffs is insufficient to justify a preliminary injunction, the plaintiff are "not required to wait until they have suffered *actual harm* before they apply for an injunction, but may seek injunctive relief against the *threatened infringement* of their rights." (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1292, 240 Cal.Rptr. 872, 743 P.2d 932, italics added; accord, *City of Torrance v. Transitional Living Centers for Los Angeles, Inc.* (1982) 30 Cal.3d 516, 526, 179 Cal.Rptr. 907, 638 P.2d 1304 [injunctive relief is available where the injury sought to be avoided is " 'actual or threatened' "]; *7978 Corporation v. Pitchess* (1974) 41 Cal.App.3d 42, 46, 115 Cal.Rptr. 746 [same].) ¶ If the threshold requirement of irreparable injury is established, then we must examine two interrelated factors to determine whether the trial court's decision to issue a preliminary injunction should be upheld: "(1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction." (*Butt v. State of California* (1992) 4 Cal.4th 668, 677–678, 15 Cal.Rptr.2d 480, 842 P.2d 1240.) Appellate review is generally limited to whether the trial

court's decision constituted an abuse of discretion. (*Ibid.*). (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1463, 47 Cal.Rptr.3d 147.) However, [t]o the extent that the trial court's assessment of likelihood of success on the merits depends on legal rather than factual questions, [such as when the meaning of a contract or a statute are at issue,] our review is de novo.' " (*City of Lake Forest v. Evergreen Holistic Collective* (2012) 203 Cal.App.4th 1413, 1428, 138 Cal.Rptr.3d 332; *Garamendi v. Executive Life Ins. Co.* (1993) 17 Cal.App.4th 504, 512, 21 Cal.Rptr.2d 578.)" (Emphasis added.) (Costa Mesa City Employees' Assn. v. City of Costa Mesa (2012) 209 Cal.App.4th 298, 305–306.)

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

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

Irreparable Injury

When a party is forced to arbitrate a claim where it is likely that the claim is not subject to arbitration, the party is deprived of the right to trial before a jury or the court and subjected to increased burden and expense due to having to defend against the arbitration on the ground of lack of jurisdiction and, if successful, to then try the case in court.

Being forced to arbitrate a claim that is not subject to arbitration is per se irreparable harm and the harm of being compelled to participate in such a futile arbitration outweighs the relative interim harm of the party seeking to arbitrate a claim that is not arbitrable. (See Brooks v. AmeriHome Mortgage Co., LLC (2020) 47 Cal.App.5th 624, 630; and PaineWebber Inc. v.

Hartmann (3d Cir. 1990) 921 F.2d 507, 514–515, overruled on other grounds by Howsam v. Dean Witter Reynolds, Inc. (2002) 537 U.S. 79, 85, 123 S.Ct. 588, 154 L.Ed.2d 491.).)

The court finds that plaintiffs have sufficiently shown irreparable harm.

Preliminary Injunction Available

The 1st Amended Complaint for declaratory relief, reformation of contract, unfair competition, and preliminary and permanent injunction filed in this action concerns a dispute over whether defendant can force plaintiffs to assign to defendant their lease of the premises/restaurant where the franchise was operated until the franchise terminated at the conclusion of the franchise term. Attached to the complaint as Exhibit A is the alleged franchise agreement that was assigned to plaintiffs on April 23, 2008, which allegedly expired on January 2, 2022. (1st Amended Complaint, paragraphs 6, 7 and 10.)

Plaintiff's counsel declares: plaintiff's counsel sent a courtesy copy of the complaint by email to defense counsel on January 10, 2022 and the amended complaint was served on February 8, 2022; on the same day that the complaint was set for filing in the superior court, defendant filed an action in the Eastern District of California and brought an ex parte motion for an order to occupy the premises, which was denied; counsel did not receive the claim in arbitration until after the court action was filed; to counsel's knowledge, plaintiffs were not personally served with the arbitration claim or federal action; two days later counsel received the claim in arbitration filed by defendant in Orange County, California; the claim was amended on February 4, 2022; and counsel sent a written objection to the American Arbitration Association (AAA) with objections to and denial of arbitration, which AAA rejected. (Declaration of Kathleen C. Lyon in Support of Application, paragraphs 6-10.)

It appears that preliminary injunctive relief may be requested pursuant to the provisions of Code of Civil Procedure, §§ 526(a)(2) and (3) as defendant has engaged in conduct to

purportedly irreparably injure plaintiffs by allegedly wrongfully depriving them of their right to litigate this action respecting the subject of the action, which would render any civil judgment ineffectual if an arbitration award is issued.

Arbitration Provision

"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.)

Plaintiffs Salvatore Viscuso and Sandra Viscuso declare: they are shareholders of plaintiff SV Adventures, Inc., which has a principal place of business in El Dorado Hills; plaintiffs live in Placer County; on April 23, 2008 they were assigned the subject franchise by means of a six page assignment that incorporates by reference the underlying franchise agreement; a copy of the underlying franchise agreement was not attached to the assignment; the franchisor never

provided plaintiffs with a copy of the underlying franchise agreement; they were told they had to take the underlying franchise agreement as it existed and no negotiations would take place as they were assuming obligations already agreed to; on August 3, 2021 plaintiff through counsel gave defendant notice that they were not renewing the franchise beyond the January 2, 2022 expiration date; after more than 60 days expired after that notice was sent, without defendant indicating an intent to purchase the franchise, plaintiffs began to rebrand the store as Viscuso's Pizza and Draft House with new signage, paint and recipes; on November 18, 2021 plaintiffs received an email from defendant stating the franchise agreement expires in January 2, 2022 and that defendant was exercising its option under Section 15.E. of the franchise agreement to purchase the subject restaurant; on December 22, 2022 [sic] the complaint was filed in this action; plaintiffs were never personally served the arbitration claim or the federal action; plaintiffs are a team owning and operating the business for 15 years and they have personal guarantees on the lease of the store and would be liable if another franchisee occupied the leased space; the food delivery and all services that support the restaurant are in their names and plaintiffs would be liable for someone else's mistakes if they were to turn over the business without having time to transfer liability, thereby causing them severe and irreparable injury; all witnesses to be called in this case are located in Northern California; and the landlord of the premises, DC Management, LLC will be a witness and is located in El Dorado County, in addition to numerous customers, which will refute the claim of trademark infringement. (Court's Emphasis.) (Omnibus Declaration of Plaintiffs in Support of Application, paragraphs 1, 2, 4-13, and 15-22.)

Defense counsel declares in opposition: he understood that plaintiffs received a copy of the subject agreement, because on March 26, 2008 they signed a receipt acknowledging that they received the subject agreement, which is established by Defense Exhibit 3 that is attached to

Steven Adjani's declaration in opposition; on February 28, 2022 plaintiffs' counsel responded to correspondence sent by defense counsel wherein she stated that plaintiffs stand by their declarations 100%, because they never received the franchise agreement from defendant and plaintiffs have not declared they were not aware of the subject agreement; and that correspondence also admits that plaintiffs received a large box of documents from the prior franchisee, which included the subject franchise agreement. (Declaration of Ryan Bykerk in Opposition to Motion, paragraphs 2 and 4; and Exhibit 9 – February 28, 2022, Correspondence from Plaintiff's Counsel, page 1, second paragraph.)

Plaintiffs admittedly received a copy of the subject agreement from the prior franchisee. Even assuming plaintiffs did not read the subject franchise agreement, that does not excuse them from a claim that the arbitration agreement in the underlying franchise agreement is applies. However, that does not lead to a conclusion that the arbitration clause is enforceable as there remain issues concerning unconscionability of the arbitration clause to consider.

The question then becomes whether the arbitrator or the court has jurisdiction to determine the validity of the arbitration provision in the agreement.

A line of cases hold that an arbitrator decides whether the disputes are arbitrable only where it is established by *clear and unmistakable* evidence that the parties elected to have the arbitrator, rather than the court, decide which grievances are arbitrable. (Emphasis in original.) (Hartley v. Superior Court (2011) 196 Cal.App.4th 1249, 1254-1255.)

The Third District Court of Appeal has recently held: "Arbitration agreements are construed to give effect to the intention of the parties. (*Aanderud, supra*, 13 Cal.App.5th at p. 890, 221 Cal.Rptr.3d 225.) "If contractual language is clear and explicit, it governs. [Citation.]" (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264, 10 Cal.Rptr.2d 538, 833 P.2d 545.) ¶ When a dispute arises between parties to an arbitration agreement, the parties may disagree

not only about the merits of the dispute but also about "the threshold arbitrability question—that is, whether their arbitration agreement applies to the particular dispute." (*Henry Schein, Inc. v. Archer and White Sales, Inc.* (2019) ––– U.S. ––––– [139 S.Ct. 524, 527, 202 L.Ed.2d 480] (*Schein*).) The high court has recognized that parties may "agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes." (*Ibid.*) Such threshold or "gateway" questions of arbitrability include whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. (*Id.* at p. ––––– [139 S.Ct. at p. 529].) Indeed, "an 'agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the ... court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.' " (*Ibid.*) ¶ The question of who has the power to decide issues of arbitrability "turns upon what the parties agreed about *that* matter." (*First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 943, 115 S.Ct. 1920, 131 L.Ed.2d 985 (*First Options*).) If the parties agreed to submit arbitrability questions to the arbitrator, then the court reviews the arbitrator's decision under the same standard it reviews other decisions by the arbitrator. (*Ibid.*) "If, on the other hand, the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently. These two answers flow inexorably from the fact that arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes -- but only those disputes -- that the parties have agreed to submit to arbitration. [Citations.]" (*Ibid.*) ¶ Courts presume that the parties intend *courts*, not arbitrators, to decide threshold issues of arbitrability. (*Aanderud, supra*, 13 Cal.App.5th at p. 891, 221 Cal.Rptr.3d 225.) Accordingly, " '[t]here are two prerequisites for a delegation clause to be effective. First, the language of the clause must be clear and unmistakable. [Citation.] Second, the delegation

must not be revocable under state contract defenses such as fraud, duress, or unconscionability.' [Citation.] The 'clear and unmistakable' test reflects a '*heightened* standard of proof' that reverses the typical presumption in favor of the arbitration of disputes. [Citation.]" (*Id.* at p. 892, 221 Cal.Rptr.3d 225.) Where the agreement is silent or ambiguous on the question of who decides threshold arbitrability questions, the court and not the arbitrator should decide arbitrability so as not to force unwilling parties to arbitrate a matter they reasonably thought a judge, not an arbitrator, would decide. (*First Options, supra*, 514 U.S. at p. 945, 115 S.Ct. 1920.)" (Emphasis added.) (Sandoval-Ryan v. Oleander Holdings LLC (2020) 58 Cal.App.5th 217, 222–223.)

Defendant argues: the plaintiffs received a copy of the franchise agreement from the prior franchisee from whom plaintiffs acquired the franchise; the then current agreement was also sent to them by defendant as an exhibit to the Franchise Disclosure Document; plaintiffs signed a receipt that acknowledged they received the agreement; plaintiffs signed the assignment and assumption agreement on April 23, 2008; and the arbitration provision of the then operative/current agreement provides in Section 17.F. that any dispute between plaintiffs and defendant, including disputes over the enforceability of the agreement itself, would be resolved by binding arbitration (Emphasis added.) (See Declaration of Steven Adyani in Opposition to Motion, Exhibit 2.).

Plaintiffs argue in reply: the arbitration provision in Exhibit A to plaintiff's counsel's supplemental declaration is the only franchise agreement assigned and assumed by plaintiff.

David Laursen declares: he is the franchisor developer agent for defendant that spoke with the plaintiffs about their intent to assume the subject franchise in 2008; he knows from the plaintiff's execution of the March 26, 2008 receipt that he had sent them the then operative Franchise Disclosure Document; and he understands that plaintiffs claim that he did not

provide the form of arbitration clause attached as an exhibit of the Franchise Disclosure Document, because they told me they already had a copy from the franchisee they were acquiring the franchise from, which is not true and does not make sense since the Franchise Disclosure Document contains the then current form of the franchise agreement. (Emphasis added.) (Declaration of David Laursen in Opposition to Motion, paragraphs 4 and 5.)

The arbitration provision in the franchise agreement between the predecessor franchisee and defendant, which was executed on January 3, and 18, 2007, provides: **"EXCEPT FOR CONTROVERSIES, DISPUTES OR CLAIMS RELATED TO OR BASED ON YOUR USE OF THE MARKS AFTER THE EXPIRATION OF TERMINATION OF THIS AGREEMENT, ALL CONTROVERSIES, DISPUTES OR CLAIMS BETWEEN US AND OUR AFFILIATES, AND OUR AFFILIATES' RESPECTIVE SHAREHOLDERS, OFFICERS, DIRECTORS, AGENTS, AND/OR EMPLOYEES AND YOU (AND YOUR OWNERS, GUARANTORS, AFFILIATES AND EMPLOYEES, IF APPLICABLE) ARISING OUT OF OR RELATED TO: ¶ * * * (3) THE VALIDITY OF THIS AGREEMENT OR ANY OTHER AGREEMENT BETWEEN YOU AND US OR ANY PROVISION OF ANY OF THOSE AGREEMENTS; ¶ * * * MUST BE SUBMITTED FOR BINDING ARBITRATION TO THE AMERICAN ARBITRATION ASSOCIATION…"** **(**Emphasis in Original.) (Omnibus Declaration in Support of Application, Exhibit B – Concept Acquisitions, LLC Franchise Agreement with the Galstyans, Paragraph 17.F. (Subject Franchise Agreement Assigned to Plaintiffs.))

Defendant contends that the franchise agreement included in the Franchise Disclosure Document attached as Exhibit 2 to the declaration of Steven Adyani in Opposition to the Motion is the operative agreement and not the franchise agreement executed by Concept Acquisitions, LLC and the Galstyans on January 3, and 18, 2007.

Steven Adyani declares: he is the vice-president of operations for defendant and is familiar with the corporate records; the corporate records reflect that on January 3, 2007 the Galstyans entered into a franchise agreement with defendant's predecessor, Concept Acquisitions, LLC, and a true and correct copy of that agreement is attached as Exhibit 1; the corporate records also reflect that on March 26, 2008 plaintiffs acknowledged receipt of the Franchise Disclosure Document that included the franchise agreement as Exhibit B, which is attached as Exhibit 2; and on April 23, 2008 plaintiff executed an assignment and assumption agreement thereby assuming all of the prior franchisee's obligations under the franchise agreement, which is attached as Exhibit 4. (Declaration of Steven Adyani in Opposition to Motion, paragraphs 3-5.)

Exhibit 1 of the Declaration of Steven Adyani in Opposition to Motion is the franchise agreement between the predecessor franchisee, the Galstyans, and defendant's predecessor, Concept Acquisitions, LLC, that was executed on January 3, and 18, 2007, which contains the exact same arbitration agreement language in Section 17.F. that is previously cited in this ruling from Exhibit B of the Omnibus Declaration in Support of Application.

Exhibit 2 of the declaration of Steven Adyani in Opposition to Motion is a standard Franchise Disclosure Document, which includes a blank, unexecuted franchise agreement that purportedly is the agreement between Concept Acquisitions, LLC and an unnamed franchise owner. The arbitration provision in that blank, unexecuted franchise agreement is materially different from the executed January 3, 2007, Concept Acquisitions, LLC franchise agreement with the Galstyans. The agreement attached as Exhibit B to the Franchise Disclosure Document provides with respect to matters that are to be decided by the arbitration: "**(3) THE SCOPE OR VALIDITY OF THIS AGREEMENT OR ANY OTHER AGREEMENT BETWEEN YOU (OR YOUR OWNERS) AND US OR ANY PROVISION OF ANY OF THESE AGREEMENTS (INCLUDING THE VALIDITY AND SCOPE OF THE ARBITRATION**

OBLIGATION UNDER THIS SECTION, WHICH WE AND YOU ACKNOWLEDGE IS TO BE DETERMINED BY AN ARBITRATOR AND NOT BY A COURT)…" (Declaration of Steven Adyani in Opposition to Motion, Exhibit 2 - Franchise Disclosure Document, Exhibit B, paragraph 17.F.(3).)

The assignment and assumption agreement entered into between Concept Acquisitions, LLC, franchisees Galstyan, and plaintiffs on April 23, 2008 expressly provides: the subject assigned and assumed franchise agreement was the defendant's franchise agreement with the Galstyans dated January 3, 2007; the recitals in the agreement are incorporated into and made part of the agreement by reference; the franchisee transfers, sets over, and assigns to assignee all of the franchisee's rights to and interest in the subject franchise agreement and the restaurant and all related rights; and the assignee accepts the assignment from the franchisee and assumes the franchisee's obligations, agreements, commitments, duties and liabilities under the subject franchise agreement. (Declaration of Steven Adyani in Opposition to Motion, Exhibit 4 – Assignment and Assumption Agreement, 1st Recital, page 1, and paragraphs 1-3.)

Plaintiffs agreed to be assigned and assume the franchise agreement entered between defendant/Concept Acquisitions, LLC and the Galstyans, which was executed by Concept Acquisitions, LLC and the Galstyans on January 3, and 18, 2007, not a purported current/operative blank, sample franchise agreement attached as an exhibit to a disclosure document. Therefore, the operative franchise agreement arbitration provision is found in plaintiff's Exhibit B and defense Exhibit 1. The arbitration agreement does not include any specific language that provided that the validity and scope of the arbitration obligation under this arbitration section was acknowledged/agreed to be determined by an arbitrator and not by a court.

The arbitration provision in the 2007 franchise agreement assumed by plaintiffs does not clearly, unmistakably, and explicitly delegate to the arbitrator the resolution of threshold questions regarding the validity of the arbitration agreement itself. The provision vaguely refers to this agreement and other agreements between them and their provisions. At best the provision is ambiguous on the question of who decides threshold arbitrability questions, therefore, the court and not the arbitrator should decide arbitrability so as not to force unwilling parties to arbitrate a matter they reasonably thought a judge, not an arbitrator, would decide.

Agreement Unconscionability

"The party resisting arbitration bears the burden of proving unconscionability." (Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC (2012) 55 Cal.4th 223, 247.)

The lack of opportunity to negotiate terms of an employment/arbitration agreement and take or leave it nature of the adhesive aspect of an employment/arbitration agreement is not dispositive. (Serpa v. California Surety Investigations, Inc. (2013) 215 Cal.App.4th 695, 704.) "When, as here, there is no other indication of oppression or surprise, "the degree of procedural unconscionability of an adhesion agreement is low, and the agreement will be enforceable unless the degree of substantive unconscionability is high." (*Ajamian v. CantorCO2e* (2012) 203 Cal.App.4th 771, 796, 137 Cal.Rptr.3d 773; accord, *Dotson v. Amgen, Inc.* (2010) 181 Cal.App.4th 975, 981-982, 104 Cal.Rptr.3d 341; see generally *Roman,* at p. 1471, fn. 2, 92 Cal.Rptr.3d 153["[w]hen bargaining power is not grossly unequal and reasonable alternatives exist, oppression typically inherent in adhesion contracts is minimal"].) [Footnote omitted.]" (Serpa v. California Surety Investigations, Inc. (2013) 215 Cal.App.4th 695, 704.)

"Even in adhesion contracts, courts will enforce provisions that are conspicuous, plain, and clear, and that do not "operate to defeat the reasonable expectations of the parties." (*Madden*

v. Kaiser Foundation Hospitals (1976) 17 Cal.3d 699, 710, 131 Cal.Rptr. 882, 552 P.2d 1178.)" (Flores v. West Covina Auto Group (2013) 212 Cal.App.4th 895, 920.)

While the "take it or leave it" agreement is a contract of adhesion, there must be other factors present for a court to determine that the agreement is unenforceable due to unconscionability. "Unconscionability analysis begins with an inquiry into whether the contract is one of adhesion. (Id. at pp. 817-819, 171 Cal.Rptr. 604, 623 P.2d 165.) "The term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." (*Neal v. State Farm Ins. Cos.* (1961) 188 Cal.App.2d 690, 694, 10 Cal.Rptr. 781.) If the contract is adhesive, the court must then determine whether "other factors are present which, under established legal rules -- legislative or judicial -- operate to render it [unenforceable]." (*Scissor-Tail*, supra, at p. 820, 171 Cal.Rptr. 604, 623 P.2d 165, fn. omitted.)" (Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 113.)

"We explained the judicially created doctrine of unconscionability in *Scissor-Tail*, supra, 28 Cal.3d 807, 171 Cal.Rptr. 604, 623 P.2d 165. Unconscionability analysis begins with an inquiry into whether the contract is one of adhesion. (Id. at pp. 817-819, 171 Cal.Rptr. 604, 623 P.2d 165.) "The term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." (*Neal v. State Farm Ins. Cos.* (1961) 188 Cal.App.2d 690, 694, 10 Cal.Rptr. 781.) If the contract is adhesive, the court must then determine whether "other factors are present which, under established legal rules -- legislative or judicial -- operate to render it [unenforceable]." (*Scissor-Tail*, supra, at p. 820, 171 Cal.Rptr. 604, 623 P.2d 165, fn. omitted.) "Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such

a contract or provision which does not fall within the reasonable expectations of the weaker or 'adhering' party will not be enforced against him. [Citations.] The second -- a principle of equity applicable to all contracts generally -- is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or 'unconscionable.' " (Ibid.) Subsequent cases have referred to both the "reasonable expectations" and the "oppressive" limitations as being aspects of unconscionability. (See *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486-487, 186 Cal.Rptr. 114 (A & M Produce Co.).) ¶ In 1979, the Legislature enacted Civil Code section 1670.5, which codified the principle that a court can refuse to enforce an unconscionable provision in a contract. (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 925, 216 Cal.Rptr. 345, 702 P.2d 503.) As section 1670.5, subdivision (a) states: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." Because unconscionability is a reason for refusing to enforce contracts generally, it is also a valid reason for refusing to enforce an arbitration agreement under Code of Civil Procedure section 1281, which, as noted, provides that arbitration agreements are "valid, enforceable and irrevocable, save upon such grounds as exist [at law or in equity] for the revocation of any contract." The United States Supreme Court, in interpreting the same language found in section 2 of the FAA (19 U.S.C. § 2), recognized that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements...." (*Doctor's Associates, Inc. v. Casarotto*, supra, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902, italics added.) ¶ As explained in *A & M Produce Co.*, supra, 135

Cal.App.3d 473, 186 Cal.Rptr. 114, "unconscionability has both a 'procedural' and a 'substantive' element," the former focusing on "oppression" or "surprise" due to unequal bargaining power, the latter on "overly harsh" or "one-sided" results. (Id. at pp. 486-487, 186 Cal.Rptr. 114.) "The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability." (*Stirlen v. Supercuts, Inc.*, supra, 51 Cal.App.4th at p. 1533, 60 Cal.Rptr.2d 138 (Stirlen).) But they need not be present in the same degree. "Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves." (15 Williston on Contracts (3d ed. 1972) § 1763A, pp. 226-227; see also A & M Produce Co., supra, 135 Cal.App.3d at p. 487, 186 Cal.Rptr. 114.) In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 113-114.)

"'The procedural element focuses on two factors: "oppression" and "surprise." [Citations.] "Oppression" arises from an inequality of bargaining power which results in no real negotiation and "an absence of meaningful choice." [Citations.] "Surprise" involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms. [Citations.]' [Footnote omitted.] The substantive prong of unconscionability encompasses '"overly harsh" or "one-sided" results.' [Footnote omitted.] Stated another way, '[t]he substantive component of unconscionability looks to whether the contract allocates the risks of the bargain in an objectively unreasonable or unexpected manner.' [Footnote omitted.] Both procedural and substantive unconscionability

must be present to deny enforcement to the contract, but there may be an inverse relation between the two components, 'such that the greater the unfair surprise or inequality of bargaining power, the less unreasonable the risk reallocation which will be tolerated.' [Footnote omitted.]" (Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal.App.4th 708, 722-723.)

With the above-cited principles in mind, the court will determine whether there exists procedural and substantive unconscionability such that the agreement to arbitrate is unenforceable, or is a valid, enforceable agreement.

- Procedural Unconscionability

Defendant argues there is no procedural unconscionability, because plaintiffs did receive a copy of the franchise agreement with the arbitration provision; and a "take it or leave it" arbitration provision is not per se procedurally unconscionable, therefore, the agreement must also be procedurally unconscionable in another manner for the court to determine the arbitration provision is procedurally unconscionable.

The evidence presented in support of the motion indicates a likelihood that plaintiffs will prevail on a claim that the franchise agreement is adhesive in nature as it was offered on a take it or leave it basis with no negotiations allowed and that there is some procedural unconscionability in the agreement.

The California Supreme Court has held that there is no obligation to highlight the arbitration clause of its contract or to specifically call that clause to the weaker party's attention. "…Valencia was under no obligation to highlight the arbitration clause of its contract, nor was it required to specifically call that clause to Sanchez's attention. Any state law imposing such an obligation would be preempted by the FAA. (See *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 684, 687–688, 116 S.Ct. 1652, 134 L.Ed.2d 902 [holding state statute requiring

arbitration clause to be in underlined capital letters on the first page of a contract is preempted]; but cf. *Concepcion, supra,* 563 U.S. at pp. ––––, fn. 6, 131 S.Ct. at p. 1750, fn. 6 ["States remain free to take steps addressing the concerns that attend contracts of adhesion-for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted."].) Furthermore, we have held that even when a customer is assured it is not necessary to read a standard form contract with an arbitration clause, "it is generally unreasonable, in reliance on such assurances, to neglect to read a written contract before signing it." (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 424, 58 Cal.Rptr.2d 875, 926 P.2d 1061.) ¶ Here the adhesive nature of the contract is sufficient to establish some degree of procedural unconscionability. Yet "a finding of procedural unconscionability does not mean that a contract will not be enforced, but rather that courts will scrutinize the substantive terms of the contract to ensure they are not manifestly unfair or one-sided." (*Gentry, supra,* 42 Cal.4th at p. 469, 64 Cal.Rptr.3d 773, 165 P.3d 556.)" (Emphasis added.) (Sanchez v. Valencia Holding Co., LLC (2015) 61 Cal.4th 899, 914-915.)

The plaintiffs can hardly claim they were surprised that there was an arbitration provision in the franchise agreement they assumed as they admittedly received a copy of the subject agreement directly from the predecessor franchisee, the Galstyans.

Therefore, the only procedural unconscionability is that this is a contract of adhesion. Such procedurally unconscionability by itself will be sufficient to support a finding of unconscionability where both the substantive unconscionably and the procedural unconscionability together establish that the arbitration clause is unenforceable.

- Substantive Unconscionability

Plaintiffs argue the arbitration provision is substantively unconscionable for the following reasons: the contract gives the franchisor defendant access to a judicial forum to litigate

intellectual property claims, while the provision requires that all claims brought by a franchisee be arbitrated resulting in the arbitration provision lacking mutuality; the arbitral forum is designated in the arbitration provision to be expressly limited to a location within ten miles of the franchisor's principal place of business in Florida, which is considerably more advantageous to the franchisor such that the imbalance favors a finding of substantive unconscionability; Section 17.K. of the agreement limits the statute of limitation for claims of the franchisee to one year, while franchisor claims for payments are not so limited resulting in the arbitration provision lacking mutuality; Section 17.I results in more imbalance and lack of mutuality in that it provides that the franchisor's remedies are unlimited, including punitive damages recoverable against the franchisee, while franchisee damages are strictly limited to actual damages and equitable relief thereby sheltering the stronger party from liability for certain damages; and paragraph 17.I includes an unlawful provision that constitutes a pre-litigation waiver of the right to jury trial in trademark and disclosure of confidential information actions the franchisor brings against the franchisee, which is not subject to arbitration.

Defendant argues in opposition: the agreement is not substantively unconscionable as the venue provision and other provisions do not shock the conscience; a class waiver is not substantively unconscionable; arbitrating the dispute near defendant's offices does not shock the conscience; the arbitration agreement is mutual and there are no non-mutual provisions; and the jury waiver is not substantively unconscionable.

""A provision is substantively unconscionable if it 'involves contract terms that are so one-side as to "shock the conscience," or that impose harsh or oppressive terms.' " (*Morris, supra,* 128 Cal.App.4th at p. 1322, 27 Cal.Rptr.3d 797.) Substantive unconscionability may be shown if the disputed contract provision falls outside the nondrafting party's reasonable expectations.

(*Gutierrez, supra,* 114 Cal.App.4th at p. 88, 7 Cal.Rptr.3d 267.)" (Parada v. Superior Court (2009) 176 Cal.App.4th 1554, 1573.)

"Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. (*Armendariz,* at p. 114, 99 Cal.Rptr.2d 745, 6 P.3d 669; *Mission Viejo Emergency Medical Associates v. Beta Healthcare Group* (2011) 197 Cal.App.4th 1146, 1159, 128 Cal.Rptr.3d 330.) A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be "so one-sided as to 'shock the conscience.' " (*24 Hour Fitness, Inc. v. Superior Court, supra,* 66 Cal.App.4th at p. 1213, 78 Cal.Rptr.2d 533.)" (Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC (2012) 55 Cal.4th 223, 246.)

"Where a party with superior bargaining power has imposed contractual terms on another, courts must carefully assess claims that one or more of these provisions are one-sided and unreasonable." (Gutierrez v. Autowest, Inc. (2003) 114 Cal.App.4th 77, 88.)

There is another analysis that requires "particular scrutiny" of arbitration agreements where the asserted claim relates to violation of unwaivable rights grounded in public policy. "An arbitration procedure passes muster under *Armendariz* if it " '(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum....' " [Footnote omitted.]" (Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal.App.4th 708, 716.)

One form of substantive unconscionability is an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party. (Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 119.)

““Substantively unconscionable terms may ‘generally be described as unfairly one-sided.’ [Citation.] For example, an agreement may lack ‘a modicum of bilaterality’ and therefore be unconscionable if the agreement requires ‘arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party.’ ” (*Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 713, 13 Cal.Rptr.3d 88, quoting *Armendariz, supra,* 24 Cal.4th at p. 119, 99 Cal.Rptr.2d 745, 6 P.3d 669.)” (Higgins v. Superior Court (2006) 140 Cal.App.4th 1238, 1253.)

Paragraph 17.D. of the agreement provides: “You agree that you will not withhold payment of any amounts owed to us on the grounds our alleged nonperformance of any of our obligations under this Agreement. You agree that all claims will, if not otherwise resolved, be submitted to arbitration as provided in Paragraph F of this Section.” (Omnibus Declaration in Support of Application, Exhibit D – Concept Acquisitions, LLC Franchise Agreement, Paragraph 17.D.(Subject Franchise Agreement Assigned to Plaintiffs.))

The arbitration clause is found in paragraph 17.F. of the franchise agreement. It provides: **“EXCEPT FOR CONTROVERSIES, DISPUTES OR CLAIMS RELATED TO OR BASED ON YOUR USE OF THE MARKS AFTER THE EXPIRATION OR TERMINATION OF THIS AGREEMENT, ALL CONTROVERSIES, DISPUTES OR CLAIMS BETWEEN US AND OUR AFFILIATES, AND OUR AFFILIATES’ RESPECTIVE SHAREHOLDERS, OFFICERS, DIRECTORS, AGENTS, AND/OR EMPLOYEES AND YOU (AND YOUR OWNERS, GUARANTORS, AFFILIATES AND EMPLOYEES, IF APPLICABLE) ARISING OUT OF OR RELATED TO: ¶ (1) THIS AGREEMENT OR ANY OTHER AGREEMENT BETWEEN YOU AND US OR ANY PROVISION OF ANY OF THESE AGREEMENTS; ¶ (2) OUR RELATIONSHIP WITH YOU; ¶ (3) THE VALIDITY OF THIS AGREEMENT OR ANY OTHER AGREEMENT BETWEEN YOU AND US OR ANY PROVISION OF ANY OF THOSE AGREEMENTS; OR ¶ (4) ANY SYSTEM STANDARD RELATING TO THE**

ESTABLISHMENT OR OPERATION OF THE RESTAURANT; ¶ MUST BE SUBMITTED FOR BINDING ARBITRATION TO THE AMERICAN ARBITRATION ASSOCIATION. THE ARBITRATION PROCEEDINGS WILL BE CONDUCTED BY ONE ARBITRATOR AT A SUITABLE LOCATION CHOSEN BY THE ARBITRATOR THAT IS WITHIN TEN (10) MILES OF OUR THEN CURRENT PRINCIPAL BUSINESS ADDRESS IN FLORIDA…" (Emphasis in Original.) (Omnibus Declaration in Support of Application, Exhibit B – Concept Acquisitions, LLC Franchise Agreement with the Galstyans, Paragraph 17.F. (Subject Franchise Agreement Assigned to Plaintiffs.))

The arbitration provision further states: "…**THE ARBITRATOR WILL NOT HAVE THE RIGHT TO DECLARE ANY MARK GENERIC OR OTHERWISE INVALID OR, EXCEPT AS PROVIDED IN PARAGRAPH I OF THIS SECTION, TO AWARD EXEMPLARY OR PUNITIVE DAMAGES**…" (Emphasis in Original.) (Omnibus Declaration in Support of Application, Exhibit B – Concept Acquisitions, LLC Franchise Agreement with the Galstyans, Paragraph 17.F.(Subject Franchise Agreement Assigned to Plaintiffs.))

Paragraph 17.I of the underlying franchise agreement provides in part: "**EXCEPT FOR YOUR OBLIGATION TO INDEMNIFY US UNDER SECTION 16.D AND CLAIMS WE BRING AGAINST YOU FOR YOUR UNAUTHORIZED USE OF THE MARKS OR UNAUTHORIZED USE OR DISCLOSURE OF ANY CONFIDENTIAL INFORMATION, WE AND YOU AND YOUR RESPECTIVE OWNERS WAIVE TO THE FULLEST EXTENT PERMITTED BY LAW ANY RIGHT TO OR CLAIM FOR ANY CLAIM FOR PUNITIVE OR EXEMPLARY DAMAGES AGAINST THE OTHER AND AGREE THAT, IN THE EVENT OF A DISPUTE BETWEEN US, THE PARTY MAKING THE CLAIM WILL BE LIMITED TO EQUITABLE RELIEF AND TO RECOVERY OF ANY ACTUAL DAMAGES IT SUSTAINS.**" (Omnibus Declaration in Support

of Application, Exhibit B – Concept Acquisitions, LLC Franchise Agreement with the Galstyans, Paragraph 17.I.(Subject Franchise Agreement Assigned to Plaintiffs.))

The franchisor defendant has access to a judicial forum to litigate intellectual property claims concerning trademarks and trademark use after the expiration of the franchise, while the arbitration provision requires that all claims brought by a franchisee be arbitrated. This is a lack of mutuality that favors the stronger party defendant.

In addition, there is a lack of mutuality of remedies concerning the availability of claims for punitive damages. The previously cited provisions allow the stronger party defendant, to recover punitive damages against the weaker party plaintiffs for claims of indemnity against the plaintiff franchisees and claims against the plaintiff franchisees for their alleged unauthorized use of the marks or alleged unauthorized use or disclosure of any confidential information, while the plaintiffs have no right to claim and be awarded punitive damages under any circumstances.

"Where the party with stronger bargaining power has restricted the weaker party to the arbitral forum, but reserved for itself the ability to seek redress in either an arbitral or judicial forum, California courts have found a lack of mutuality supporting substantive unconscionability. As the California Supreme Court held in *Armendariz*, substantive unconscionability may manifest itself in the form of "an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party." 24 Cal.4th at 119, 99 Cal.Rptr.2d 745, 6 P.3d 669; *see also Martinez,* 118 Cal.App.4th at 115, 12 Cal.Rptr.3d 663 (holding that an arbitration agreement requiring employees to arbitrate all claims, but reserving the right of employer to obtain injunctive or other equitable relief in a judicial forum for certain causes of action, lacks mutuality). ¶ In *O'Hare v. Municipal Resource Consultants,* 107 Cal.App.4th 267, 277, 132 Cal.Rptr.2d 116 (2003), the California Court of

Appeal was called upon to analyze the unconscionability of an arbitration clause in an employment contract that required the employee to arbitrate all claims against the employer, but expressly permitted the employer to file a lawsuit seeking injunctive and equitable relief against the employee and remained silent as to the employer's obligation to arbitrate claims. The Court of Appeal there recognized that "unconscionability turns not only on a one-sided result, but also on an absence of justification for it." *Id.* at 273, 132 Cal.Rptr.2d 116 (internal quotation marks omitted). Therefore, the Court of Appeal rejected the employer's contention that it had a legitimate business justification in the "highly confidential and proprietary nature" of its auditing and consulting work for allowing it, but not the employee, to seek injunctive relief in court. *Id.* at 277, 132 Cal.Rptr.2d 116. Citing the California Supreme Court's *Armendariz* opinion, the Court of Appeal noted that to constitute a reasonable business justification, the justification must be " 'something other than the employer's desire to maximize its advantage based on the perceived superiority of the judicial forum.' " *Id.* at 277, 132 Cal.Rptr.2d 116 (quoting *Armendariz,* 24 Cal.4th at 120, 99 Cal.Rptr.2d 745, 6 P.3d 669). Reasoning that the arbitration rules themselves permit such relief, the Court of Appeal held that there was no justification for the one-sided provision. *Id.* at 278, 132 Cal.Rptr.2d 116. Because the one-sided clause permeated the entire arbitration provision, the Court of Appeal refused to enforce it on grounds of unconscionability. *Id.* at 277–78, 132 Cal.Rptr.2d 116; *see also Flores,* 93 Cal.App.4th at 854, 113 Cal.Rptr.2d 376 (finding lack of mutuality of remedies where a debtor was forced to arbitrate any controversy arising out of a loan, but the lender could "proceed by judicial or non-judicial foreclosure, by self-help remedies such as setoff, and by injunctive relief to obtain appointment of a receiver"); *Stirlen,* 51 Cal.App.4th at 1539–42, 60 Cal.Rptr.2d 138 (finding an arbitration provision unconscionable where employment disputes were required to be submitted to arbitration, but breach of noncompete or confidentiality clause

claims could be brought in court). ¶ The MailCoups arbitration provision lacks mutuality. Like the contract in *O'Hare,* it requires that Nagrampa submit to arbitration any controversy related to the franchise agreement, "or any breach thereof, including without limitation, any claim that this Agreement or any portion thereof is invalid, illegal or otherwise voidable or void," while reserving MailCoups's right to obtain any provisional remedy "including, without limitation, injunctive relief from any court of competent jurisdiction, as may be necessary in MailCoups's sole subjective judgment to protect its Service Marks and proprietary information." This language, read plainly, means that MailCoups could go to court to obtain "any provisional remedy," even if it related to a claim for breach of contract, if the claim also implicated MailCoups's Service Marks or proprietary information. Moreover, it is far more likely that Nagrampa—and not MailCoups—would assert claims related to the invalidity or unenforceability of the non-negotiable contract written by MailCoups. Thus, this provision is clearly one-sided, effectively giving MailCoups the right to choose a judicial forum and eliminating such a forum for Nagrampa. California courts consistently have found such arbitration provisions unconscionable. *See Martinez,* 118 Cal.App.4th at 115, 12 Cal.Rptr.3d 663; *Mercuro,* 96 Cal.App.4th at 176, 116 Cal.Rptr.2d 671; *Stirlen,* 51 Cal.App.4th at 1541–42, 60 Cal.Rptr.2d 138." (Emphasis added.) (Nagrampa v. MailCoups, Inc. (9th Cir. 2006) 469 F.3d 1257, 1285–1287.)

Paragraph 17.K. provides: "Except for claims arising from your non-payment or underpayment of amounts you owe us under this agreement, any and all claims arising out of or relating to this Agreement or our relationship with you will be barred unless a judicial or arbitration proceeding is commenced within one (1) year from the date on which the party asserting the claim knew or should have known of the facts giving rise to the claims." (Omnibus Declaration in Support of Application, Exhibit B – Concept Acquisitions, LLC

Franchise Agreement with the Galstyans, Paragraph 17.K.(Subject Franchise Agreement Assigned to Plaintiffs.))

This is a provision that unfairly bars plaintiffs from asserting any claims arising from the agreement unless arbitration is commenced within one year and then allows the stronger defendant to assert claims arising under the agreement that plaintiffs failed to make payments under the contract to the defendant franchisor or made underpayments to the defendant franchisor within the much longer four-year statute of limitation for breach of contract. This is an unfair, one-sided provision.

The arbitral forum is expressly limited to a location within ten miles of the franchisor's principal place of business in Florida. It does not state that arbitration shall take place within ten miles of the current principal place of defendant's business. (Omnibus Declaration in Support of Application, Exhibit B – Concept Acquisitions, LLC Franchise Agreement with the Galstyans, Paragraph 17.F.(Subject Franchise Agreement Assigned to Plaintiffs.))

"…if the "place and manner" restrictions of a forum selection provision are "unduly oppressive," *see Bolter v. Superior Court,* 87 Cal.App.4th 900, 909–10, 104 Cal.Rptr.2d 888 (2001), or have the effect of shielding the stronger party from liability, *see Comb v. PayPal, Inc.,* 218 F.Supp.2d 1165, 1177 (N.D.Cal.2002), then the forum selection provision is unconscionable. To that end, a "party may attempt to make a showing that would warrant setting aside the forum-selection clause—that the agreement was affected by fraud, undue influence, or overweening bargaining power; that enforcement would be unreasonable and unjust; or that proceedings in the contractual forum will be so gravely difficult and inconvenient that the resisting party will for all practical purposes be deprived of his day in court." *Mitsubishi Motors Corp.,* 473 U.S. at 632, 105 S.Ct. 3346 (citations and alterations omitted); *see also Hayes Children Leasing Co. v. NCR Corp.,* 37 Cal.App.4th 775, 787 n. 5, 43 Cal.Rptr.2d

650 (1995). Similarly, "California favors contractual forum selection clauses so long as they are entered into freely and voluntarily, and their enforcement would not be unreasonable." *Am. Online, Inc. v. Superior Court,* 90 Cal.App.4th 1, 11, 108 Cal.Rptr.2d 699 (2001). The Court of Appeal discussed the rationale for this favorable treatment in *Wimsatt v. Beverly Hills Weight Loss Clinic Int'l, Inc.,* 32 Cal.App.4th 1511, 1523, 38 Cal.Rptr.2d 612 (1995), a case involving weight-loss center franchises. The Court of Appeal there stated that "[f]orum selection clauses *are* important in facilitating national and international commerce, and as a general rule should be welcomed." *Id.* However, this favorable treatment of forum selection clauses is conditioned on their free and voluntary procurement, "with the place chosen having some logical nexus to one of the parties or the dispute, and so long as California consumers will not find their substantial legal rights significantly impaired by their enforcement." *Am. Online,* 90 Cal.App.4th at 12, 108 Cal.Rptr.2d 699. Therefore, to be enforceable, the selected jurisdiction must be " 'suitable,' 'available,' and able to 'accomplish substantial justice.' " *Id.* (citing *Bremen v. Zapata Off–Shore Co.,* 407 U.S. 1, 17, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972)). ¶ To assess the reasonableness of the "place and manner" provisions in the arbitration clause, we must take into account the "respective circumstances of the parties." *Bolter,* 87 Cal.App.4th at 909, 104 Cal.Rptr.2d 888. In *Bolter,* the Court of Appeal held that place and manner restrictions were unconscionable where small "Mom and Pop" franchisees located in California were required to travel to Utah to arbitrate their claims against an international carpet-cleaning franchisor. *Id.* The Court of Appeal found a forum selection provision unreasonable and "unduly oppressive" because the remote forum would work severe hardship upon the franchisees and would unfairly benefit the franchisor by effectively precluding the franchisees from asserting any claims against it. *Id.; see also Comb,* 218 F.Supp.2d at 1177 ("Limiting venue to PayPal's backyard appears to be yet one more means by which the arbitration clause

serves to shield PayPal from liability instead of providing a neutral forum in which to arbitrate disputes."); *Armendariz,* 24 Cal.4th at 118, 99 Cal.Rptr.2d 745, 6 P.3d 669 (holding that structuring an arbitration provision to effectively preclude the other party from pursuing its claims would be unconscionable, because "[a]rbitration was not intended for this purpose")." (Nagrampa v. MailCoups, Inc. (9th Cir. 2006) 469 F.3d 1257, 1287–1288.)

While the arbitration has been filed far to the South in Orange County, California, the arbitration agreement itself contains an even more harsh and oppressive term that this "Mom and Pop" plaintiff restaurant operation in El Dorado Hills must arbitrate across the nation in Florida. While plaintiffs operate several restaurants, they are not a large corporate entity and can be considered a "Mom and Pop" operation when compared to defendant. The provision is substantively unconscionable.

As stated earlier, plaintiffs argue that paragraph 17.I includes an unlawful provision that constitutes a pre-litigation waiver of the right to jury trial in trademark and disclosure of confidential information actions the franchisor brings against the franchisee, which is not subject to arbitration.

"When parties elect a judicial forum in which to resolve their civil disputes, article I, section 16 of the California Constitution accords them the right to trial by jury (with limited exceptions not relevant in the present case). [Footnote omitted.] Our Constitution treats the historical right to a jury resolution of disputes that have been brought to a judicial forum as fundamental, providing that in "a civil cause," any waiver of the inviolate right to a jury determination must occur by the consent of the parties to the cause *as provided by statute.* (Cal. Const., art. I, § 16.) [Footnote omitted.] ¶ The statute implementing this constitutional provision is section 631. It holds inviolate the right to trial by jury, and prescribes that a jury may be waived in civil cases *only* as provided in subdivision (d) of its provisions. (§ 631, subd. (a).) Subdivision (d)

describes six means by which the right to jury trial may be forfeited or waived, including failure to appear at trial, failure to demand jury trial within a specified period after the case is set for trial, failure to pay required fees in advance or during trial, oral consent in open court, or written consent filed with the clerk or the court." (Grafton Partners v. Superior Court (2005) 36 Cal.4th 944, 951.) The California Supreme Court held that Code of Civil Procedure, § 631 does not authorize predispute waiver of the right to jury trial in a California court (See Grafton Partners v. Superior Court (2005) 36 Cal.4th 944, 956–961.); and discussed the statutory provision allowing the predispute waiver of the right to a jury trial where the parties agree to arbitrate, which the California Supreme Court also distinguished from a pre-dispute waiver of a jury trial in court proceedings as arbitration agreements are represent an agreement to avoid the judicial forum altogether. (Grafton Partners v. Superior Court (2005) 36 Cal.4th 944, 955.)

Paragraph 17.I of the underlying franchise agreement provides in part: "**WE AND YOU IRREVOCABLE WAIVE TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM, WHETHER AT LAW OR IN EQUITY, BROUGHT BY EITHER OF US.**" (Emphasis in Original.)

While the pre-dispute waiver of trial by jury in court actions involving trademark actions the franchisor brings against the franchisee that are not the subject of arbitration appears to be void as it violates the constitutional right to a jury trial in court, the potentially void provision does not establish a lack of mutuality in the arbitration agreement. Instead, the lack of mutuality involves the stronger defendant carving out claims that can be asserted only by the defendant franchisor as triable in court proceedings, materially reducing the statute of limitations for claims brought by plaintiffs against defendant, choice of an arbitration venue that is greatly inconvenient to plaintiffs, and disparate treatment regarding remedies, as stated earlier in this ruling.

The court finds that the totality of the circumstances establishes that there are numerous instances of substantive unconscionability in the arbitration agreement leading to a very strong level of substantive unconscionability. The totality of the substantively unconscionable provisions leads the court to find that they are so one-sided as to shock the conscience.

Both procedural and substantive unconscionability is present in the subject arbitration agreement and together they have a degree of unconscionability such that plaintiffs have established a likelihood of success in their assertion that the arbitration provision is unenforceable and that these claims should be determined in the instant civil case and not by compelled arbitration.

Severance of Unconscionable Provisions in Order to Allow Arbitration

As an alternative to finding an arbitration clause unenforceable as unconscionable, the court has the discretion to sever the offending provision and enforce the remainder of the agreement, provided the central purpose of the contract is not tainted with unconscionability, the arbitration clause is not permeated with unconscionability, and the circumstances do not establish the unconscionable provision of the arbitration agreement was drafted in bad faith. (Gutierrez v. Autowest, Inc. (2003) 114 Cal.App.4th 77, 92-93.)

"California law grants courts the discretion either "to sever an unconscionable provision or refuse to enforce the contract in its entirety." *Adams III,* 279 F.3d at 895; Cal. Civ.Code § 1670.5(a). In exercising this discretion, courts look to whether the "central purpose of the contract is tainted with illegality" or "the illegality is collateral to [its] main purpose." *Adams III,* 279 F.3d at 895 (quoting *Armendariz,* 24 Cal.4th at 124, 99 Cal.Rptr.2d 745, 6 P.3d at 696–97). Even though the 1998 arbitration agreement is a revised version of the agreement we held unconscionable in *Adams III,* it is nonetheless permeated with objectionable provisions. While many of the terms of Circuit City's arbitration agreement appear facially neutral, the effect of

these provisions is to obstruct its employees' ability to substantiate claims against Circuit City. *See Ferguson,* 298 F.3d at 787("While many of its arbitration provisions appear 'equally applicable to both parties, [these provisions] work to curtail the employee's ability to substantiate any claim against [the employer].' ") (quoting *Kinney,* 70 Cal.App.4th at 1332, 83 Cal.Rptr.2d 348). ¶ Circuit City correctly argues that the FAA articulates a strong public policy in favor of arbitration agreements. 9 U.S.C. § 2 (2002); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (holding that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration"). Nevertheless, this "policy is manifestly undermined by provisions in arbitration clauses [that] seek to make the arbitration process itself an offensive weapon in one party's arsenal." *Kinney,* 70 Cal.App.4th at 1332, 83 Cal.Rptr.2d 348. ¶ While it is within this court's discretion to sever unconscionable provisions, because an "insidious pattern" [FN 24.] exists in Circuit City's arbitration agreement "that functions as a thumb on Circuit City's side of the scale should an employment dispute ever arise between the company and one of its employees," we conclude that the agreement is wholly unenforceable. *Adams III,* 279 F.3d at 892. The adhesive nature of the contract and the provisions with respect to coverage of claims, the statute of limitations, class claims, the filing fee, cost-splitting, remedies, and Circuit City's unilateral power to terminate or modify the agreement combine to stack the deck unconscionably in favor of Circuit City. Any earnest attempt to ameliorate the unconscionable aspects of Circuit City's arbitration agreement would require this court to assume the role of contract author rather than interpreter. Because that would extend far beyond the province of this court we are compelled to find the entire contract unenforceable. [FN 25.] *See Ferguson,* 298 F.3d at 787–88; *Adams III,* 279 F.3d at 895–96; *Armendariz,* 24 Cal.4th at 124–27, 99 Cal.Rptr.2d 745, 6 P.3d at 697–98. ¶ FN24. *Ferguson,* 298 F.3d at 787. ¶ FN25. Because we

find that numerous provisions in Circuit City's arbitration agreement are substantively unconscionable, we decline to sever particular terms from the agreement, as the Sixth Circuit did in *Morrison.*" (Emphasis added.) (Ingle v. Circuit City Stores, Inc. (9th Cir. 2003) 328 F.3d 1165, 1180.)

As stated earlier in this ruling, there are numerous provisions in the arbitration agreement that are unconscionable and under such circumstances it is very likely that the court would decline to sever the offensive terms of the agreement.

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

Bond Requirement

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

An undertaking by bond in an amount to be fixed by the Court is required. (Code of Civil Procedure, § 529(a); California Rules of Court, Rule 359.)

An undertaking in some amount is mandated by statute when a preliminary injunction is issued, unless there is a statutory exception that applies or a waiver of the bond requirement.

(Smith v. Adventist Health System/West (2010) 182 Cal.App.4th 729, 744.) Where an undertaking is set by the court as required by statute, "Within five days after the service of the injunction, the person enjoined may object to the undertaking…" (Code of Civil Procedure, § 529(a).)

The application for preliminary injunction has not addressed the bond requirement and defendant has not addressed the bond requirement. Appearances are required regarding argument about the bond amount.

TENTATIVE RULING # 6: PLAINTIFFS' REQUEST FOR ISSUANCE OF A PRELIMINARY INJUNCTION IS GRANTED. APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, APRIL 15, 2022, IN DEPARTMENT NINE FOR ORAL ARGUMENT ON THE BOND AMOUNT. 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. NO HEARING ON THE RULING GRANTING THE REQUEST FOR ISSUANCE OF THE PRELIMINARY INJUNCTION 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, APRIL 15, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

7. MATTER OF THE MARTHA J. VOESTER LIVING TRUST PP-20160033

Hearing Re: Motion to Enter Default Against Respondent for Failure to Respond to 2nd Amended Petition.

This action is stayed by the respondent's bankruptcy proceeding.

Petitioner reports: the Bankruptcy case was referred to the Bankruptcy Court's settlement program; while the Bankruptcy Court notified counsel that the Bankruptcy case had settled, the COVID-19 pandemic has disrupted the orderly progression to completion; the final settlement agreement has not been executed; a motion to enforce the bankruptcy settlement agreement was required as not all parties signed the agreement; the order granting that motion was entered on March 29, 2021; the bankruptcy court judgment has not yet been ordered and bankruptcy counsel has not yet advised when such a judgment will enter and become final; the bankruptcy court jurisdiction and stay continues in effect.

Upon request of counsel, the May 7, 2021, hearing was continued to August 27, 2021. Petitioner filed a notice of continuing automatic bankruptcy stay, which reported: counsel was advised that a motion to enforce the settlement agreement in the Bankruptcy became necessary, which was granted by the Bankruptcy Court and entered on March 29, 2021; the order provided for a judgment of non-dischargeability of debt to be entered together with interest; the judgment was not entered for some time and petitioner's bankruptcy attorney has not yet advised as to when judgment would be entered, when it would be final, and when the time for appeal would expire; counsel has now been advised that the judgment was entered, however, the Bankruptcy Court also entered a stay of the judgment, leaving the date of finality of the judgment and time to appeal unknown; and the Bankruptcy Court jurisdiction and stay

continued in effect. Counsel requested and was granted a continuance of the hearing to February 4, 2022.

There were no appearances by either respondent or petitioner at the February 4, 2022, hearing and the matter continued to April 15, 2022. The February 4, 2022, minute order continuing the hearing to April 15, 2022, was served by mail to the interested parties on January 7, 2022.

The minute order mailed to David Foyil, counsel for Robert Peterson, was returned by the U.S. Postal Service as it was not deliverable as addressed and unable to forward.

The court has not received any further information from the parties.

TENTATIVE RULING # 7: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, APRIL 15, 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. AMERICAN EXPRESS v. MOUNT PC-20210350

Plaintiff's Motion for Summary Judgment.

TENTATIVE RULING # 8: THIS MATTER IS CONTINUED TO 8:30 A.M. ON FRIDAY, APRIL 22, 2022, IN DEPARTMENT NINE.

9. DUDUGJIAN v. WELLS FARGO BANK PC-20210060

Plaintiff's Motion for Summary Judgment.

Plaintiff Trustees of the Dudugjan Family Trust filed a complaint against defendants asserting a cause of action to quiet title to certain real property. The complaint alleges: a judgment lien in favor of Dudugjian and Maxey, A Law Corp. affecting title to the subject property was recorded on February 1, 2002; a judgment lien in favor of Kris B. Frost (Cardwell) affecting title to the subject property was recorded on July 16, 2002; defendant Wells Fargo Bank was the original beneficiary under a junior Deed of Trust affecting title to the property, which was recorded on February 4, 2010; on October 23, 2017, a litigation guarantee was issued by First American Title Company to Dudugjian and Maxey, A Law Corp.; On January 10, 2020 an order of sale of the dwelling was executed by Judge Sullivan; on January 28, 2020 a notice of Sheriff's sale of real property (non-foreclosure) was executed; on March 4, 2020 the property was sold at the duly conducted Sheriff's sale to non-party Kris B. Frost and the Sheriff's deed was recorded on March 4, 2020; there was no redemption of the property; defendant Specialized Loan Servicing, LLC is the assignee of the Wells Fargo Bank deed of trust by virtue of an assignment recorded on May 11, 2020; defendant Quality Loan Service Corp. is acting as trustee under the Wells Fargo Bank deed of trust assigned to defendant Specialized Loan Servicing; defendant Quality Loan Service Corp. recorded a notice trustee's sale on January 24, 2020 and the trustee's sale was scheduled for March 4, 2021; and plaintiff owns in fee the property by virtue of a grant deed affecting title recorded on November 17, 2020. (Complaint, paragraphs 8-16.) Plaintiff Trust seeks a declaration that title to the subject property vested in the plaintiff Trust alone and each defendant should be declared to have no

estate, right, title or interest in the subject property and the determination is sought as of the date of the recording of the Sheriff's deed on March 4, 2020.

Plaintiff moves for entry of summary judgment against defendants on the following grounds: the Wells Fargo Deed of Trust recorded in 2010 is not a purchase money mortgage as it was created well after the property was purchased; the two judgment abstract liens recorded in 2002 are entitled to priority over the Wells Fargo 2010 deed of trust as those abstract judgment liens are first in time and first in right; support judgments are exempt from the judgment renewal requirement and there is no limitation period on support enforcement; the laches defense does not apply to collection of family court support judgments if the debt is owed to someone other than the State; the lien on the property from these family law support judgments stay in effect against the property until all support obligations are paid in full or otherwise satisfied, even if the lien is not satisfied before the transfer or encumbrance of the obligor's interest on the real property.

Plaintiff requests the court to take judicial notice of various recorded documents, documents filed with the court, and court orders. (Seen Plaintiff's RJN in Support of Motion for Summary Judgment, Plaintiff's Exhibits A-E, H, K, L, and N-R.)

Defendant Specialized Loan Servicing, LLC (Specialized) opposes the motion on the following grounds: plaintiff has not established that the recorded Frost Abstract of Judgment includes only the support payments due and owing up until the date in 2010 that the Wells Fargo Bank deed of trust was recorded; the recorded attorney's fee abstract of judgment was invalid after February 1, 2012 as there is no evidence it was renewed after February 1, 2002; plaintiff has unclean hands as the credit bid amount was improperly inflated as no evidence was presented to the court during the proceedings to order sale of the property concerning how the support instalment payments were calculated or whether plaintiff's separate attorney

fees judgment had been renewed after February 2002; since Wells Fargo Bank paid off all prior liens, except the two subject judgment liens in 2010, it is equitable to predate the 2010 deed of trust, thereby making it the senior lien on the property as Wells Fargo Bank did not know about the judgment liens when it paid off the 1999 and 2001 liens; there is no evidence that the Frost and Attorney Fees Judgment abstracts were properly indexed, thereby making Wells Fargo Bank a bona fide encumbrancer; the judgment abstract liens are void, because they do not include debtor Stephen Frost's driver's license number; there is no support for plaintiffs claim for recovery of attorney fees incurred in this action as there is no contractual right to recover such fees and such relief is not requested in the complaint, which justifies denial of the entire motion; and defendant should be granted a 90 day continuance of the hearing or denial of the motion in order to allow defendant to engage in discovery to uncover essential evidence to oppose the motion for summary judgment.

Defendant Specialized also objected to Plaintiff's Requests for Judicial Notice, Plaintiff's Exhibits A, C, D, F, I, and J; and paragraphs 4, 7, and 8 of trustee Robert Dudugjian's declaration submitted in support of the motion for summary judgment.

Plaintiff replied to the opposition: there is no dispute that all sums due under the judgment for support payments as of the date the Wells Fargo Bank deed of trust was recorded in 2010; court ordered attorney fees is a family law judgment under Family Code, § 17402 which is exempt from the requirement that the judgments be renewed; such judgments are due and payable until paid in full with no limitations period on enforcement; the doctrine of unclean hands does not apply under the facts; the deed of trust beneficiary, Wells Fargo Bank, took no action at the OSC hearing re: sale of the subject property to enforce the judgment liens and did not ask for any relief from the order before the assignment of the deed of trust to defendant Specialized Loan Servicing, LLC; defendant Wells Fargo did make a claim to its title insurance

company rather than ask for relief; the application for order for sale placed Wells Fargo Bank on notice that the judgment liens were superior to its deed of trust and after a court order determining that priority, defendant Wells Fargo Bank did not take any steps to dispute that priority or ask for relief; Wells Fargo Bank assigned the deed of trust to Specialized Loan Servicing, LLC two months after the Sheriff's sale and recording of the Sheriff's deed conveying the property to Kris B. Frost, which leaves no basis for Wells Fargo Bank to dispute actual knowledge of the support judgment liens at the time of the assignment; and there is no grounds for equitable subrogation or balancing equities under such facts.

Defendant Specialized's Objections to Requests for Judicial Notice

Defendant Specialized objects that the court should not take judicial notice of the Complaint in this action (Plaintiff's Exhibit A), because the moving party can not rely on its own pleadings. The objection is overruled. The pleadings are the starting point to the court's determination of whether a moving plaintiff has met the plaintiff's initial burden of proof and whether defendants has raised a triable issue of material fact that is reasonably reflected in the pleadings.

"Summary judgment cannot be granted on a ground not raised by the pleadings. (*Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848, 885, 164 Cal.Rptr. 510, 610 P.2d 407, revd. on other grounds (1981) 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800.) Conversely, summary judgment cannot be *denied* on a ground not raised by the pleadings. (Citations omitted.)" (Bostrom v. County of San Bernardino (1995) 35 Cal.App.4th 1654, 1663.)

"The pleadings determine the issues to be addressed by a summary judgment motion. (*Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848, 885, 164 Cal.Rptr. 510, 610 P.2d 407, revd. on other grounds *Metromedia, Inc. v. San Diego* (1981) 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800.)" (Oakland Raiders v. National Football League (2005) 131 Cal.App.4th 621, 629.)

"The first step in analyzing a motion for summary judgment is to identify the issues framed by the pleadings. It is these allegations to which the motion must respond by showing there is no factual basis for relief or defense on any theory reasonably contemplated by the opponent's pleading. (Citations omitted.)" (6 Witkin, California Procedure (5th ed. 2008) Proceedings Without Trial, § 212, page 650.)

Defendant Specialized objects that plaintiff's Exhibits C, D, and P, which are recorded abstracts of judgment and the notice of trustee's sale recorded on January 24, 2020, on the grounds that the documents lack foundation, are hearsay, and are irrelevant and immaterial. The objections are overruled.

Defendant Specialized objects that plaintiff's Exhibits F, I and J consisting of the October 23, 2017 litigation guarantee issued to Dudugjian and Maxey, A Law Corp., the First American Title Trustee's Sale Guarantee, dated October 9, 2019 issued to Quality Loan Service, which was produced in discovery propounded upon Wells Fargo Bank, and correspondence from National Title Insurance, dated October 24, 2019, which was produced in discovery propounded upon Wells Fargo Bank, are irrelevant, they lack foundation and are hearsay. The objections are overruled.

Defendant Specialized's Objections to Portions of Trustee Robert Dudugjian's Declaration

Defendant Specialized objects to paragraphs 4, 7, and 8 of trustee Robert Dudugjian's declaration, which authenticate plaintiff's Exhibits F, I and J on the grounds that the authentications are hearsay and lack foundation. The objections are overruled.

Motion for Summary Judgment Principles

"For purposes of motions for summary judgment and summary adjudication: ¶ (1) A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to

judgment on that cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto…" (Code of Civil Procedure, § 437c(p)(1).)

"The motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken…" (Code of Civil Procedure, § 437c(b)(1).)

"The moving party "bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar, supra,* 25 Cal.4th at p. 850, 107 Cal.Rptr.2d 841, 24 P.3d 493, fn. omitted.) "In moving for summary judgment, a 'plaintiff ... has met' his 'burden of showing that there is no defense to a cause of action if' he 'has proved each element of the cause of action entitling' him 'to judgment on that cause of action. Once the plaintiff ... has met that burden, the burden shifts to the defendant ... to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant ... may not rely upon the mere allegations or denials' of his 'pleadings to show that a triable issue of material fact exists but, instead,' must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.' [Citation.]" (*Id.* at p. 849, 107 Cal.Rptr.2d 841, 24 P.3d 493, quoting Code Civ. Proc., § 437c, subd. (*o*)(1); see also Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2004) ¶ 10:224.1, p. 10–81.)" (Law Offices of Dixon R. Howell v. Valley (2005) 129 Cal.App.4th 1076, 1091-1092.)

"The pleadings determine the issues to be addressed by a summary judgment motion. (*Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848, 885, 164 Cal.Rptr. 510, 610 P.2d 407, revd. on other grounds *Metromedia, Inc. v. San Diego* (1981) 453 U.S. 490, 101 S.Ct.

2882, 69 L.Ed.2d 800.)" (Oakland Raiders v. National Football League (2005) 131 Cal.App.4th 621, 629.)

"The first step in analyzing a motion for summary judgment is to identify the issues framed by the pleadings. It is these allegations to which the motion must respond by showing there is no factual basis for relief or defense on any theory reasonably contemplated by the opponent's pleading. (Citations omitted.)" (6 Witkin, California Procedure (5th ed. 2008) Proceedings Without Trial, § 212, page 650.)

"The purpose of summary judgment is to penetrate through pleadings to ascertain, by means of affidavits, the presence or absence of triable issues of material fact. (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107 [252 Cal.Rptr. 122, 762 P.2d 46].) The trial judge determines whether triable issues of fact exist by examining the affidavits and evidence, including any reasonable inferences which may be drawn from the facts. (*People v. Rath Packing Co.* (1974) 44 Cal.App.3d 56, 61-64 [118 Cal.Rptr. 438].) The evidence of the moving party is strictly construed and the evidence of the opposing party liberally construed. Doubts as to the propriety of granting the motion must be resolved in favor of the party resisting the motion. (*Stationers Corp. v. Dun & Bradstreet, Inc*. (1965) 62 Cal.2d 412, 417 [42 Cal.Rptr. 449, 398 P.2d 785].)" (Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal.App.4th 1509, 1524.)

"In ruling on the motion, the court must "consider all of the evidence" and "all" of the "inferences" reasonably drawn therefrom (id., § 437c, subd. (c)), and must view such evidence (e.g., *Molko v. Holy Spirit Assn.*, supra, 46 Cal.3d at p. 1107, 252 Cal.Rptr. 122, 762 P.2d 46; *Stationers Corp. v. Dun & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 417, 42 Cal.Rptr. 449, 398 P.2d 785) and such inferences (see, e.g., *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1520, 80 Cal.Rptr.2d 94 [review on appeal]; *Ales-Peratis Foods Internat.,*

Inc. v. American Can Co. (1985) 164 Cal.App.3d 277, 280, 209 Cal.Rptr. 917, fn. * [same]), in the light most favorable to the opposing party." (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843.)

"Even where the complaint does present a cognizable claim, so that the court proceeds to the second or third step, the pleadings remain significant. Summary judgment cannot be granted on a ground not raised by the pleadings. (*Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848, 885, 164 Cal.Rptr. 510, 610 P.2d 407, revd. on other grounds (1981) 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800.) Conversely, summary judgment cannot be *denied* on a ground not raised by the pleadings. (*Lewinter v. Genmar Industries, Inc.* (1994) 26 Cal.App.4th 1214, 1223, 32 Cal.Rptr.2d 305 [complaint alleged failure to warn of manufacturing defect in boat; plaintiff could not avoid summary judgment by showing failure to warn based on post-manufacture discovery of defect]; *Danieley v. Goldmine Ski Associates, Inc.* (1990) 218 Cal.App.3d 111, 119–120, 266 Cal.Rptr. 749 [complaint alleged owner negligently maintained ski slopes; plaintiff could not avoid summary judgment by showing owner negligently cared for her after accident]; *Cochran v. Linn* (1984) 159 Cal.App.3d 245, 250, 205 Cal.Rptr. 550 [complaint alleged products liability based on manufacture and sale of liquid protein diet; plaintiffs could not avoid summary judgment by showing defendant negligently wrote book promoting diet]; see generally *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381–382, 282 Cal.Rptr. 508.) ¶ If either party wishes the trial court to consider a previously unpleaded issue in connection with a motion for summary judgment, it may request leave to amend. (*Lee v. Bank of America* (1994) 27 Cal.App.4th 197, 216, 32 Cal.Rptr.2d 388; *Dorado v. Knudsen Corp.* (1980) 103 Cal.App.3d 605, 611, 163 Cal.Rptr. 477.) Such requests are routinely and liberally granted. However, " ' "[I]n the absence of some request for amendment there is no occasion to inquire about possible issues not raised by the pleadings." '

" (*Metromedia, Inc. v. City of San Diego, supra,* 26 Cal.3d at p. 885, 164 Cal.Rptr. 510, 610 P.2d 407, quoting *Krupp v. Mullen* (1953) 120 Cal.App.2d 53, 57, 260 P.2d 629.) Declarations in opposition to a motion for summary judgment "are no substitute for amended pleadings." (*AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1065, 225 Cal.Rptr. 203.) If the motion for summary judgment presents evidence sufficient to disprove the plaintiff's claims, as opposed to merely attacking the sufficiency of the complaint, the plaintiff forfeits an opportunity to amend to state new claims by failing to request it. (See *Kirby v. Albert D. Seeno Construction Co., supra,* 11 Cal.App.4th at p. 1068, 14 Cal.Rptr.2d 604.)" (Bostrom v. County of San Bernardino (1995) 35 Cal.App.4th 1654, 1663–1664.)

"To create a triable issue of material fact, the opposition evidence must be directed to issues raised by the pleadings. (*Zavala v. Arce*, supra, 58 Cal.App.4th at p. 926, 68 Cal.Rptr.2d 571.) If the opposing party's evidence would show some factual assertion, legal theory, defense or claim not yet pleaded, that party should seek leave to amend the pleadings before the hearing on the summary judgment motion. (See *580 Folsom Associates v. Prometheus Development Co.* (1990) 223 Cal.App.3d 1, 18, 272 Cal.Rptr. 227*; City of Hope Nat. Medical Center v. Superior Court* (1992) 8 Cal.App.4th 633, 639, 10 Cal.Rptr.2d 465; & Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2000) ¶¶ 10:257 & 10:257.2, pp. 10-96 & 10-97 (rev.# 1, 2000).)" (Distefano v. Forester (2001) 85 Cal.App.4th 1249, 1264-1265.)

"…[I]t is axiomatic that the party opposing summary judgment " 'must produce admissible evidence raising a triable issue of fact. [Citation.]' [Citation.]" (*Dollinger, supra,* 199 Cal.App.4th at pp. 1144–1145, 131 Cal.Rptr.3d 596.) This requirement is black letter law (Code Civ. Proc., § 437c, subd. (p)(2)) that applies whether the alleged cause of action is statutory or under the common law." (All Towing Services LLC v. City of Orange (2013) 220 Cal.App.4th 946, 960.)

With the above-cited legal principles in mind, the court will rule on plaintiffs' motion for summary judgment.

Defendant Specialized's Request to Continue the Hearing on the Motion in Order to Obtain Evidence to Oppose the Motion for Summary Judgment

Defendant Specialized seeks a 90 day continuance of the hearing on this motion to engage in further discovery asserting the following reasons: discovery was delayed due to the parties' desire for an early mandatory settlement conference and/or mediation; defendant first appeared in this action in June 2021 just as California was coming out of the first wave of the pandemic; due to business that required immediate attention and to obtain evidence as quickly as possible, defendant requested information informally rather than through discovery; and having reviewed the court's file and other information at length, defendant believes it will receive information from subpoenas to the Sheriff's Office, through plaintiff's depositions, written discovery responses, requests for admission, and Kris Frost's deposition that would confirm the credit bids were artificially inflated, that plaintiffs have unclean hands, and confirm defendant's equitable subrogation rights.

Plaintiff argues in reply that a continuance is not appropriate as defendant Specialized has not shown good cause to continue the hearing; and more time is not necessary as it will not provide new evidence to overcome defendant's failure to meet the test for equitable subrogation.

"If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just." (Code of Civil Procedure, § 437c(h).)

"Section 437c, subdivision (h) of the Code of Civil Procedure provides that a motion for summary judgment or adjudication shall be denied, or a continuance shall be granted, '[i]f it appears from the affidavits submitted in opposition ... that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented....' The nonmoving party seeking a continuance 'must show: (1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]' (*Wachs v. Curry* (1993) 13 Cal.App.4th 616, 623, 16 Cal.Rptr.2d 496.) The decision whether to grant such a continuance is within the discretion of the trial court. (*FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 72, 41 Cal.Rptr.2d 404.) But as this court recently noted, the interests at stake are too high to sanction the denial of a continuance without good reason. '[T]echnical compliance with the procedures of Code of Civil Procedure section 437c is required to ensure there is no infringement of a litigant's hallowed right to have a dispute settled by a jury of his or her peers.' (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395, 107 Cal.Rptr.2d 270.) Subdivision (h) was added to section 437c of the Code of Civil Procedure (herein section 437c) '[t]o mitigate summary judgment's harshness,' and it mandates a continuance for the nonmoving party ' " 'upon a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to the motion.' [Citation.]" [Citation.]' (*Bahl v. Bank of America*, supra, 89 Cal.App.4th at p. 395, 107 Cal.Rptr.2d 270.) Moreover, the affiant is not required to show that essential evidence does exist, but only that it may exist. This, and the language stating the continuance shall be granted upon such a showing, 'leaves little room for doubt that such continuances are to be liberally granted.' (Ibid.)" (Emphasis added.) (Frazee v. Seely (2002) 95 Cal.App.4th 627, 633-634.)

Failure to identify the information that might be obtained from the additional discovery that would shed light on a dispositive issue on summary judgment is a ground for denial of an opposing party's Section 437c(h) request to deny the motion for summary judgment or continue the hearing to allow additional discovery to take place. (Cheviot Vista Homeowners Ass'n v. State Farm Fire & Cas. Co. (2006) 143 Cal.App.4th 1486, 1501.)

Defense Counsel declares: preliminary discovery suggests that the calculation of the credit bid presented to the El Dorado County Superior Court may have been inflated and led the court to set an inflated credit bid, which prevented any sufficient funds to be paid to Wells Fargo Bank; and in a phone call to the El Dorado County Sheriff's Department regarding the March 4, 2020 Sheriff's sale, counsel was told that a nominal case payment was made by Kris Frost in the amount of approximately $5,000, which indicates no cash payment was made, or the amount remitted was never provided by the creditors to Wells Fargo Bank. (Declaration of Robert Hunter in Opposition, paragraphs 9 and 10.)

As stated in Frazee v. Seely (2002) 95 Cal.App.4th 627, 634, defendant is not required to show that essential evidence does exist, but only that it may exist; and such continuances are to be liberally granted.

Under the circumstances presented, in an abundance of caution, the court grants a continuance of the hearing on this motion for summary judgment to 8:30 a.m. on Friday, July 22, 2022, in Department Nine. Defendant Specialized's supplemental opposition and supplemental evidence in support thereof only addressing the issues of alleged artificial inflation of the credit bids, unclean hands and equitable subrogation rights shall be filed and served not later than July 11, 2022, and the supplemental reply to the supplemental opposition, including any objections to the supplemental evidence submitted, shall be filed and served not later than July 15, 2022.

TENTATIVE RULING # 9: THE COURT GRANTS DEFENDANT SPECIALIZED LOAN SERVICING, LLC'S REQUEST FOR A CONTINUANCE OF THE HEARING ON THIS MOTION FOR SUMMARY JUDGMENT IN ORDER TO ENGAGE IN FURTHER DISCOVERY TO DISCOVER FACTS ESSENTIAL TO JUSTIFY OPPOSITION THAT MAY EXIST BUT CANNOT NOW BE PRESENTED. THE COURT ORDERS THE HEARING CONTINUED TO 8:30 A.M. ON FRIDAY, JULY 22, 2022, IN DEPARTMENT NINE. DEFENDANT SPECIALIZED'S SUPPLEMENTAL OPPOSITION AND SUPPLEMENTAL EVIDENCE IN SUPPORT THEREOF ONLY ADDRESSING THE ISSUES OF ALLEGED ARTIFICIAL INFLATION OF THE CREDIT BIDS, UNCLEAN HANDS AND EQUITABLE SUBROGATION RIGHTS SHALL BE FILED AND SERVED NOT LATER THAN JULY 11, 2022, AND THE SUPPLEMENTAL REPLY TO THE SUPPLEMENTAL OPPOSITION, INCLUDING ANY OBJECTIONS TO THE SUPPLEMENTAL EVIDENCE SUBMITTED, SHALL BE FILED AND SERVED NOT LATER THAN JULY 15, 2022.

10. MCDERMOTT v. TRINITY FINANCIAL SERVICES PC-20210522

Demurrer to 1st Amended Complaint.

Defendant Trinity Financial Services, LLC demurred to all causes of action of the original complaint. On December 17, 2021, the court sustained the demurrers to the violation of Civil Code, § 2923.5, violation of Civil Code, § 2924(a)(1), negligence, wrongful foreclosure, and cancellation of written instruments causes of action without leave to amend, overruled the demurrers to the truth in lending act and unfair business practices causes of action, and sustained the demurrer to the Rosenthal Fair Debt Collection Practices Act with ten days leave to amend. On December 30, 2021, plaintiffs filed the 1st amended complaint asserting causes of action for Violation of the Truth in Lending Act; Violation of the Rosenthal Fair Debt Collection Practices Act; and Unfair business Practices.

Defendant Trinity Financial Services, LLC demurs to the Rosenthal Fair Debt Collection Practices Act on the following grounds: plaintiff has failed to allege facts to establish statutory liability under the Act for alleged misrepresentation of the amount of debt owed on the loan by including interest and fees that are federally prohibited from being collected on the subject loan (1st Amended Complaint, paragraph 31.) as plaintiffs only rely upon conclusory and vague allegations without actually citing the federal statute that allegedly prohibits the alleged fees and interest from being collected; plaintiff has failed to allege facts to establish statutory liability under the Act for alleged bad faith and misleading conduct in sending out a statement on or about early 2021 concerning plaintiffs tendering payment of $31,160.19 when, in fact, plaintiff borrowers did not know they owed on this loan (1st Amended Complaint, paragraph 32.) as this is not misleading or bad faith conduct; the allegation that the amount of arrears stated in the Notice of Default included federally prohibited interest and fees (1st Amended Complaint,

paragraph 31.) is vague and conclusory; the allegation that the federal periodic statement rules under the Truth in Lending Act apply and it requires mortgage lenders and servicers to provide homeowners with prompt, regular and accurate information about the loan (1st Amended Complaint, paragraph 32.) does not in itself state a violation of the Rosenthal Fair Debt Collection Practices Act, because the State Rosenthal Fair Debt Collection Practices Act only incorporates the Federal Fair Debt Collections Practices Act provisions and not the Truth in Lending Act provisions; and the allegation that defendant violated Civil Code, § 1788.30 and 15 USC 1692(e)(2) by falsely stating an amount owed that was not owed to them (1st Amended Complaint, paragraph 33.) are vague and conclusory statements as plaintiffs have failed to explain why the amount is incorrect, failed to allege any facts to establish that defendant did not own the 2nd loan, and has not alleged facts disputing the chain of assignments to defendant.

Plaintiffs oppose the demurrer on the following grounds: plaintiffs have stated a cause of action for violation of the Truth in Lending Act; plaintiffs have stated a cause of action for violation of the unfair competition law; and plaintiffs have adequately alleged a cause of action for violation of the Rosenthal Fair Debt Collection Practices Act in paragraphs 31-35 of the 1st amended complaint as the defendant allegedly wrongfully accelerated the note, because they did not attempt to collect on the note for various years, and plaintiffs did not know they owed on this loan any longer, thereby violating 15 USC 1692(e)(2).

Plaintiffs request that should the court sustain the demurrer that leave to amend be granted.

Defendant Trinity Financial Services, LLC replied to the opposition: the plaintiffs still fail to explain how the amount due under the 2nd loan is incorrect or somehow violates federal law; plaintiffs raise in the opposition the argument that defendant's acceleration of the note was improper because defendant did not attempt to collect for various years and such argument is

not sufficient to support the cause of action in that Section 15 of the 2nd Deed of Trust expressly allows defendant to accelerate the loan at its option upon notice to the borrowers (Defendant's Request for Judicial Notice, Exhibit 3 – 2nd Deed of Trust Recorded with the El Dorado County Recorder on December 30, 2005.) and all required notices were provided; plaintiffs' assertion that defendant violated 15 USC 1692(e)(2) does not sufficiently allege that the State Rosenthal Fair Debt Collection Practices Act was violated by violating a provision of federal law contained in the Federal Fair Debit Collection Practices Act as there is no subpart (e)(2) to that statute, Section 1692 only states congressional findings and the purposes of the Federal Act, and subpart (e) only states the general purpose of that Act; and plaintiffs have failed to allege how defendants' foreclosure on the subject deed of trust was an abusive debt collection.

Inasmuch as the defendant's demurrer is directed solely at the Rosenthal Fair Debt Collection Practices Act cause of action of the 1st amended complaint, the court will not address the opposition arguments related to any other cause of action as such arguments are irrelevant.

Demurrer Principles

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

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

proving the allegations of the complaint.' (*Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 572 [108 Cal.Rptr. 480, 510 P.2d 1032].)" (Highlanders, Inc. v. Olsan (1978) 77 Cal.App.3d 690, 696-697.)

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

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

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

With the above cited principles in mind, the court will rule on the demurrers to the 2nd amended complaint.

Rosenthal Fair Debt Collection Practices Act Cause of Action

"Notwithstanding any other provision of this title, every debt collector collecting or attempting to collect a consumer debt shall comply with the provisions of Sections 1692b to 1692j, inclusive, of, and shall be subject to the remedies in Section 1692k of, Title 15 of the United States Code. However, subsection (11) of Section 1692e and Section 1692g shall not apply to any person specified in paragraphs (A) and (B) of subsection (6) of Section 1692a of Title 15 of the United States Code or that person's principal. The references to federal codes in this section refer to those codes as they read January 1, 2001." (Civil Code, § 1788.17.)

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

"A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: ¶ (2) The false representation of—

¶ (A) the character, amount, or legal status of any debt; or ¶ (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt." (15 USC 1692e(2).)

The 1st Amended Complaint alleges: defendant Trinity Financial Services, LLC is a debt collector within the meaning the both the Federal Fair Debt Collections Practices Act (FDCPA) and the California Rosenthal Fair Debt Collection Practices Act; 15 USC 1692(e)(2) of the FDCPA prohibits a debt collector from making a false representation of the amount, character, or status of a debt; defendant Trinity Financial Services, LLC misrepresented the amount of debt by including interest and fees that it is federally prohibited from collecting on the plaintiffs' loan in its reinstatement calculation, which was included in the notice of default; prior to sending out any statement on or about early 2021, defendant Trinity Financial Services, LLC clearly acted in bad faith and misled the borrower plaintiffs by demanding tender of $31,160.19, when in fact the plaintiff borrowers did not know they owed on this loan; the federal periodic statement rules under the Truth in Lending Act apply, and it requires lenders and servicers to provide homeowners with prompt, regular and accurate information about the loan; defendant Trinity Financial Services, LLC violated the Rosenthal Fair Debt Collection Practices Act (Civil Code, § 1788.30.) and 15 USC 1692(e)(2) by falsely stating the amount owed that was not owed to them; the Rosenthal Fair Debt Collection Practices Act requires debt collectors to comply with FDCPA requirements; and defendant Trinity Financial Services, LLC violated the FDCPA and the California Rosenthal Fair Debt Collection Practice Act. (1st Amended Complaint, paragraphs 29-35.)

The allegation that defendant violated 15 USC 1692(e)(2) is clearly a clerical error as plaintiffs were obviously referring to 15 USC 1692e(2).

The allegation that the federal periodic statement rules under the Truth in Lending Act apply, and it requires lenders and servicers to provide homeowners with prompt, regular and accurate information about the loan is not an allegation of violation of the Rosenthal Fair Debt Collection Practices Act, because those federal periodic statement rules under the Truth in Lending Act are not provisions of the Federal Fair Debt Collection Practices Act and, therefore, can not form the basis for a claim of violation of the Rosenthal Fair Debt Collection Practices Act.. (See Civil Code, § 1788.17.)

The allegations that Defendant Trinity Financial Services, LLC demanded payment of interest and fees that were federally prohibited on plaintiff's loan on the reinstatement calculation in the notice are vague and conclusory as these federal laws are not alleged.

The allegation that defendant Trinity Financial Services, LLC clearly acted in bad faith and misled the borrower plaintiffs by demanding tender of $31,160.19, when in fact the plaintiff borrowers did not know they owed on this loan is a legal conclusion of bad faith and misleading the plaintiff borrowers that is not supported by the specific facts alleged. Plaintiffs have not alleged any facts that when taken as true for the purposes of demurrer establish that it is misleading and acting in bad faith for the holder/beneficiary of a duly recorded Deed of Trust (See Defendant's Request for Judicial Notice, Exhibit 3 – 2nd Deed of Trust Recorded with the El Dorado County Recorder on December 30, 2005.) to request the borrowers to tender the amount due and owing on the Deed of Trust/Loan where the borrowers did not know they still owed on this loan.

The allegation that defendant Trinity Financial Services, LLC violated the Rosenthal Fair Debt Collection Practices Act (Civil Code, § 1788.30.) and 15 USC 1692(e)(2) [sic] by falsely stating the amount owed that was not owed to them is a conclusion of law or fact that the court is not required to take as true for the purposes of demurrer. Plaintiffs have not alleged the

underlying facts that leads them to conclude that the amount defendant stated was owed to them was false as that specific amount was not owed by plaintiffs to defendant.

The allegations of the 1st amended complaint are insufficient to state a cause of action for violation of the Rosenthal Fair Debt Collection Practices Act and are not sufficiently clear to apprise the defendant of the issues which it is to meet and the complaint does not set forth the essential facts of plaintiff's Rosenthal Fair Debt Collection Practices Act cause of action with reasonable precision and with particularity sufficiently specific to acquaint defendant of the nature, source, and extent of the cause of action. (Gressley v. Williams (1961) 193 Cal.App.2d 636, 643-644.)

The demurrer to the Rosenthal Fair Debt Collection Practices Act cause of action is sustained. The question becomes whether leave to amend should be granted.

"The burden is on the plaintiff to demonstrate how he or she can amend the complaint. It is not up to the judge to figure that out. (*Blank v. Kirwan*, supra, 39 Cal.3d 311, 318, 216 Cal.Rptr. 718, 703 P.2d 58.)" (Roman v. County of Los Angeles (2000) 85 Cal.App.4th 316, 322.)

Plaintiff argues that should the allegations not be sufficient, plaintiff should be allowed leave to amend to correct any deficiencies. (See Plaintiffs' Opposition to Demurrer, page 4, lnes 12-13; and page 7, lines 10-11.) Plaintiffs fail to state what facts can be alleged to remedy the deficiencies in order to state a cause of action for violation of the Rosenthal Fair Debt Collection Practices Act.

Plaintiff has had two opportunities to sufficiently allege a violation of the Rosenthal Fair Debt Collection Practices Act cause of action and has failed. There does not appear to be a reasonable possibility that the pleading can be cured by amendment, the 1st amended complaint appears to be incapable of amendment to cure the defect, and plaintiff has not

demonstrated how the 1st amended complaint can be amended to cure the defect. (See Roman v. County of Los Angeles (2000) 85 Cal.App.4th 316, 322.) The demurrer to the Rosenthal Fair Debt Collection Practices Act cause of action is sustained without leave to amend.

TENTATIVE RULING # 10: DEFENDANT TRINITY FINANCIAL SERVICES, LLC'S DEMURRER TO THE ROSENTHAL FAIR DEBT COLLECTION PRACTICES ACT OF THE 1ST AMENDED COMPLAINT IS SUSTAINED WITHOUT LEAVE TO AMEND. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE 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, APRIL 15, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

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

OSC Re: Preliminary Injunction.

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

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

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

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

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

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

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

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

The court presumes that the documents and points and authorities filed by plaintiff and defendants regarding the application for the TRO and OSC are the points and authorities and documents that the parties are relying on for the court to decide whether issuance of the requested preliminary injunction is appropriate.

Plaintiff seeks issuance of the preliminary injunction asserting the following grounds: the subject easements are non-exclusive and the defendants have engaged in aggressive conduct

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

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

Defendants oppose issuance of the preliminary injunction on the following grounds: there is no emergency that requires issuance of a preliminary injunction; plaintiff is merely attempting to avoid the application of the County codes related to gate permits; defendants have two easements over plaintiffs property and they should not be limited in their use of those easements; defendant will suffer irreparable harm from the preliminary injunction as it will prevent them from developing their land without using the Rattlesnake Bar easement, whereas the only harm to plaintiff is that it will lose access to some of its land and there is a possibility that some of its horses will be harmed; plaintiff presents no facts to establish that the harm to it would amount to immediate or irreparable harm; defendants were justified in removing plaintiff's fencing in order to develop the easement as it was in the middle of the easement and relocation of the fence 47 feet from the westerly border of plaintiff's land was required due to the topography of the land and trees and boulders located in the easement; defendants need two lanes of traffic, ditches on either side of the road, offset water, electric lines, and must wind through large heritage oaks and boulders; plaintiff is not prevented from using the easement land; the issue of gates on the easement is premature and should not be decided by the court at this time; plaintiff has not fulfilled the conditions for issuance of the gate permit; it is unlikely that that a farm gate with combination lock would be allowed on a major road to the potential

147 residences to be permitted to be built on defendants' properties; since the properties the plaintiff and defendants purchased were sold to them by a land developer, the agricultural exception to the County gate permit ordinance does not apply to the properties as they were not meant to be used for agricultural purposes; and this application is frivolous and maintained in bad faith such that defendants should be awarded attorney fees pursuant to the provisions of Code of Civil Procedure, § 128.5

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

On April 8, 2022, plaintiff filed a reply to an opposition that plaintiff states were untimely served at 9:00 p.m. on April 6, 2022. Plaintiff replied: the late served opposition prejudiced plaintiff by its being served so close to the hearing date thereby leaving plaintiff very limited time to respond; defendant's late opposition should be stricken or the court should refuse to consider them pursuant to rules of Court, Rule 3.1300(d) and Kapitanski v. Von's Grocery Co. (1983) 146 Cal.App.3d 29, 32-33; defendants misstates the facts and relief sought as plaintiff does not dispute the existence of the easements and only wants the defendants to keep the gates shut when they enter the easements from the south and when they enter their respective properties in the north; defendants grossly exaggerate the development potential of their properties and potential development should not change the court's analysis, since should the circumstances change in the future the matter may be revisited; defendant's assertion in the opposition that the Highway 49 easement is a public road is false as the road is and always has been a private road and has not been offered for dedication to or accepted by El Dorado County; the Georgetown Divide Recreation District activities are irrelevant; as private parties, defendants have no standing to assert in a civil court that there is a purported violation of a municipal code as held in Mendez v. Rancho Valencia Resort Partners, LLC (2016) 3

Cal.App.5th 248, 264-269; and Hill v. San Jose Family Housing Partners, LLC (2011) 198 Cal.App.4th 764, 775-776; the plaintiff has obtained a permit for gates at each end of the Highway 49 easement, has contacted the El Dorado Fire District, and is working to ensure compliance with its safety requirements; and plaintiff can not be excluded from the easements on its property; defendants have ignored the court's TRO; and defendants' claim of unclean hands and request for sanctions is frivolous.

Opposition Served on Plaintiff

The documents in opposition served on plaintiff were not in the court's file as of April 12, 2022, when this ruling was prepared, therefore, it is not even a late filed document. If it is filed before the hearing and late, the court exercises its discretion to not consider the late filed opposition documents.

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

Plaintiff's Objections to Defendants' Evidence Submitted in Opposition

- Declaration of Alexander Byrd

Plaintiff has objected to portions of defendant Alexander Byrd's declaration in opposition that was presumably served on April 6, 2022. Since the court is not considering that declaration, the objection would be moot, except for the fact that in considering the declarations filed by defendants on March 4, 2022, that declaration of Alexander Byrd contained the same statements objected to. The court will rule on the objections as having been made to the declaration filed on March 4, 2022.

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

- Declaration of Terry Wilson

Plaintiff has objected to portions of defendant Terry Wilson's declaration in opposition that was presumably served on April 6, 2022. Since the court is not considering that declaration, the objection would be moot, except for the fact that in considering the declarations filed by defendants on March 4, 2022, that declaration of Terry Wilson contained the same statements objected to. The court will rule on the objections as having been made to the declaration filed on March 4, 2022.

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

Preliminary Injunction Principles

A preliminary injunction shall not be granted without notice to the opposing parties. (Code of Civil Procedure, § 527(a).)

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

amount of compensation which would afford adequate relief. ¶ (6) Where the restraint is necessary to prevent a multiplicity of judicial proceedings. ¶ (7) Where the obligation arises from a trust." (Emphasis added.) (Code of Civil Procedure, § 526(a).)

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

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

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

"The plaintiff bears the burden of presenting facts establishing the requisite reasonable probability: "[T]he drastic remedy of an injunction pendente lite may not be permitted except

upon a sufficient factual showing, by someone having knowledge thereof, made under oath or by declaration under penalty of perjury." (*Ancora–Citronelle Corp. v. Green, supra,* 41 Cal.App.3d at p. 150, 115 Cal.Rptr. 879.)" (Fleishman v. Superior Court (2002) 102 Cal.App.4th 350, 356.)

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

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

injunctive relief against the *threatened infringement* of their rights." (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1292, 240 Cal.Rptr. 872, 743 P.2d 932, italics added; accord, *City of Torrance v. Transitional Living Centers for Los Angeles, Inc.* (1982) 30 Cal.3d 516, 526, 179 Cal.Rptr. 907, 638 P.2d 1304 [injunctive relief is available where the injury sought to be avoided is " 'actual or threatened' "]; *7978 Corporation v. Pitchess* (1974) 41 Cal.App.3d 42, 46, 115 Cal.Rptr. 746 [same].) ¶ If the threshold requirement of irreparable injury is established, then we must examine two interrelated factors to determine whether the trial court's decision to issue a preliminary injunction should be upheld: "(1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction." (*Butt v. State of California* (1992) 4 Cal.4th 668, 677–678, 15 Cal.Rptr.2d 480, 842 P.2d 1240.) Appellate review is generally limited to whether the trial court's decision constituted an abuse of discretion. (*Ibid.*). (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1463, 47 Cal.Rptr.3d 147.) However, [t]o the extent that the trial court's assessment of likelihood of success on the merits depends on legal rather than factual questions, [such as when the meaning of a contract or a statute are at issue,] our review is de novo.' " (*City of Lake Forest v. Evergreen Holistic Collective* (2012) 203 Cal.App.4th 1413, 1428, 138 Cal.Rptr.3d 332; *Garamendi v. Executive Life Ins. Co.* (1993) 17 Cal.App.4th 504, 512, 21 Cal.Rptr.2d 578.)" (Emphasis added.) (Costa Mesa City Employees' Assn. v. City of Costa Mesa (2012) 209 Cal.App.4th 298, 305–306.)

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

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

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

Easement Principles

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

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

roadway use grants a right of ingress and egress and a right of unobstructed passage to the holder of the easement. A roadway easement does not include the right to use the easement for any other purpose. (See *Marlin v. Robinson* (1932) 123 Cal.App. 373, 377, 11 P.2d 70.) When the easement is "nonexclusive" the common users "have to accommodate each other." (*Applegate v. Ota* (1983) 146 Cal.App.3d 702, 712, 194 Cal.Rptr. 331.) An obstruction which unreasonably interferes with the use of a roadway easement can be ordered removed "for the protection and preservation" of the easement. (*Id.* at pp. 712–713, 194 Cal.Rptr. 331.)" (Emphasis added.) (Scruby v. Vintage Grapevine, Inc. (1995) 37 Cal.App.4th 697, 703.)

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

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

setting; as the land was historically used for grazing when the property was purchased in 2018, there was existing fencing along the plaintiff's property's west, east, and south property lines and a locked gate at the southern end of the Highway 49 easement; all the existing fencing and Highway 49 easement gate had existed for decades; in 2019 plaintiff began to construct fencing along the perimeter of its property where fencing did not already exist; pasture gates were also installed at the northerly end of the Highway 49 easement and at both ends of the unimproved Rattlesnake Bar easement; the only active road used by defendants was the Highway 49 easement, which always had a locked gate at its southern end; the gate was meticulously kept closed and locked while she was seeking to purchase the property and has historically always been used to contain livestock and for security; only one more gate needed to be installed to contain livestock on plaintiff's land with respect to the Highway 49 easement; plaintiff's fencing goal was to contain and graze livestock and secure its property from trespassers; defendants Byrd and Wilson have constructed gates at the North end of the Highway 49 easement to secure their respective properties; the Byrds have indicated to the declarant that they too intend to graze livestock on their property; she is informed and believes that the Wilsons will do the same as Terry Wilson also appears to own horses and has constructed a barn on his property; neither the Byrd family nor the Wilson family live on their respective properties; the Saunders family only uses the subject roads on rare occasion as they have their own access to Highway 49 to the North; various defendants have responded to the plaintiff's fencing by destroying plaintiff's fencing and gate at the northern end of the Rattlesnake Bar easement, buried or otherwise rendered inoperable the gate at the northern end of the Highway 49 easement, and dismantled, stolen, and damaged the gate at the southern end of the Highway 49 easement multiple times; when repaired, defendants refuse to keep the southern gate closed and locked, which leaves plaintiff's property unsecured and

vulnerable to trespassers from an adjoining public park; defendants contend that they are entitled to cross-fence both easements traversing plaintiff's land to exclude plaintiff's livestock from the nonexclusive easements on plaintiff's land; on or about May 26, 2021 Terry Wilson admittedly stole the entire gate at the south end of the Highway 49 easement as established in Thomas Swett's declaration; when that gate was replaced, it was then damaged to the point it was inoperable; as part of the perimeter fencing project, plaintiff installed a double gate at the northern end of the Highway 49 easement, which was destroyed (Exhibit 8); thereafter defendants Byrd and Wilson constructed their own gates across the easement (Exhibit 4); as a result of the repeated destruction of fencing and gates, plaintiff has been forced to install temporary panels across its property in order to contain it livestock safely (Exhibit 9); since this dispute commenced plaintiff has had to replace the lock on the southern Highway 49 easement approximately 21 times at a cost of over $400; there is video evidence of defendant Alexander Byrd taking multiple locks and she has observed locks having disappeared when defendant Terry Wilson has transitioned through the property; the gates have been left open by defendants; should a horse escape when the southern Highway 49 easement gate is open, the horse, a human, or both could be seriously injured or killed; Exhibit 11 is a true and correct copy of a photo taken by motion sensing camera showing that the same gate was open at approximately midnight; many instances of harassment and misconduct by defendants have been captured by motion sensing cameras, observed by the declarant, and observed by plaintiff's volunteers; on February 11, 2022 defendant Terry Wilson cut the locks on the northwest and southwest corner gates of plaintiff's property with the northwest corner gate left open (Exhibit 13) that could have allowed all of plaintiff's cattle and horses to escape, amounting to 35 animals; the northwest and southwest corners of the property are at opposite ends of the Rattlesnake Bar easement, which is unimproved and not used by any defendants;

all of the locks are combination locks that have always had the same combination, which was repeatedly shared with defendants; defendants are free to either use the lock provided by plaintiff, or they could pace their own lock at a different portion of the gate chain so they could independently manage their access; beginning February 25, 2022 defendants Terry Wilson and Alexander Byrd destroyed plaintiff's gates and fence at the Rattlesnake Bar easement, dismantled plaintiff's temporary panels, and otherwise created conditions by which plaintiff's livestock could escape the property (Exhibit 15); in connection with this activity, defendants disabled plaintiff's security cameras, trespassed outside the 50 foot easement corridor, began to construct a fence to exclude plaintiff and its livestock from the easement, thereby depriving plaintiff of use of its property; declarant has checked the public records of El Dorado County with respect to grading and encroachment permits related defendants' properties and the Rattlesnake Bar Easement; there is no evidence that any defendant has obtained a grading permit for road construction or permit to encroach on Rattlesnake Bar road; without these permits, no road can be constructed, thereby making the destruction of plaintiff's property and construction of an exclusionary fence conduct that serves no legitimate purpose and can only be done for the purpose of harassment of plaintiff; defendants have also been parking on the easement area and trespassing outside the easement area onto plaintiff's property as depicted in Exhibit 16 photos of this activity; defendants have also been hiking and jogging in the easement area using it for recreational purposes and not just for ingress and egress as depicted in the Exhibit 17 photos of this behavior; Exhibit 18 is a recent aerial photo from Google Earth showing plaintiff's property and the location of the gates at issue and depicting the active Highway 49 easement and the unimproved condition of the Rattlesnake Bar easement; and plaintiff is a non-profit corporation relying on donations to fund its animal rescue work, the attorney fees already incurred in connection with this case have put a severe

financial strain on the organization, and while plaintiff can afford to post a $2,500 bond, a larger bond may deprive plaintiff of this provisional remedy. (Declaration of Wendy Digiorno in Support of Motion for Preliminary Injunction, paragraphs 6-25.)

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

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

The authenticated emails from Terry Wilson state: "I have the capacity and willingness to be a caring, kind, watchful and generous neighbor. This is what I hope I'll be able to embody. And I am not seeing that from your side …at all. ¶ When plan A isn't working I go to plan B which I am heavily leaning in to right now. I also have the capacity and willingness to be very aggressive, pull out all stops and go to war. I can do both REALLY well. ¶ I can do either, you choose which path to proceed on. Once I pick a plan I stay with it until the finish." (Declaration

of Thomas Swett in Support of Motion for Preliminary Injunction, Exhibit 1.); "You have been notified. Your client needs to move their fence out of our easement or I'm moving it and will send her the bill. There are not [sic] cattle on that side of the road yet. So it won't cause the danger you suggest. But if your client now moves cattle to that side of the road after you've been notified to remove it? What's that called? I know what I call it. ¶ Pretty silly to think your client can install a fence on our easement without a court order and I need a court order to remove it. Really? And silly is a nice word I'm choosing right now (Declaration of Thomas Swett in Support of Motion for Preliminary Injunction, Exhibit 2.); and "…Your client should have removed the gates to be in compliance with the code enforcement judgement yet she continues to keep the gate up and locks us out of our road. I removed it for her today." (Declaration of Thomas Swett in Support of Motion for Preliminary Injunction, Exhibit 4 – Email from defendant Terry Wilson dated May 26, 2021.)

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

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

winds through the easement and moving 47 feet from the property line is required for defendants to install the road, utilities, ditches, cutbacks, and a sidewalk; and this is the minimum amount of use of the easement that is necessary to develop it. (Declaration of Terry Wilson in Opposition to Motion for Preliminary Injunction, paragraphs 2, 3 and 4.)

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

topography, and large heritage oaks which sometimes encroach into the easement by 25 feet defendants plan to create a road that winds through the easement and moving 47 feet from the property line is required for defendants to install the road, utilities, ditches, cutbacks, and a sidewalk; this is the minimum amount of use of the easement that is necessary to develop it; he plans to build a small house on the Byrd property commencing construction in the spring of 2022; he needs uninhibited access route to his home where his developers and contractors will be able to access his property with large loads of material and heavy equipment to build a pad and his home; the Highway 49 easement is unavailable for this purposeful to the limitations imposed by the court; he is unable to build on the Byrd property and has spent thousands of dollars to rent a home when he could be living in a house on his property. (Declaration of Alexander Byrd in Opposition to Motion for Preliminary Injunction, paragraphs 2, 4-11.)

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

Plaintiff's Executive Director, Wendy Digiorno, submitted a reply declaration wherein she describes continuing misconduct; damage to a lock and fencing; removal of fencing and a gate; trespassing outside the easement; defendant Alexander Byrd installing a second gate adjacent to plaintiff's existing gate without notice and installed directly over plaintiff's main waterline to the property that could be damaged by grading or vehicle traffic; continued development of the Rattlesnake Bar easement by construction of a road, cutting down plaintiff's trees, destroying fencing, and perpetuating a condition where livestock could escape the property; Fire District personnel installed a District approved lock on the South gate and she remains in contact with Fire Inspector Sterling to ensure that any concerns of the Fire District are address.

- Gate Permit

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

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

While there is evidence that a gate permit was issued with conditions, there is no evidence the conditions have been completely satisfied. However, the existence or non-existence of a gate permit issued under County Ordinance Code, § 130.30.090 is irrelevant if the gates in question are exempt or excluded from the provisions of Section 130.30.090.

County Ordinance Code, § 130.30.090 expressly provides: "The placement of gates across county-maintained rights-of-way shall be prohibited. The following regulations establish a supplemental review and approval procedure for placing gates across non-county maintained roads or private driveways entering residential and nonresidential development. The regulations in this section do not apply to gates serving agricultural uses." (Emphasis added.)

The sole ground for asserting that the gates are not code compliant is County Ordinance Code. § 130.30.090. There is no citation to any County Ordinance Code or Fire Code that provides standards for gates serving agricultural uses or the number of gates allowed.

The evidence is that there are two easements involved with .one gate at each end of the easements at the plaintiff's property lines. (See Declaration of Wendy Digiorno in Support of Motion for Preliminary Injunction, Exhibits 1.) The North end of the Highway 49 easement has

a double gate. (Declaration of Wendy Digiorno in Support of Motion for Preliminary Injunction, paragraph 1.)

There is evidence before the court that plaintiff negotiated the purchase of the land for the purpose of securing immediate pasture for the animals plaintiff cares for and ultimately to provide a home for its operations; historically all the parcels at issue in this litigation were used for grazing cattle as one unit and a perimeter for larger holding was fenced; neighboring properties are also used for grazing livestock, which is customary in the rural setting; as the land was historically used for grazing when the property was purchased in 2018, there was existing fencing along the plaintiff's property's west, east, and south property lines and a locked gate at the southern end of the Highway 49 easement; all the existing fencing and Highway 49 easement gate had existed for decades; in 2019 plaintiff began to construct fencing along the perimeter of its property where fencing did not already exist; and pasture gates were also installed at the northerly end of the Highway 49 easement and at both ends of the unimproved Rattlesnake Bar easement.

There is no evidence that plaintiff installed the gate for the purposes of enclosing property as a gated development.

It appears that the plaintiff's property is being used for agricultural purposes and the subject gates serve agricultural uses of the property, therefore, the evidence supports a finding that Section 130.30.090 does not apply, and a permit is not required to maintain the subject gates.

- Irreparable Harm

Plaintiff argues that it is irreparably harmed by defendants' interference with its property rights; pursuant to the holding in Mendelson v. McCabe (1904) 144 Cal. 230, 231-233, the right to have a gate shut immediately upon having transitioned through the gate gives rise to injunctive relief even if there is no other damage proven; and should defendants' conduct

related to the gates result in an animal escaping onto Highway 49, the loss of human life is possible, which is indisputably irreparable harm.

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

"If the defendant has the right to maintain the gates, the plaintiff has the right to open them only for the purpose of passing through and over the way, and then it is his duty to close them. Goddard's Law of Easements (Bennett's Ed.) p. 331; Jones on Easements, § 412; *Phillips v. Dressler,* 122 Ind. 414, 24 N. E. 226, 17 Am. St. Rep. 375; *Amondson v. Severson*, 37 Iowa, 602. The right to an injunction is not defeated by the mere absence of substantial damage from the acts sought to be enjoined. The acts of the plaintiff in leaving the gates open, if persisted in as he threatens, will constitute a continual invasion of the right of the defendant to maintain the gates, which, if continued for a sufficient length of time, will ripen into a right by prescription, which will destroy the defendant's right to maintain the gates, so that thereafter the plaintiff would have an unobstructed right of way, and the defendant's property would be deprived of the protection arising from the maintenance of the gates." (Mendelson v. McCabe (1904) 144 Cal. 230, 232.)

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

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

- Plaintiff's Likelihood of Ultimately Prevailing on the Merits

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

"The task of the reviewing court has been described as placing itself in the position of the contracting parties in order to ascertain their intent at the time of the grant. [Citation.] If the intent of the parties can be derived from the plain meaning of the words used in the deed, the court need not, and should not, resort to technical rules of construction." (*Machado v. Southern Pacific Transportation Co.* (1991) 233 Cal.App.3d 347, 352–353, 284 Cal.Rptr. 560 (*Machado*).) Similarly, "[i]f the language is clear and explicit in the conveyance, there is no occasion for the use of parol evidence to show the nature and extent of the rights acquired." (*Scruby, supra,* 37 Cal.App.4th at p. 702, 43 Cal.Rptr.2d 810.) ¶ Here, Parks's 1941 grant provides the following: "RESERVING to the grantor, her successors, assigns and/or heirs, the right of ingress and egress for public road purposes over, along and across the Easterly 40 feet thereof." The meaning of Parks's grant, at least as relevant to the determination of the issues presented in this appeal, is clear and unambiguous. The grant is limited to a "right of ingress and egress ... over, along and across" a portion of the Schmidt parcel. The phrase "for

public road purposes" reflects the impetus for the reservation and the reason for the right of ingress and egress. It is a qualification of, and limitation on, the right of ingress and egress reserved in the grant. It does not expand the right to include activities other than ingress and egress." (Schmidt v. Bank of America, N.A. (2014) 223 Cal.App.4th 1489, 1500.)

The Third District Court of Appeal has held: "We recognize that " '[u]nless it is expressly stipulated that the way shall be an open one, or it appears from the terms of the grant or the circumstances that such was the intention, the owner of the servient estate may erect gates across the way, if they are constructed so as not unreasonably to interfere with the right of passage.' " (*McCoy v. Matich* (1954) 128 Cal.App.2d 50, 53, 274 P.2d 714, quoting 73 A.L.R. 779.) [FN 5.] However, "[w]here an easement under a grant is specific in its terms, '[i]t is decisive of the limits of the easement' [citations]." (*Wilson v. Abrams, supra,* 1 Cal.App.3d at p. 1034, 82 Cal.Rptr. 272.) ¶ FN5. "[T]he grant of a way without reservation of the right to maintain gates does not necessarily preclude the servient estate owner from having such gates, and unless it is expressly stipulated in the grant that the way shall be an open one, or unless a prohibition of gates is implied from the circumstances, the servient owner may maintain a gate across the way if necessary for the use of the servient estate and if the gate does not unreasonably interfere with the right of passage." (Annot., Right to Maintain Gate or Fence Across Right of Way (1973) 52 A.L.R.3d 9, 15, § 2, and cases cited.)" (Emphasis added.) (Van Klompenburg v. Berghold (2005) 126 Cal.App.4th 345, 350.)

As stated earlier in this ruling, the grant of easements in the recorded deed in this case does not prohibit gates across the easements. The Rattlesnake Bar easement grant specified it was "a non-exclusive easement road and public utilities easement" and the parcel map of the Highway 49 easement stated it was a road and public utilities easement. There is no language

that prohibits the servient estate owner, the plaintiff, from gating each end of the easements in order to prevent the grazing livestock on plaintiff's land from escaping.

Furthermore, the plaintiff's property is being used for agricultural purposes. There is evidence that plaintiff requires the existence of the gates and that the gates be closed after entry onto the easement in order to contain their livestock on the property. There is no provision in the grant or parcel map that allows the dominant tenement owner to demand exclusive use of the easement to the exclusion of plaintiff's use of the land upon which the easement exists to graze livestock. Gates across the easements in order to contain the servient tenement owner's livestock on the property is not an unreasonable interference with the right of passage, particularly since the combinations of the lock on the gates are known or readily available to the dominant tenement owners and, if they so choose, they could purchase their own locks with their own keys/combinations and merely place their locks between other links of a chain securing the gates. Access by aged persons could be accommodated by placement of gates that can be opened and closed electronically by remote control at the expense of the dominant estate owner who requires such an accommodation. Access for construction equipment, materials and personnel would not appear to be hindered by the subject gates with common combination locks whose combination is shared with the dominant estate owners. The problem defendants complain of is the undeveloped state of the Rattlesnake Bar easement as an impediment to such road usage. There is evidence that defendants started development of the road without any grading permit for road construction or permit to encroach on Rattlesnake Bar Road and there is no evidence before the court that such permits have been obtained.

In affirming a judgment entered after a nonjury trial awarding plaintiff Ferdinando Daluiso, damages for personal injuries sustained as a result of defendant's forcible entry onto

certain land on which plaintiff resided when defendants, the California Supreme Court discussed the public policy against self-help to resolve civil disputes involving land as follows: "We intend by our holding today to give to a plaintiff in peaceable possession of land a right to recover In tort for damages for injuries to his person and goods against one forcibly entering the land. We reiterate that this holding gives full effect to the declared policy of this state against the use of self-help to recover possession of land and imposes liability on persons who engage in conduct which leads to a breach of the peace. 'It is a general principle that one who is or believes he is injured or deprived of what he is lawfully entitled to must apply to the state for help. ¶ Self help is in conflict with the very idea of the social order. It subjects the weaker to risk of the arbitrary will or mistaken belief of the stronger. Hence the law in general forbids it.' (5 Pound, Jurisprudence (1959) s 142, pp. 351—352.) To the extent that they are inconsistent, we overrule *Canavan v. Gray*, Supra, 64 Cal. 5, 27 P. 788, and *Walker v. Chanslor*, Supra, 153 Cal. 118, 94 P. 606." (Daluiso v. Boone (1969) 71 Cal.2d 484, 500.) In Daluiso, supra, after a survey of the boundary between defendant's and plaintiff's land the plaintiff's son and defendant had several discussions about relocation of the West fence of the Melody Ranch property to conform to survey findings. Defendant claimed that he and plaintiff reached an agreement whereby Salvatore was to move the fence to a position east of where it was then located. Salvatore denied this. Apparently intending to relocate and realign the fence to conform to the survey, employees of defendant, at the latter's direction and under his personal supervision, proceeded to remove a section of the fence running along the west line of Melody Ranch. Defendant did not provide previous notice of this action or plaintiff or his son. Plaintiff arrived at the scene and asked defendant what was occurring. He was informed of defendant's intentions. The 85-year-old plaintiff, who was ailing with a heart condition, asked defendant to order the work stopped. Defendant refused and a heated argument between plaintiff and

defendant ensued, and plaintiff became very excited and upset. Plaintiff repeatedly requested defendant during the argument to order his employees to stop and to settle the controversy about the location of the fence by legal means.

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

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

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

- Relative Interim Harms

The relative interim harms are defendants will be delayed in building a home on their properties and an aged relative would be unable to move into the house built on the property

pending a final judgment in this action, while the plaintiff will lose the ability to contain its livestock on its property, or will be prevented from usage of a significant portion of its property as defendants will effectively have exclusive use of the property as a road to their properties by requiring plaintiff to re-fence its property in order to exclude the easements from being used as grazing land and to contain the livestock without any gates at the north and south ends of the easements.

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

The evidence is that there is no residence on the Byrd property, and it is contemplated to be constructed this year. Defendants have not acknowledged that there are alternatives to the combination locked gates on each end on the Rattlesnake Bar easement to accommodate the access for defendant Byrd's aged relative after a residence is constructed on his property. Defendants are free to seek a modification of the preliminary injunction should the residence be built, and defendant Byrd agrees to construct an accommodation with the gates that will not unreasonably interfere with the gates being closed after transitioning through the gate onto the easement, which will also provide ready access to the aged relative to the property.

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

of the proposed easement development on the Rattlesnake Bar easement falling within the scope of the easement granted.

Undertaking/Bond Requirement

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

An undertaking by bond in an amount to be fixed by the Court is required. (Code of Civil Procedure, § 529(a); California Rules of Court, Rule 359.)

An undertaking in some amount is mandated by statute when a preliminary injunction is issued, unless there is a statutory exception that applies or a waiver of the bond requirement. (Smith v. Adventist Health System/West (2010) 182 Cal.App.4th 729, 744.) Where an undertaking is set by the court as required by statute, "Within five days after the service of the injunction, the person enjoined may object to the undertaking…" (Code of Civil Procedure, § 529(a).)

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

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

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

TENTATIVE RULING # 11: PLAINTIFF'S REQUEST FOR ISSUANCE OF A PRELIMINARY INJUNCTION IS GRANTED. PLAINTIFF SHALL POST AN UNDERTAKING/BOND IN THE AMOUNT OF $2,500, SUBJECT TO DEFENDANTS' OBJECTION TO THE AMOUNT WITHIN FIVE DAYS AFTER THE SERVICE OF THE INJUNCTION. 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, APRIL 15, 2022, EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.