NOTICE:

To request limited oral argument on any matter on this calendar, you must call the Court at (916) 874-7858 (Department 53) by 4:00 p.m. the court day before this hearing and advise opposing counsel. If no call is made, the tentative ruling becomes the order of the court. Local Rule 1.06.

Parties requesting services of a court reporter shall advise the court at the number stated above no later than 4:00 p.m. the court day before the hearing. Please be advised there is a $30.00 fee for court reporting services, which must be paid in Room 102 prior to the hearing unless otherwise ordered, for each civil proceeding lasting less than one hour. Govt. Code §68086(a)(1)(A).

The Court Reporter will not report any proceeding unless a request is made and the requisite fees are paid in advance of the hearing.

Department 53
Superior Court of California
800 Ninth Street, 3rd Floor
David I. Brown, Judge
E. Brown, Clerk
C. Chambers/J. Green,, Bailiff

Tuesday, July 08, 2014, 2:00 PM

Item 1 **2011-00107430-CU-FR**

Christina J. Gonzalez vs. Todd William Johnson

Nature of Proceeding: Hearing on Demurrer

Filed By: Del Cid, Elizabeth

This matter is transferred to Department 54 for hearing on 7/8/2014 at 09:00AM

Item 2 **2012-00125619-CU-PO**

Thanh Van Nguyen vs. Phuong Kim Pham

Nature of Proceeding: Motion to Withdraw as Counsel

Filed By: Barrad, Brian S.

Attorney Brian S. Barrad's motion to withdraw as counsel for record for Plaintiff Thanh Van Nguyen (P2) is unopposed but is DENIED without prejudice.

Although counsel filed his declaration on the "Declaration in Support of Attorney's Motion to Be Relieved as Counsel-Civil (form MC-052)" as required by California Rule of Court 3.1362(c), **counsel failed to lodge a proposed order with the Court and serve a completed copy of the proposed order** (Civil Form MC-053) on the client and all parties who have appeared in this action as required by California Rule of Court 3.1362(d)-(e). That requirement is mandatory. (Cal. Rule of Court 3.1362(d)-(e) ("The notice of motion and motion, the declaration, *and the proposed order must be served* on the client and on all other parties who have appeared in the case.") ("The proposed order relieving counsel must be prepared on the Order Granting Attorney's Motion to Be Relieved as Counsel -- Civil (form MC-053) *and must be lodged with the court*

with the moving papers.") (emphasis added).)

Parenthetically, the order must specify all hearing dates scheduled in the action or proceeding, including the date of trial, if known. If no hearing date is presently scheduled, the court may set one and specify the date in the order. After the order is signed, a copy of the signed order must be served on the client and on all parties that have appeared in the case. The court may delay the effective date of the order relieving counsel until proof of service of a copy of the signed order on the client has been filed with the court.

Additionally, the notice of motion does not provide notice of the Court's tentative ruling system as required by Local Rule 1.06(D). Counsel is ordered to notify the client and all non-moving parties immediately of the tentative ruling system and to be available at the hearing, in person or by telephone, in the event the client appears without following the procedures set forth in Local Rule 1.06(B). The Court recognizes the judicial council forms do not contain such a provision, but counsel should ensure that it is included in the motion to withdraw.

This minute order is effective immediately. No formal order pursuant to California Rule of Court 3.1312 or other notice is required.

Item 3 **2013-00152367-CU-BC**

Willow Family Housing LP vs. Department of Housing and Commu

Nature of Proceeding: Hearing on Demurrer and Motion to Strike

Filed By: Austin, Susan A.

Defendant Department of Housing and Community Development's ("HCD" or "Defendant") demurrer to Plaintiff Willow Family Housing, LP's ("WFH" or "Plaintiff") First Amended Complaint ("FAC") is unopposed and is SUSTAINED in its entirety with leave to amend. Defendant's motion to strike is DROPPED as moot.

In this action, Plaintiff's FAC seeks to obtain specific performance of contractual agreements between itself and Defendant, and also asserts causes of action for slander of title and quiet title.

Plaintiff alleges that Central Valley Coalition for Affordable Housing, Inc. ("CVACH") is its managing general partner, and which provides low income housing. Plaintiff alleges that it obtained a loan from Defendant in 2006 through the Joe Serna Jr. Farmworker Housing Grant Program, which program required that housing units within a project be made available to farm and agricultural industry workers. Plaintiff asserts that Defendant refuses to comply with its obligations under the original loan documents or a December 2011 amendment by insisting that the agreements require that a minimum of 37 farmworkers reside in the project at all times. Defendant has since recorded a notice of default.

Plaintiff did not file a substantive opposition to the demurrer and motion to strike.

Instead, Plaintiff filed a document styled as an "Opposition," which states in part: "In the short period of time since the First Amended Complaint was filed, much has changed - including some of the factual predicates upon which the First Amended Complaint was based." (Oppo. at 2.) Further, the "Opposition" also states that: "Plaintiff is currently in the process of commencing a substitution of general partner . . . [t]his process could actually take months - and has implications for this action as well as *U.S. Fund and Investment Consultants, Inc. v. Department of Housing and Community Development, et al.*; Sacramento County Superior Court; Case No. 34-2014-00162237." (*Id.*) Finally, the "Opposition" provides that "[t]o address the issue raised in the recent factual and legal history of this matter, as well as to provide a vehicle to address anticipated forthcoming events, the Plaintiff respectfully requests leave to amend its First Amended Complaint." (*Id.*)

However, Plaintiff's counsel did not obtain a stipulation for the requested amendment, and Plaintiff has already amended its pleading once as of right (Code Civ. Proc. § 472) in this case. Likewise, Plaintiff did not file any motion seeking leave of court to file an amended or supplemental pleading. (Code Civ. Proc. §§ 464, 576.) Plaintiff's casual request for leave to amend its pleading is improper. The court may, "in its discretion, *after notice to the adverse party*, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars." (Code Civ. Proc., § 473, subd. (a)(1).) [emphasis added] Such relief, therefore, may only be sought on noticed motion, not by way of as aside in an opposition.

The Court construes Plaintiffs' non-substantive response to the arguments made in Defendant's demurrer and motion to strike as Plaintiff's concession as to the merits of those arguments. (*See e.g. Herzberg v. County of Plumas* (2005) 133 Cal.App.4th 1, 20.)

Further, this Court has already previously ruled that Plaintiff's FAC reveals a lack of standing to bring this action. In denying Plaintiff's motion for preliminary injunction, the Court explained:

"the party that has brought this lawsuit is not in fact WFH, the limited partnership, but rather US Fund and Investment Consultants, LP, a limited partner of WPH." (FAC ¶¶ 17, 18.) [. . .] The Corporations Code makes clear that a "limited partner does not have the right or power as a limited partner to act for or bind the limited partnership." (Corp. Code § 15903.02.)" (Order Denying Prelim. Inj., dated April 21, 2014.) In that order, the Court rejected Plaintiff's argument that the action was properly pled "as a derivative action pursuant to Corporations Code § 15910.02 which authorizes a partner to bring a derivative action to enforce a right of the limited partnership if the '(1) the partner first makes a demand on the general partners, requesting that they cause the limited partnership to bring an action to enforce the right, and the general partners do not bring the action within a reasonable time; or (2) a demand would be futile.'" (*Id.*; FAC ¶ 18.) The Court explained that "[t]he purpose of a limited partner's derivative action is to enforce a claim which the limited partnership possesses against others… but which the partnership refuses to enforce. [citations omitted] Like a shareholder's

derivative action, a limited partner's derivative suit is filed in the name of a limited partner, and the partnership is named as a defendant. Although a limited partner is named as the plaintiff, it is the limited partnership which derives the benefits of the action." (*Id.* citing *Wallner v. Parry Professional Bldg*. (1994) 22 Cal.App.4th 1446, 1449-1450.)

The Court further explained that, "while US Fund attempted to file a derivative action to enforce WFH's rights, it is not named as a plaintiff and has not named WFH as a defendant. Instead, it listed WFH as the plaintiff, though [. . .] clearly is not the plaintiff and US Fund as a limited partner has no authority to act for WFH." (*Id.*) Further, "given that it is clear that US Fund is a limited partner seeking to bring a derivative action to enforce a right of WFH, WFH must be named as a defendant in this action. Indeed, WFH has to be served with the summons and derivative action complaint and there are remedies available to WFH, for example, a motion to require US Fund to furnish a bond pursuant to Corporations Code Section 15910.06 based on a contention that the derivative action would not benefit the limited partnership (indeed given the general partner's demand that the instant lawsuit be dismissed it appears this is a remedy WFH might pursue), which cannot be pursued until WFH is properly brought into the action as a named defendant." (*Id.*)

Accordingly, based upon the foregoing and upon Plaintiff's failure to substantively oppose the demurrer, Defendants' demurrer is SUSTAINED in its entirety with LEAVE TO AMEND. Plaintiff could potentially amend the FAC to include allegations bolstering its potential standing, and although Plaintiff did not bother to substantively oppose the demurrer or explain what amendments it hoped to make to cure the defects addressed in the demurrer, the Court will permit leave to amend. This demurrer is the first challenge to the adequacy of Plaintiff's pleading. However, although the Court permits leave to amend, it would behoove Plaintiff to closely analyze the arguments made in Defendants' papers when crafting any such amended pleading, including but not limited to those regarding Plaintiff's *lack of standing* to bring this action. If Plaintiffs' amendments to the pleading fail to properly account for Defendants' arguments on this demurrer, the Court is unlikely to be amenable to any further requests for the opportunity to amend the pleading to attempt to correct such defects.

In accordance with the foregoing, Plaintiff shall file and serve a Second Amended Complaint ("SAC") by no later than **July 22, 2014**. Defendants' response thereto to be filed and served within 10 days thereafter, 15 days if the SAC is served by mail. (Although not required by any statute or rule of court, Plaintiff is requested to attach a copy of the instant minute order to the amended pleading to facilitate the filing of that pleading.)

Motion to Strike

Defendant's Motion to Strike, which argues that the FAC's repeated references to a "New Agreement" (Notice of Motion at 3), is also substantively unopposed. Because the Court sustains the demurrer but provides Plaintiff leave to file an amended

pleading, the motion to strike is DROPPED as moot.

Tentative Ruling Language

The notice of motion does not provide notice of the Court's tentative ruling system as required by with C.R.C., Rule 3.1308 and Local Rule 1.06(D). Local Rules for the Sacramento Superior Court are available on the Court's website. Counsel for moving party is ordered to notify opposing party immediately of the tentative ruling system and to be available at the hearing, in person or by telephone, in the event opposing party appears without following the procedures set forth in Local Rule 1.06(B).

The Court notes that moving party has indicated the incorrect address in its notice of motion. The correct address for Departments 53 and 54 of the Sacramento County Superior Court is **800 9th Street**, Sacramento, California 95814. Moving party shall notify responding party(ies) immediately.

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or other notice is required.

Item 4 **2013-00156575-CU-BC**

Across Corporation vs. World Mission Emmanuel Full Gospel Ch

Nature of Proceeding: Hearing on Demurrer

Filed By: Foster, Luke A.

Defendants World Mission Emmanuel Full Gospel Church ("World Mission") and Soo Young Park's ("Park") (collectively, "Defendants") demurrer to Plaintiffs Across Corporation ("Across Corporation") and Ki Ok Son ("Son") (collectively, "Plaintiffs") First Amended Complaint is OVERRULED IN PART and SUSTAINED IN PART.

Request for Judicial Notice

In support of the demurrer, Defendants filed a Request for Judicial Notice ("Def.'s RJN"), which attaches printouts from the Contractor's State License Board ("CSLB") website reflecting Plaintiff's suspended license, and Defendant's complaint to the CSLB regarding Plaintiff's license status. While the Court may take judicial notice of "official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States" (Evid. Code § 452(c)), and while "official acts" can include "records, reports and orders of administrative agencies" (*see Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 518 (citing cases and taking judicial notice of the CSLB's final decision and order)), Defendants have not shown that the internet printouts amount to "records, reports, and orders" of the CLSB for purposes of judicial notice. As noted in *Jolley v. Chase Home Finance, LLC,* (2013) 2013 Cal. App. 4th 772, "we know of no "official Web site" provision for judicial notice in California. (See *L.B. Research & Education Foundation v. UCLA Foundation* (2005) 130 Cal.App.4th 171, 180, fn. 2 [29 Cal.Rptr.3d 710].) "Simply because information is on the Internet does not mean that it is not reasonably subject to dispute." (*Huitt v. Southern California*

Gas Co. (2010) 188 Cal.App.4th 1586, 1605, fn. 10)" Accordingly, while the Court takes judicial notice of the existence of these documents, it does not accept the truth of the matters stated therein. (*See Professional Engineers v. Dep't of Transp.* (1997) 15 Cal.4th 543, 590 (judicial notice of findings of fact does not mean that those findings of fact are true); *Steed v. Department of Consumer Affairs* (2012) 204 Cal.App.4th 112, 120-121.) Plaintiffs also attached several documents to their Opposition, but failed to file a separate Request for Judicial Notice or a declaration authenticating such documents or describing why such extrinsic evidence might properly be considered on a demurrer. Accordingly, the documents were not properly put before the Court, and the Court has not considered them.

Demurrer

A demurrer challenges only the legal sufficiency of a complaint, not the truth or the accuracy of its factual allegations or the plaintiff's ability to prove those allegations. (*Ball v. GTE Mobilnet of California* (2000) 81 Cal.App.4th 529, 534-35.)

Allegations

The First Amended Complaint alleges that World Mission owns real property at 8709 Gerber Road in Sacramento, and that on or about April 15, 2010, Across Corporation and World Mission "entered into a written agreement in which plaintiff agreed to furnish labor, service, equipment, and material for a work of improvement on the subject property for an agreed contract price of $370,000" to be paid by World Mission. (First Am. Compl. ¶¶ 2, 5-6.) Across Corporation allegedly performed work and supplied materials and equipment between April 16, 201 and October 5, 2012, pursuant to the alleged agreement, and the value of such services is allegedly $196,675. (*Id.* ¶ 6-9.) World Mission allegedly failed to fully pay for the work done, and paid "$244,000 and no more." (*Id.* at 12.) World Mission also allegedly maintains possession of Plaintiffs' "tools and equipment." (*Id.* ¶ 19.) Park allegedly falsely informed the California Contractors' State License Board ("CSLB") that Son, an alleged licensed contractor for Across Corporation, is a convicted felon. (*Id.* ¶ 24.)

The First Amended Complaint includes causes of action for: (1) breach of contract; (2) foreclosure of mechanic's lien; (3) conversion; (4) defamation; and (5) "false light."

Defendants demur to the first, second, fourth, and fifth cause of action only.

First Cause of Action (Breach of Contract)

Defendants argue that Plaintiffs cannot state a breach of contract claim because the contract involved work requiring a contractor's license and Plaintiffs did not actually hold such a license. (Def.'s Ps & As at 7-8.)

However, a demurrer tests the sufficiency of allegations in a pleading, not the truth of the facts alleged therein. Plaintiffs affirmatively alleged that Across Corporation was "licensed by the State" for the work allegedly performed in this particular case. (First Am. Compl. ¶ 1.) While Defendant's RJN indicates that Plaintiff's license was

"suspended" at some point, this does not necessarily prove that Plaintiff was unlicensed at the time the alleged work was completed. Moreover, the Court declines to take the contents of Exh. A to the RJN as a judicially noticed "fact" *beyond reasonable dispute* that such suspension occurred. The "dispute" here is not merely hypothetical; Plaintiff's Opposition argues that Plaintiffs did indeed possess the requisite license when the alleged work was actually performed. (Pls.' Oppo. at 6-7.) Moreover, Defendants did not cite to authorities indicating that *all* work allegedly done pursuant to the alleged contract necessarily required a contractor's license.

The Court notes that it even if Defendants could cite authorities demonstrating that a particular alleged activity required a contractor's license as a matter of law, which Defendants have not shown here, the question of whether Plaintiffs actually possessed or lacked a contractor's license to complete each particular alleged type of work presents a factual argument likely requiring extrinsic proof as to the nature of the alleged work and Plaintiff's license status. Defendants cite to the *Hydrotech* case, but in that case the plaintiff *conceded* that it lacked a California license to perform work "which required such a license. (*Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 996.) Here, on the other hand, Plaintiffs do not "concede" a lack of California contractor's license; they allege they possessed such a license. (First Am. Comp. ¶ 1.) In general, and absent Defendants' citation to authorities suggesting otherwise, the apparent factual dispute regarding whether Plaintiffs possessed or lacked a license at the relevant time for the particular relevant work activity is not the sort that can be properly determined at the pleading stage.

Accordingly, Defendants have not shown that the breach of contract claim fails as a matter of law based upon the facts alleged in the pleading or on judicially noticeable facts.

Also, the Court is not persuaded that the first cause of action is prohibitively uncertain for failure to allege the substance of the relevant terms. Defendants argue that the pleading "fails to identify which provisions of the contract regarding payment were allegedly breached." (Def.'s Ps & As at 8.) However, the pleading alleges that work was to be performed "for an agreed contract price of $370,000" to be paid by World Mission, and that after the work was performed, World Mission allegedly failed to fully pay for the work done in that it paid "$244,000 and no more." (First Am. Compl. ¶¶ 2, 5-9, 12.) These allegations suffice to support the alleged breach and alleged substance of the agreement for purposes of surpassing the pleading stage. The demurrer to the first cause of action is OVERRULED.

<u>Second Cause of Action (Foreclosure of Mechanic's Lien)</u>

Defendants' argument that Plaintiffs' Second Cause of Action fails on grounds of Plaintiffs' lack of a valid contractor's license fails for the same reasons discussed above in connection with the first cause of action.

Defendants argue that the pleading is uncertain with respect to the second cause of action because it references an "Exhibit A" (Def.'s Ps & As at 8), but failed to actually

attach such an Exhibit. The First Amended Complaint describes "Exhibit A" as "a copy of the claim of lien that includes the required statutory notice of lien." (First Am. Compl. ¶ 17.) Defendants are correct that no "Exhibit A" is attached to the First Amended Complaint. However, Defendants do not cite authorities or explain why the lack of "Exhibit A" necessarily renders the second cause of action prohibitively uncertain, and absent such explanation the Court is not persuaded. The demurrer to the second cause of action is OVERRULED.

Fourth Cause of Action (Defamation)

"Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage. Publication means communication to some third person who understands the defamatory meaning of the statement and its application to the person to whom reference is made. Publication need not be to the 'public' at large; communication to a single individual is sufficient." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645 (citations and quotation marks omitted) (citing Civ. Code, § 45, 46; 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts § 471, pp. 557-558.))

However, Civil Code Section 47(b) provides that "[a] privileged publication or broadcast is one made . . . [P] . . . [P] . . . [i]n any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure [writs] . . . ." (Civ. Code § 47(b).)

Defendants argue that Plaintiffs' fourth cause of action, which is premised upon Defendant Park's allegedly false statement to the CSLB that Plaintiff Son is a convicted felon (First Am. Compl. ¶¶ 23-24, 27), was "absolutely privileged" under Civil Code § 47(b), given that it was made in a judicial or quasi-judicial proceeding because it was a communication to a "governmental agenc[y]," and such that the privilege would apply even if the statements were "malicious" when made. (Def.'s Ps & As at 8-11.) Defendants also argue that, "[a]s is evidenced in the Complaint Form filed by defendants with the [CSLB], defendants requested that the Board remedy a wrong and invalidate the construction action and the subject mechanic's lien because [P]laintiff Across Corporation was not licensed during the entire term of the construction contract" due in part to Son's status as a convicted felon. (*Id.* at 10.) Under CCP §47 (b), statements made in judicial or legislative proceedings, or "in any other official proceeding authorized by law" are absolutely privileged. *Hagberg v California Federal Bank* (2004) 32 Cal.4th 350, 360. Doubts about the applicability of the privilege are resolved in favor of its use." *Pollock v University of Southern California* (2003) 112 Cal.App.4th 1416, 1430. Statements that are preparatory to the initiation of official proceedings are equally protected. *See, e.g*. *Hagberg, supra*; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115.

Plaintiff does not argue that the complaint Park allegedly made to the CSLB is not

within the scope of Civil Procedure § 47(b) ("Section 47(b)"). Instead, Plaintiff counters that the allegedly false statement was "malicious" and "was a personal attack designed to harm" Son's reputation, and was the result of "personal conflict," such that it had no "reasonable relation" to Son's "skill as a contractor" and therefore is not subject to the privilege. (Pl.'s Oppo. at 8-9 (citing *Bradley v. Hartford Accident & Indemnity Co.* (1973) 30 Cal.App.3d 818, 825 (absolute privilege applies only where publication has a "reasonable relation" to the official proceeding), *Action Apartment Ass'n, Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232).)

Plaintiffs have not persuasively refuted Defendants' argument that Section 47(b)'s absolute privilege applies to Son's alleged statement to the CSLB. Plaintiffs' position that the alleged communication is unrelated to Park's alleged "skill or competence" as a contractor does not end the analysis; as alleged, Son's communication appears to bear upon Park's *licensure status* and therefore reasonably relates to the subject of an official CSLB proceeding. In other words, notwithstanding Plaintiff's argument that the statement was a mere "personal attack," the face of the First Amended Complaint reveals that an alleged communication regarding contractor licensure was made to a governmental agency authorized to receive complaints bearing on such licensure. Plaintiffs have not persuasively argued that the alleged communication had no bearing on licensure. "Business and Professions Code section 7090, which governs the Contractors' State License Board, provides that 'the registrar may upon his or her own motion and shall upon the verified complaint in writing of *any person*, investigate the actions of any . . . contractor . . . within the state and may deny the licensure or the renewal of licensure of, or cite . . . any license . . . if the . . . licensee . . . commits any one or more of the acts or omissions constituting causes for disciplinary action.'" (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 521 (holding that the trial court did not err in sustaining demurrer without leave to amend as to allegations that a defendant made false statements to the CLSB about plaintiff contractor) (emphasis added).) The Court is not persuaded by Plaintiffs' argument that the "personal attack" nature of the communication means that it had no "reasonable relation" to the CSLB's official role. Further, Plaintiffs did not meaningfully analogize to any authorities involving analogous facts. Plaintiffs did not cite authorities discussing adequacy of defamation allegations in the context of Section 47(b) and complaints made to agencies like the CSLB.

Accordingly, the demurrer is SUSTAINED with respect to the fourth cause of action for defamation. However, as this is Plaintiffs' first attempt to allege defamation, Plaintiffs shall have LEAVE TO AMEND that cause of action to include additional factual allegations, to the extent possible, as to the timing of Park's alleged communication to the CSLB and any other factors that it believes would undercut application of the privilege codified in Section 47(b).

Fifth Cause of Action (False Light)

"Courts now recognize four separate torts within the broad designation of 'invasion of privacy': (1) the commercial appropriation of the plaintiff's name or likeness, as codified in Civil Code section 3344, subdivision (a); (2) intrusion upon the plaintiff's physical

solitude or seclusion; (3) public disclosure of true, embarrassing private facts concerning the plaintiff; and (4) publicity which places the plaintiff in a false light in the public eye." (*Kinsey v. Macur* (1980) 107 Cal.App.3d 265, 270.)

Defendants argue that the "false light" cause of action is also subject to demurrer on the same "absolute privilege" grounds as the defamation cause of action, discussed above. (Def.'s Ps & As at 8-10 (citing *Aisenson v. American Broad Co.* (1990) 220 Cal.App.3d 146, 161 (false light cause of action has the same legal elements as a libel claim).) Plaintiffs did not address this argument, which the Court considers a concession as to its merits. Plaintiffs did not otherwise argue that the "false light" cause of action should be analyzed differently with respect to Section 47(b).

Defendants also argue that the allegations underlying the "false light" cause of action are deficient because they allege ***only*** communication to the CSLB, such that they do not allege "publicity in the sense of communications to the public in general." (Def.'s Ps & As at 10 (citing *Kinsey,* 107 Cal.App.3d at 270-72 ("publicity in the sense of communication to the public in general or to a large number of persons as distinguished from one individual or a few").) Plaintiffs did not address this argument, which the Court considers a concession as to its merits.

Accordingly, the demurrer is SUSTAINED WITH LEAVE TO AMEND as to the "false light" cause of action in the same respects as to the "defamation" cause of action, and so as to allow Plaintiffs to allege any additional facts pertaining to any alleged recipients of Park's alleged statement other than the CSLB.

In accordance with the foregoing, Plaintiff shall file and serve a Second Amended Complaint ("SAC") by no later than **July 22, 2014**. Defendants' response thereto to be filed and served within 10 days thereafter, 15 days if the SAC is served by mail. (Although not required by any statute or rule of court, Plaintiff is requested to attach a copy of the instant minute order to the amended pleading to facilitate the filing of that pleading.)

The minute order is effective immediately. No formal order pursuant to California Rule of Court 3.1312 or other notice is required.

Item 5 **2014-00161459-CU-PA**

Jennifer Michelle Crouch vs. Jamie Mathis Skaff

Nature of Proceeding: Motion to Set Aside Default

Filed By: Gibbons, Heather

Defendants Jamie and Peter Skaff (collectively, "Defendants") motion to set aside entry of default is GRANTED.

A motion to set aside a default judgment is addressed to the sound discretion of the trial court. It is the policy of the law to favor, wherever possible, a hearing on the merits, and appellate courts are much more disposed to affirm an order where the

result is to compel a trial upon the merits than they are when the judgment by default is allowed to stand and it appears that a substantial defense could be made. The policy of the law is to have every litigated case tried upon its merits, and it looks with disfavor upon a party, who, regardless of the merits of the case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary. (*Weitz v. Yankosky* (1966) 63 Cal. 2d 849, 854-855.)

Code of Civil Procedure § 415.20(b) permits substitute service on individuals when personal service cannot be accomplished with reasonable diligence. Substitute service on an individual is accomplished by "leaving a copy of the summons and complaint at the person's dwelling house, usual place of abode, usual place of business, or usual mailing address other than a United States Postal Service post office box, in the presence of a competent member of the household or a person apparently in charge of his or her office, place of business, or usual mailing address … , at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint by first-class mail, postage prepaid to the person to be served at the place where a copy of the summons and complaint were left." (Code Civ. Proc. § 415.20(b); *American ExpressCenturion Bank v. Zara* (2011) 199 Cal.App.4th 383, 389.)

Here, Plaintiff Jennifer Michelle Crouch ("Plaintiff") filed her Complaint on April 7, 2014. On May 1, 2014, Plaintiff filed two proofs of service reflecting that Peter Skaff and Jamie Skaff were both served with the summons and complaint on April 13, 2014, by way of substituted service at 5030 Morrill Way in El Dorado Hills. Specifically, the proofs of service indicate that the summons and complaint for Jamie Skaff and Peter Skaff were left with "John Skaff (Son)," a "competent member of the household (at least 18 years of age)". The proofs of service also indicate that the summons and complaint were thereafter mailed First Class, with postage prepaid, to Defendants on April 14, 2014 (as to Peter Skaff), and April 17, 2014 (as to Jamie Skaff) to the same Morrill Way address. Plaintiff filed the proofs of service on May 1, 2014, and requested entry of default on May 28, 2014. The Clerk of the Court entered Defendants' default on May 28, 2014. Plaintiffs moved to set aside the default on June 10, 2014. No default judgment has yet been entered.

In their memorandum of points and authorities, Defendants challenge the accuracy of the representations made in the proofs of service and the propriety of the service reflected therein. Defendants argue that the summons and complaint were ***not*** actually left with a competent member of their household as required and as stated in the proofs, because Defendants do not have an adult son named "John Skaff." Further, Defendants argue that while they do have a minor son, his name is not John, and he does not recall being served, such that the substituted service was defective. (Def.s' Ps & As at 5-6.)

While these arguments, if true, would indeed raise concerns regarding the propriety of the substituted service reflected in Plaintiff's proofs, the *only admissible evidence timely put into the record indicates that service was effective*. Defendants failed timely

to substantiate any of their above-described argument with proper *evidence*. For instance, with their moving papers, Defendants did not file their own declarations stating that they do not have a son named "John" and/or that their son is not yet 18 years old.

Defendants did not file their own declarations with their moving papers specifying whether or when they received the summons and complaint, although their memorandum of points and authorities argues that they received the documents by "regular, uncertified mail" on or about May 5, 2014. (Def.s' Ps & As at 4.) With their moving papers, Defendants did not file a declaration from their son stating that he was not served. At most, Defendants' *counsel* filed her own declaration supporting the moving papers, but she does not appear to have *personal knowledge of the facts pertaining to the substituted service* in question here. Plaintiff's objections to the declaration of defense counsel, to the extent she makes statements regarding the substituted service, are sustained as described below.

Along with their Reply brief, Defendants filed their own declarations properly supporting the above-described assertions for the first time. No explanation was provided for the delay in filing such evidence. However, the Court in its discretion declines to consider such evidence, as it was Defendants' burden to put such evidence forth in a timely manner so that the opposing party has ample opportunity to consider and respond to it. In general, a moving party is not permitted to submit new facts and evidence in their reply papers. (*See, e.g., San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308 (trial court did not err in declining to consider new evidence filed with reply in support of summary judgment motion).) This is also the rule outside the summary judgment context: "[t]he general rule of motion practice, which applies here [in the anti-SLAPP motion context], is that new evidence is not permitted with reply papers." (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-1538; *Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1308 (in preliminary injunction proceeding, "the trial court had discretion whether to accept new evidence with the reply papers," and the trial court did not err in considering the newly filed evidence).)

Defendants also appear to challenge the adequacy of the "mail" component of the substituted service reflected in Plaintiffs' proofs. (Def.'s Ps & As at 4.) Defendants argue that, when they first received the summons and complaint in the mail "on or about May 5, 2014," they had been improperly sent by "regular, uncertified mail." (*Id.*) The argument is not well-taken; Code of Civil Procedure § 415.20(b) does not expressly require "certified" mail for proper service.

Defendants have not met their burden of showing that the substituted service reflected in Plaintiffs' proofs of service was defective. Accordingly, the Court's analysis proceeds as though service was indeed proper.

Defendants also argue in the alternative that, even if the Court were to determine that the substituted service was proper, Defendants' delay in responding to the pleading was the result of mistake, inadvertence, and excusable neglect pursuant to Code of

Civil Procedure § 437(b) and warrants setting aside the entry of default. (Def.'s Ps & As at 7-9.) Defendants have complied with the procedural requirement of filing a copy of the Answer they seek to file upon relief from the entry of default and timely filed their motion in compliance with Code of Civil Procedure § 437(b). (Code Civ. Proc. § 437 (b) ("Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken.").)

Section 473, subdivision (b) states that a court may, in its discretion and "upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 694.) "Section 473 is often applied liberally where the party in default moves promptly to seek relief, and the party opposing the motion will not suffer prejudice if relief is granted. [Citations.] In such situations 'very slight evidence will be required to justify a court in setting aside the default.' [Citations.] [¶] Moreover, because the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in favor of the party seeking relief from default [citations]. (*Id.* at 695 (citations omitted).)

Here, defense counsel explains that a "short delay in [Geico's] getting the file to defense counsel occurred due to the timing of correspondence overlapping with pre-scheduled vacation and an inadvertent error in e-mail address." (Def.'s Ps & As at 6.) Defense counsel explains that she and Defendants nevertheless "tried to pursue a route to file a responsive pleading" by meeting and conferring with Plaintiffs' counsel on May 29, 2014, the day after the default was entered. (*Id.* at 8.) Defendants' counsel also argues that Plaintiff "should not be allowed to benefit for failing to exercise professional courtesy and cooperation in this matter by having a judgment entered in their favor for damages that have not been proven," and argues that a timely responsive pleading could have been filed if Plaintiff's counsel had simply provided defense counsel or Geico a courtesy copy of the Complaint or Proof of Service when requested on May 6, 2014. (*Id.* at 7.)

Plaintiff has not argued that she has suffered any prejudice by the delay in filing an answer. While Plaintiff's Opposition begins to argue that Defendants' conduct does not amount to "excusable" neglect, the relevant portion of Plaintiff's Opposition cites only broadly to authorities and fails to *apply* any of those authorities to the particular circumstances described here. (Pl.'s Oppo. at 8-9.)

Ultimately, the Court is persuaded that the modest delay in filing an answer was caused by mistake, inadvertence, and excusable neglect. Defendants' insurer sent the case materials to an erroneous email address for defense counsel, which resulted in a short but impactful delay in defense counsel's receipt of the file (and relevant proof of service documents), which delayed the filing of an answer. However, no prejudice to Plaintiff apparently occurred, and a typo in counsel's email address is the type of

mistake that a reasonable person could have made under same or similar circumstances, such that it warrants setting aside the entry of default in this particular case. (*See e.g., Fasuyi*, 167 Cal.App.4th at 694-96 (where an insured defendant promptly turned over a summons and complaint to its insurer, who inexplicably misplaced it and failed to file a timely answer, and no prejudice to plaintiff was shown, there were "abundant grounds" for relief from default under CCP § 473(b)).) This result is especially appropriate given the well-established policy that cases should be decided on their merits. "[T]he policy of the law is to have every litigated case tried upon its merits, and it looks with disfavor upon a party, who, regardless of the merits of the case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary." (*Fasuyi*, 167 Cal.App.4th at 696 (citations and internal quotation marks omitted); *Smeltzley v. Nicholson Mfg. Co.* (1977) 18 Cal.3d 932, 936; *Weitz v. Yankosky* (1966) 63 Cal.2d 849, 855).)

Defendants' motion to set aside default is GRANTED, and the Court finds good cause to SET ASIDE THE DEFAULT entered against Defendants Jamie and Peter Skaff on May 28, 2014, pursuant to Code of Civil Procedure § 473(b), (d). Defendants shall file and serve the Answer (i.e., Exh. G to their motion) on or before **July 22, 2014**.

Objections to Evidence

Plaintiff's objections (Oppo. at 4-7) to the Declaration of Heather Gibbons (and exhibits thereto) are ruled upon as follows:

Objection Nos. 1, 2, 3, 4, 5, 6, 7, 9, 10, 11 are SUSTAINED. Objection Nos. 8, 12, 13 (Ps & As at 4:19-21; 6:17-18 ("delay in sending the case files to counsel"); 6:18-21) are OVERRULED.

The Court notes that moving party has indicated the incorrect address in its notice of motion. The correct address for Departments 53 and 54 of the Sacramento County Superior Court is 800 9th Street, Sacramento, California 95814. Moving party shall notify responding party(ies) immediately.

The minute order is effective immediately. No formal order pursuant to California Rule of Court 3.1312 or other notice is required.

Item 6 **2014-00162237-CU-BC**

US Fund and Investment Consultants Inc vs. Department of Hou

Nature of Proceeding: Hearing on Demurrer and Motion to Strike

Filed By: Austin, Susan A.

Defendant Department of Housing and Community Development's ("HCD" or "Defendant") demurrer and motion to strike Plaintiff U.S. Fund And Investment Consultants, Inc.'s ("Plaintiff") Complaint are DROPPED as moot. Defendant's Motion to Dissolve Preliminary Injunction is unopposed but is DENIED.

Demurrer and Motion to Strike

Plaintiff filed a First Amended Complaint on June 27, 2014. Pursuant to Code of Civil Procedure § 472, "Any pleading may be amended once by the party of course, and without costs, at any time before the answer or demurrer is filed, or after demurrer and before the trial of the issue of law thereon . . . ." Accordingly, given the filing of an amended pleading, the demurrer and motion to strike are DROPPED as moot.

If Defendant intends to demur to the First Amended Complaint or file a motion to strike, it shall determine if any other defendant who has appeared in this action also intends to demur or move to strike. If so, all such defendants shall coordinate a single hearing date for the demurrers and motions to strike. Additionally, a copy of the amended complaint shall be included with the moving papers.

Motion to Dissolve Preliminary Injunction

On June 9, 2014, the Court granted Plaintiff's motion for preliminary injunction such that: "HCD is ordered restrained and enjoined from conducting, directly or by proxy, any of the following: (i) accelerating the obligations under the Note, Deed of Trust, and Regulatory Agreement between HCD and WFH [Willow Family Housing, LP ("WFH")], (ii) interfering, delaying, obstructing, and intervening in other HCD projects in which affiliates of WFH are a sponsor as a result of the claim by HCD that WFH, as owner and operator of the property known as 865 West Gettysburg Avenue, Clovis, California (the "Project"), is not in "compliance" with HCD program guidelines, (iii) appointing a receiver over WFH or the Project, or (iv) initiating, prosecuting and/or concluding a foreclosure of the Project."

Defendant's moving papers, which collapse discrete legal arguments for three separate motions into one memorandum, fail to persuasively support Defendant's request to *dissolve* the preliminary injunction granted by this Court on June 9, 2014. (Def.'s Ps & As at 2, 10-11.) *All of Defendant's cited authorities address whether a preliminary injunction should be granted in the first instance.* None of the authorities address *dissolution* of an already-issued preliminary injunction. (*Id.* (citing cases).) Anomalously, Defendant did not cite to Code of Civil Procedure § 533, which governs dissolution of preliminary injunctions, nor did Defendant attempt to make the showing required by that statute. (Code Civ. Proc. § 533 ("In any action, the court may on notice modify or dissolve an injunction or temporary restraining order upon a showing that there has been a material change in the facts upon which the injunction or temporary restraining order was granted, that the law upon which the injunction or temporary restraining order was granted has changed, or that the ends of justice would be served by the modification or dissolution of the injunction or temporary restraining order.").) Courts possess both inherent and statutory authority to revoke an ongoing injunctive decree due to materially changed circumstances, or where vacating the injunction would serve the ends of justice. (Code Civ. Proc. §533; *Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist*. (1976) 65 Cal.App.3d 121, 130; see also *Sontag Chain Stores Co., Ltd. v. Superior Court* (1941) 18 Cal.2d 92, 94.) That is because changed circumstances may cause an injunction to no longer be necessary or desirable. Defendant's moving papers did not discuss any materially changed circumstances arising after issuance of

the preliminary injunction on May 23, 2014.

Accordingly, Defendant has not made the requisite showing to dissolve the preliminary injunction, and the unopposed motion is nevertheless DENIED.

Tentative Ruling Language

The notice of motion does not provide notice of the Court's tentative ruling system as required by with C.R.C., Rule 3.1308 and Local Rule 1.06(D). Local Rules for the Sacramento Superior Court are available on the Court's website. Counsel for moving party is ordered to notify opposing party immediately of the tentative ruling system and to be available at the hearing, in person or by telephone, in the event opposing party appears without following the procedures set forth in Local Rule 1.06(B).

The Court notes that moving party has indicated the incorrect address in its notice of motion. The correct address for Departments 53 and 54 of the Sacramento County Superior Court is **800 9th Street**, Sacramento, California 95814. Moving party shall notify responding party(ies) immediately.

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or other notice is required.

Item 7 **2014-00163821-CU-CO**

Alvin Doe vs. Kamala D Harris

Nature of Proceeding: Motion for Preliminary Injunction

Filed By: Benbrook, Bradley A.

Plaintiffs Alvin Doe (“Doe”) and Paul A. Gladden’s (“Gladden”) (collectively, “Defendants”) filed a motion for preliminary injunction “preventing Defendants Kamala A. Harris and Stephen J. Lindley from enforcing the California Department of Justice’s policy that the licensed collectors’ exemption in Penal Code § 27535(b)(9) applies only to the purchase of curios and relics.” (Notice of Motion at 1.)

Defendants Kamala D. Harris in her official capacity as Attorney General of California (“Harris”) and Stephen J. Lindley in his official capacity as Chief of the California Department of Justice Bureau of Firearms (“Lindley”), opposed the motion.

Defendants’ motion for preliminary injunction is DENIED.

In this case, Plaintiffs assert causes of action for declaratory and injunctive relief, challenging the California Department of Justice’s interpretation and enforcement of laws restricting the purchase of handguns. Under California law, individuals may only purchase one handgun in a 30-day period (“1-in-30 Rule”). (Penal Code § 27535(a) (“No person shall make an application to purchase more than one handgun within any 30-day period.”).) However, the Penal Code provides an exemption (“C&R Exemption”) to the 1-in-30 Rule for persons who are “licensed collectors pursuant to” 18 U.S.C. § 921(a)(13), namely, licensed collectors of “curio and relic” firearms.

(Penal Code § 27535(b)(9) (“Subdivision (a) shall not apply to . . . [a]ny person who is licensed as a collector pursuant to Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto, and has a current certificate of eligibility issued by the Department of Justice pursuant to Article 1 (commencing with Section 26700) of Chapter 2.”).) The referenced federal statute, 18 U.S.C. § 921, provides in relevant part: “The term ‘collector’ means any person who acquires, holds, or disposes of firearms as *curios or relics*, as the Attorney General shall by regulation define, and the term ‘licensed collector’ means any such person licensed under the provisions of this chapter.” (18 U.S.C. § 921(a)(13) (emphasis added).)

Curio and Relic Firearms are defined as those which are “certified by the curator” of various museums that exhibit firearms of museum interest, and “firearms which derive a substantial part of their monetary value from the fact that they are novel, rare, bizarre, or because of their association with some historical figure, period, or event.” (27 C.F.R. § 478.11.) “Proof of qualification of a particular firearm under this category may be established by evidence of present value and evidence that like firearms are not available except as collector’s items, or that the value of like firearms available in the ordinary commercial channels is substantially less.” (*Id.*) Apart from this, the Court would note that "curio" is generally defined as something rare, novel or bizarre (Merriam-Webster Dictionary); "relic" is generally defined as an object having interest by reason of its age or its association with the past.

Plaintiffs, who are undisputed licensed collectors of curios and relics (“Licensed Collectors”) with certificates of eligibility issued by the California Department of Justice (“DOJ”), challenge Defendants’ current enforcement policy, which policy is that the C&R Exemption applies *only* to the purchase of firearms that qualify as “curios and relics” (“C&R Firearms”). Under Plaintiffs’ view, the C&R Exemption also authorizes unlimited purchases of *modern* handguns, as long as they are purchased by collectors who have licenses to purchase curios and relics. Plaintiffs argue that the statute exempts all "persons" with collectors' licenses to acquire "curios and relics," regardless of whether those persons seek to purchase curio and relic firearms or modern firearms.

Plaintiffs also argue that the DOJ previously allowed Licensed Collectors to invoke the C&R Exemption to purchase as many non-C&R Firearms as they wanted within a 30 day period, but that it “recently instructed firearms dealers not to sell modern handguns” to Licensed Collectors under the C&R Exemption. Specifically, a Bureau of Firearms (“BOF”) letter to California firearms dealers dated **May 8, 2014** (“Notice”) and signed by Lindley is attached to Plaintiffs’ pleading, and it undisputedly reflects the DOJ’s current approach to enforcement of the C&R Exemption.

In other words, Plaintiffs allege that the DOJ has recently instructed firearms dealers to apply the C&R Exemption *only* to the sale of true “curio and relic” firearms to Licensed Collectors, such that Licensed Collectors cannot use the exemption to purchase unlimited *modern* firearms. (Pl.’s Ps & As at 1; Def.s’ Oppo. at 1.) Plaintiffs allege that

such instruction is based on an improper interpretation of Penal Code § 27535, and that the DOJ's current enforcement of that statute is improper. (Compl. ¶¶ 27-30.)

Preliminary Injunctions

The granting or denial of a preliminary injunction rests in the sound discretion of the trial court and may not be disturbed on appeal absent an abuse of discretion. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69; *California Satellite Systems, Inc. v. Nichols* (1985) 170 Cal.App.3d 56, 63.)

"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. Past California decisions further establish that, as a general matter, the question whether a preliminary injunction should be granted involves two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief." (*White v. Davis* (2003) 30 Cal.4th 528, 554.) The greater the plaintiff's showing on one, the less must be shown on the other to support an injunction. (*Butt v. State of California* (1992) 4 Cal.4th 668, 677-678.) A preliminary injunction may not be granted, regardless of the balance of interim harm, unless it is reasonably probable that the moving party will prevail on the merits. (*San Francisco Newspaper Printing Co. v. Superior Court* (1985) 170 Cal.App.3d 438, 442.)

Irreparable Injury

Before the trial court can exercise its discretion to grant a preliminary injunction, 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 [citations] due to the inadequacy of legal remedies." (*Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131, 138; *Tahoe Keys Property Owners' Ass'n v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1471 (before addressing potential merits, the court will first address the claim of interim harm by denial of preliminary injunctive relief).)

Here, Plaintiffs argue that their remedy at law is inadequate to address the injuries they will suffer during the pendency of this litigation, namely, "that Plaintiffs will continue to face the threat of criminal sanctions for engaging in lawful activity or otherwise be prevented from lawfully purchasing firearms under the exemption provided n Section 27535(b)(9)." (Pl.'s Ps & As at 11.) Plaintiffs declare that their interim irreparable injury is the "fear of prosecution or other adverse action by the DOJ or law enforcement agencies" that Plaintiffs might suffer if they were to "submit additional applications to purchase non-curio or relic handguns that would violate the DOJ's enforcement policy." (Declaration of Alvin Doe ("Doe Decl.") ¶ 6; Declaration of Paul A. Gladden ("Gladden Decl.") ¶ 5.) Plaintiffs cite to cases holding that the threat of potential prosecution can indeed be "irreparable injury." (Pl.'s Reply at 1 (citing *Ebel v. City of Garden Grove* (1981) 120 Cal.App.3d 399, 410 ("fear of arrest and prosecution is sufficient to show 'irreparable injury'") (reversing judgment and directing

trial court to enter new judgment enjoining enforcement of ordinance); *McKay Jewelers, Inc. v. Bowron* (1942) 19 Cal.2d 595, 599 ("It is well settled that where the enforcement of an ordinance may cause irreparable injury, the injured party may attack its constitutionality by an action to enjoin its enforcement.") (holding that trial court erred in sustaining demurrer).) However, while those cases provide that injunctive relief can be granted to remedy a threat of potential prosecution, neither *Ebel* nor *McKay* involved analysis of whether a fear of prosecution necessarily presents a "real threat" of "immediate" injury warranting a preliminary injunction.

There is no "universal rule" that in considering the grant or denial of a preliminary injunction, an analysis of comparative harm is unnecessary simply because a statute (or, presumably, its enforcement) is argued to impinge upon constitutional rights. (*Sundance Saloon v. City of San Diego* (1989) 213 Cal.App.3d 807, 817-18 (denying motion for preliminary injunction where ordinance's impingement on First Amendment right, albeit an "irreparable" injury at law, was "minimal" and its "overall effect" on expression was "slight" such that immediate relief was not warranted) (affirming denial of preliminary injunction).) While Plaintiffs' memorandum mentions potential interference with Plaintiffs' Second Amendment rights (Reply at 2), Plaintiffs' declarations frame their "irreparable injury" as being held to the same 1-in-30 rule as non-collector members of the public, which Plaintiffs have not shown to amount to a Second Amendment violation.

Further, "[w]here, as here, the defendants are public agencies and the plaintiff seeks to restrain them in the performance of their duties, public policy considerations also come into play. There is a general rule against enjoining public officers or agencies from performing their duties. This rule would not preclude a court from enjoining unconstitutional or void acts, but to support a request for such relief the plaintiff must make a *significant* showing of irreparable injury." (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1471 (citations omitted) (emphasis added).)

On the other hand, "[i]njunctions against official action have been approved where the statute being enforced was alleged to be unconstitutional [citation], where the court found that the public official's action was not within the scope of the statute [citation], or where the public official's action exceeds his power [citation]." (*Associated Cal. Loggers, Inc. v. Kinder* (1978) 79 Cal.App.3d 34, 45.)

Here, Plaintiffs argue that the DOJ's "enforcement policy is not within the scope of the statute and . . .[that it] exceeds the Attorney General's power," such that the requested preliminary injunction is appropriate. (Pl.'s Reply at 2 and Ps & As at 11 (citing *Kinder,* 79 Cal.App.3d at 45.) Plaintiffs also argue that the DOJ's "new policy is void" because it "diminishes the scope of Section 27535(b)(9)'s exemption." (Pl.s' Ps & As at 1, 6.) The Court does not so perceive it; further, such sweeping statements do not persuade the Court. The Court will analyze Plaintiffs' likelihood of success on the merits, infra, as such analysis bears upon Plaintiffs' arguments that Defendants' enforcement and interpretation of the relevant statute exceeds the scope of the statute

and/or exceeds Defendants' official powers.

Plaintiffs have not made the "significant" showing (*Tahoe Keys,* 23 Cal.App.4th at 1471) sufficient to persuade the Court that being held to the limits of the 1-in-30 Rule during the pendency of this lawsuit amounts to a "real threat of immediate and irreparable injury" warranting extraordinary relief in the form of a preliminary injunction. (*See Triple A*, 213 Cal.App.3d at 138.)

Likelihood of Success on the Merits

Plaintiffs have not persuaded the Court that they have a "high likelihood" of success on the merits such that they need not make a strong showing of interim harm. (Pl.'s Ps & As at 11 (citing *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 447 ("The likelihood of success on the merits and the balance-of-harm analysis are ordinarily 'interrelated' factors in the decision whether to issue a preliminary injunction. [Citations.] The presence or absence of each factor is usually a matter of degree, and if the party seeking the injunction can make a sufficiently strong showing of likelihood of success on the merits, the trial court has discretion to issue the injunction notwithstanding that party's inability to show that the balance of harms tips in his favor.").)

Plaintiffs argue that the plain meaning of Penal Code § 27535 ("Section 27535") supports their interpretation and confirms their high likelihood of success on the merits as to their challenge to Defendant's enforcement policy described in the BOF Notice. (Pl.'s PS & As at 6.) Plaintiffs argue that Section 27535 applies C&R Exemption to purchases of "curio and relic" firearms and modern firearms alike, as long as the purchaser is a "licensed collector," given that the plain text of Section 27535 states that the 1 purchase in 30 days Rule "shall not apply" to "any *person* who is licensed as a collector." (Penal Code § 27535(b)(9) (emphasis added).)

However, as Defendants argue, that Section also *expressly defines* "those licensed as a collector" as those "*licensed . . . pursuant to* [18 U.S.C § 921]", which in turn *expressly defines* "licensed collectors" as those who "acquire[], hold[], or dispose[] of firearms as *curios or relics* . . . ." (18 U.S.C. § 921(a)(13) (emphases added).)

Given the interplay between these statutes, and given Section 27535's reference to persons licensed "pursuant to" 18 U.S.C. § 921(a)(13), the Court looks to the entire substance of the statute in order to determine the scope and purpose of the provision. (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 577-78 (courts give words of a statute a "plain and commonsense meaning" unless the statute specifically defines the words to give them a special meaning, and courts "do not consider the statutory language in isolation," but look to the "entire substance of the statute . . . in order to determine the scope and purpose of the provision" and "avoid any construction that would produce absurd consequences").) Commonly, courts begin with the words of a statute and give these words their ordinary meaning. If the statutory language is clear and unambiguous, then the Court need go no further. See, e.g. *Polster v. Sacramento County Office of Education*, (2009) 180 Cal. App. 4th 649, 663. The Court's fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose.' " (*In re C.H.* (2011) 53 Cal.4th 94, 100. Where, as here, a statute's

terms are unclear or ambiguous, “we may ‘look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.’ ” (*In re M.M*. (2012) 54 Cal.4th 530, 536 .)

Plaintiffs have not persuaded the Court as to their proffered “plain meaning” of the statute for purposes of issuance of extraordinary relief in the form of a preliminary injunction. Plaintiffs’ proffered interpretation would, without explanation, allow C&R license holders to quickly purchase large quantities of modern firearms by virtue of a license granted for curio and relic firearms that are “novel, rare, bizarre, or because of their association with some historical figure, period, or event.” (27 C.F.R. § 478.11.) In other words, Plaintiffs’ interpretation of the C&R Exemption would effectively elevate a curio and relic license, when combined with a Certificate of Eligibility, into a license to buy *any* handgun, even the most lethal and modern, in unlimited quantities and with unlimited frequency.

Even assuming *arguendo* Plaintiffs' "plain meaning" position, the “plain meaning” rule does not prevent a court from determining whether the literal meaning of the statute comports with its purpose. (*Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App.4th 47, 54-55.) “The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.” (*Id.*)

Defendants support their interpretation of the C&R Exemption in part on grounds that Licensed Collectors undergo the same BOF background checks for issuance of a Certificate of Eligibility as individuals whose firearm purchases are limited by the 1-in-30 Rule, such that Licensed Collectors should not be treated any differently when purchasing firearms that are not true curios or relics. (Def.’s Oppo. at 10.) Curio and relic firearms do not pose the same threat to public safety as modern firearms. (Def.’s Oppo. at 11-12; Lindley Decl. ¶ 6.) Further, Defendant’s proffered judicially-noticed Committee Analysis of AB 202 reflects that the 1-in-30 Rule was enacted to curtail the illegal gun market, disarm criminals, and save lives by preventing multiple purchases of handguns, even through legitimate channels. (Def.’s RJN Exh. 1 at 2.) Such history does not reflect a goal of permitting collectors of curios and relics to purchase an unlimited number of modern handguns.

The Court notes that, while Plaintiffs offer judicially noticed evidence of legislative history documents in the form of a “predecessor bill introduced the previous session by the same author,” the Court is not persuaded that the legislative histories of *other similar but failed bills* (i.e. AB 532) necessarily bear on interpretation of Section 27535 given that it arose from a different bill (i.e. AB 202). (Pl.’s Ps & As at 8-9.) Plaintiffs’ other proffered legislative history arguments regarding AB 202, as detailed on pages 8 through 10 of Plaintiff’s memorandum, do not compel a different result. The Third Appellate District in *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc*. (2005) 133 Cal. App. 4th 26, noted that “Even where statutory language is ambiguous, and resort to legislative history is appropriate, as a general rule in order to be cognizable, legislative history must shed light on the collegial view of the

Legislature as a whole. (See *California Teachers Assn. v. San Diego Community College Dist*. (1981) 28 Cal.3d 692, 701.)

Taking the cited text of Section 27535 together with the cited text of 18 U.S.C. § 921(a)(13), and considering the entire substance of Section 27535 and the its purpose (*see, e.g.*, Def.'s RJN Exh. 1), Plaintiffs have not shown a likelihood of success on the merits, let alone the "high likelihood" they urged in their papers (Pl.'s Ps & As at 11). The Court notes that it makes no finding as to whether Plaintiffs will ultimately prevail on the merits at trial, and that this finding is limited solely to the context of the request for extraordinary relief in the form of a preliminary injunction.

Plaintiffs have also not persuaded the Court that they are highly likely to prevail on the merits of their argument that the BOF's Notice amounts to an invalid underground regulation in violation of the Administrative Procedures Act. (Pl.'s Ps & As at 12.) Plaintiffs argue (Reply at 10) that Defendants' prior enforcement policy suffices to refute Defendants' argument (Def.'s Oppo. at 12) that the enforcement policy stated in the BOF's Notice is the "only legally tenable interpretation of a provision of law." (Cal. Gov. Code § 11340.9(f).) However, Plaintiffs have not shown that an agency's prior policy should automatically be considered "legally tenable" simply because it came first.

Although Plaintiffs have not shown a likelihood of success on the merits, the Court nevertheless proceeds to the "balance of harms" analysis. (*Butt,* 4 Cal.4th at 677-678 (the greater the plaintiff's showing on "relative interim harm" factors, the less must be shown on "potential-merit" factors).)

Balance of Interim Harms

"It is well established that when injunctive relief is sought, consideration of public policy is not only permissible but mandatory." (*O'Connell v. Superior Court (2006)* 141 Cal.App.4th 1452, 1471 (citation omitted).) The Court must "consider the potential harm to defendants if a preliminary injunction is granted. Where, as here, the [P]laintiff [s] seek[] to enjoin public . . . agencies in the performance of their duties the public interest *must* be considered." (*Tahoe Keys*, 23 Cal.App.4th at 1473 (emphasis added) (citing cases) (holding that, where the defendants were "attempting to perform their legal duties" in preventing degradation of Lake Tahoe, which was "a matter of significant public concern and provisional injunctive relief which would deter or delay defendants in the performance of their duties would necessarily entail a significant risk of harm to the public interest.").) Similar to the defendants in *Tahoe Keys,* here Defendants are attempting to perform their legal duties in regulating the purchase of firearms, which is a matter of significant public concern. (*See id.*)

Plaintiffs' interim harms are described above, namely, a fear of prosecution for attempting to purchase more than one handgun in 30 days. (Gladden Decl. ¶ 5; Doe Decl. ¶ 6.)

On the other hand, the interim harm to Defendants is the potential for an increased

threat to public safety resulting from a loophole in the 1-in-30 Rule, whereby certain individuals could purchase unlimited modern handguns in a short time period despite the statute's stated goal of *limiting* handgun purchases. (Def.'s Oppo. at 8.) Stephen Lindley has declared that the California Bureau of Firearms conducts background checks for issuance of a "Certificate of Eligibility" for a single firearm purchase (rather than a "dangerous weapons purchase") and that these are not especially "intensive" and are "relatively superficial" such that Licensed Collectors with Certificates of Eligibility have not been extensively checked for suitability to purchase multiple modern firearms and therefore could pose a "threat to public safety" if permitted to invoke the C&R Exemption to purchase unlimited modern handguns (Lindley Decl. ¶¶ 5-6), and that according to a BOF review of transactions involving simultaneous sales of modern weapons, those using the C&R Exemption are "more often than not" individuals who "do not own a collection of curio and relic handguns" and might use this exception "to acquire mass quantities of modern handguns for resale." (*Id.* ¶¶ 6-7.)

Although the interim harm to Plaintiffs is appreciable, it is less than the potential harm to Defendants and the public. (*See Tahoe Keys*, 23 Cal.App.4th at 1473; *O'Connell*, 141 Cal.App.4th at 1471.)

Status Quo

The Court notes that the general purpose of a preliminary injunction "is the preservation of the status quo until a final determination of the merits of the action." (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528; *Kendall v. Foulks* (1919) 180 Cal. 171, 173.) "Where . . . the preliminary injunction mandates an affirmative act that changes the status quo, we scrutinize it even more closely for abuse of discretion. The judicial resistance to injunctive relief increases when the attempt is made to compel the doing of affirmative acts." (*Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 625 (quotation marks and citation omitted).)

Here, Plaintiffs' motion for preliminary injunction seeks an affirmative change to the current status quo, i.e., an affirmative change to the BOF's current enforcement policy. The status quo is Defendants' *current policy* of enforcement as described in the BOF's Notice. The Court is aware that Plaintiffs' lawsuit arises from the undisputed recent change in Defendants' enforcement approach to the C&R Exemption, such that Plaintiffs argue that the requested preliminary injunction would actually *restore* the status quo "that existed for fifteen years under DOJ's prior policy." (Pl.'s Reply at 3.) However, absent authorities to the contrary, the Court is not persuaded that the requested preliminary injunction would "restore" the status quo. The "status quo" is by definition *not* the BOF's "historical practice" of enforcement, as "this historical practice ha[s] ceased to be the *current* status quo." (*See O'Connell,* 141 Cal.App.4th at 1472 (emphasis in *O'Connell* (holding that trial court erred in granting preliminary injunction in part because "far from preserving the status quo, the trial court's injunction disrupted it" by failing to consider "*the status quo at the time the lawsuit was filed*") (emphasis added).) Plaintiffs have not persuaded the Court that an affirmative change to the status quo should be ordered prior to trial on the merits. At the end of the day, the ultimate interpretation of a statute is an exercise of the judicial power conferred upon the courts by the Constitution and, in the absence of a constitutional provision, cannot

be exercised by any other body. *Yamaha Corp. of Am. v. State Bd Of Equalization* (1998) 19 Cal. 4th 1, 7.

Requests for Judicial Notice

Plaintiffs' Request for Judicial Notice ("Pl.'s RJN"), which attaches legislative history documents such as committee analyses, is unopposed and GRANTED. Likewise, Defendants' Request for Judicial Notice ("Def.'s RJN"), which attaches an Assembly Committee Analysis of AB 202 (2009-2010 Reg. Session) is unopposed and GRANTED. The Court may take judicial notice of "official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." (Evid. Code § 452(c).)

Objections to Evidence

Defendants' objections to Plaintiffs' evidence are ruled upon as follows. As to Objection Nos. 1-3 to the Declaration of Ken Lunde on grounds of "irrelevance," the objections are OVERRULED. However, the Court has reviewed Mr. Lunde's declaration and finds that it is largely comprised with hearsay statements and also attaches hearsay documents, which the Court has not considered. That said, to the extent Mr. Lunde's declaration was intended to demonstrate that the DOJ has changed its enforcement policy with respect to the C&R exemption, Defendants do not dispute that such change occurred via the BOF's Notice.

As to Defendants' objections to Paragraph 6 of the Declaration of Alvin Doe and Paragraph 5 of the Declaration of Paul A. Gladden, the objections are OVERRULED. As to Defendants' objection to Paragraph 26 of the Verified Complaint, the objection is OVERRULED.

Plaintiffs' objections to Defendants' evidence are ruled upon as follows. As to Objection No. 1 the objection is SUSTAINED. As to Objection Nos. 2 and 3, the objections are OVERRULED. As to Objection No. 4, the objection is SUSTAINED to the extent Lindley speculates as to the "likely" purposes for which Licensed Collectors seek to purchase multiple modern firearms in under 30 days, but the objection is OVERRULED in all other respects. As to Objection No. 5, the objection is SUSTAINED to the extent Lindley's statement could be interpreted as speculation that Licensed Collectors are the "persons" who are "likely to commit crimes," but is OVERRULED in all other respects.

The Court notes that moving party has indicated the incorrect address in its notice of motion. The correct address for Departments 53 and 54 of the Sacramento County Superior Court is **800 9th Street**, Sacramento, California 95814. Moving party shall notify responding party(ies) immediately.

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or other notice is required.

Item 8 **2010-00074786-CL-CL**

Northern California Collection Service Inc vs. John P Heintz

Nature of Proceeding: Notice of Hearing on Claim of Exemption

Filed By: Cribb, Steven D.

Judgment debtor Cecil Walker ("debtor") failed to support his or her Claim of Exemption with documentary evidence establishing that the bank funds levied upon are exempt under California law. (Code Civ. Proc. §§ 703.080 (exemption claimant has burden of tracing an exempt fund); 704.070(a)(2), (b)(2).) For example, if judgment debtor can establish that the funds were wages paid within the last 30 days before the levy, then 75% of those funds would be exempt.

The Court notes that judgment debtor's Claim of Exemption references a self-prepared "spreadsheet" purportedly attached as Exhibit A-1 to his filing. On the Court's review, however, no Exhibit A-1 or spreadsheet appears. Moreover, debtor has not shown that a self-prepared spreadsheet would suffice for purposes of tracing exempt funds. (Code Civ. Proc. §§ 703.080 (exemption claimant has burden of tracing an exempt fund); 704.070(a)(2), (b)(2).)

Accordingly, to permit the debtor to support his claimed exemptions with documentary evidence, this matter is **CONTINUED to August 8, 2014**.

On or before **July 17, 2014**, judgment debtor is ordered to file and serve documentary evidence supporting the Claim of Exemption. The face page of the documentary evidence must set forth the date and time of this hearing and the department (August 8, 2014, 2:00 p.m., Department 53), as well as the case number 34-2010-0074786. Creditor's Opposition thereto shall be filed and served on or before **July 28, 2014.**

The Court notes that Judgment Creditor's Notice of Motion indicated the incorrect address. The correct address for Department 53 of the Sacramento County Superior Court is 800 9th Street, Sacramento, California, **95814**.

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice is required.

Item 9 **2011-00115301-CL-CL**

Asset Acceptance, LLC vs. Eric B. Bryant

Nature of Proceeding: Motion to Compel Discovery

Filed By: Bryant, Eric B.

On June 16, 2014, Defendant Eric B. Bryant ("Defendant") filed a document styled as a "Motion to Compel For Discovery [sic] Pursuant To CCP § 2031.010," which stated that a hearing on the motion would occur on July 8, 2014. The Proof of Service filed

with that document reflects that the motion was mail-served on June 10, 2014.

The motion was not timely *filed* 16 court days before the hearing date of July 8, 2014. (Code Civ. Proc. § 1005(b); California Rule of Court 3.1300(a) ("Unless otherwise ordered or specifically provided by law, all moving and supporting papers must be served and filed in accordance with Code of Civil Procedure section 1005").) The motion was also not timely *served* 16 court days before the hearing date, plus 5 calendar days for mail. (Code Civ. Proc. §§ 1005(b), 1013; California Rule of Court 3.1300(a).)

Accordingly, Defendant's Motion is DROPPED from the calendar. Defective service of notice deprives the court of jurisdiction to act. (*Lee v. Placer Title Co.* (1994) 28 Cal.App.4th 503, 509.)

Item 10 **2013-00143407-CL-AF**

In Re: Claim of Stephon Whiteside

Nature of Proceeding: Motion to Dismiss

Filed By: Scully, Jan

Petitioner the People of the State of California's ("Petitioner") "Motion to Dismiss The People's Petition And Hearing To Decide 3rd Party Judgment Creditor Claim Per Code Of Civil Procedure §§ 708.710, 708.720, 708.730 & 708.750 et seq." ("Motion to Dismiss") is DROPPED from the calendar.

Petitioner's Proof of Service for the Motion to Dismiss indicates that the papers were mail served upon Stephon Whiteside ("Whiteside"), on "July 27, 2014." However, July 27, 2014, is a date in the future. It is also a date *after* the subject hearing date. Given that the Proof of Service necessarily reflects an incorrect service date, this Court will not rely on the Proof of Service. Accordingly, the Court lacks jurisdiction to hear the matter. (*Lee v. Placer Title Co.* (1994) 28 Cal.App.4th 503, 509 (defective service deprives the court of jurisdiction to act).)

Further, Whiteside is pro per and proceeding without counsel in this action, and as the Real Party in Interest who opposes the forfeiture and claims to have an interest in the subject $7,944, Petitioner must ensure that Whiteside is timely and properly served with notices of hearings affecting such property.

This minute order is effective immediately. No formal order pursuant to CRC rule 3.1312 or other notice is required.
