**LAW AND MOTION TENTATIVE RULINGS**
**DATE: MAY 18, 2021 TIME: 8:30 A.M.**

**TENTATIVE RULINGS ARE NOT POSTED IN UNLAWFUL DETAINER CASES**

**No. 20CV01766**

**DISHEROON v COUNTY OF SANTA CRUZ ET AL.**

**PETITIONERS' REQUEST FOR STAY OF DECISION TO ISSUE CONDITIONAL LICENSE**

Petitioners appear to be seeking a stay under the standard for administrative mandamus and traditional mandamus. (See Request for Stay at pp.5-6.)

As to whether Petitioners are entitled to a stay under the standard for administrative mandamus pursuant to Cal Code Civ Proc § 1094.5, Petitioners have not met their burden of establishing that the agency abused its discretion by not proceeding as required by law, i.e. by not making any actual findings.

LoForti states he "reviewed the application with Deputy County Administrative Officer Melodye Serino, the cannabis Licensing Official under Chapter 7.130 who LoForti reports to. Serino agreed with and adopted LoForti's finding under Section 7.130.l 10(E)(3) that the general public benefit would outweigh concerns regarding intensity of use, land use compatibility, and public health and safety, and a waiver of the 300-foot setback rule for residential zones for SCVA was appropriate. LoForti and Serino reviewed that a waiver of the residential setback requirement was justified by the compassionate care work SCVA does and that the proposed site meets ADA accessibility standards furthering access to medical cannabis for disabled members of the general public and veterans. (LoForti Dec. ¶ 16)

The LoForti declaration addresses whether the general public benefit would outweigh concerns regarding intensity of use, land use compatibility, and public health: "The proposed site was reviewed and there are no concerns regarding intensity of use because the current use is a fast food restaurant. Per County Code (specifically 13.10.552(8)) restaurants require 1 parking space per 100 square feet while retail stores require 1 parking space per 300 square feet. This decreased parking load paired with the proposed site being properly zoned per 7.130 is the basis

for considering that there are no concerns regarding intensity of use or land use compatibility. With regard to public health and safety the proposed site will be required to comply with all of the County's and State's security requirements. Additionally, Chief Deputy Carney is able to add any additional security related measures he feels are necessary to minimize safety concerns… the security retrofits alone will be significant enough to trigger building permits which will be review [ed] by various agencies, including fire, further mitigating public health and safety concerns. (LoForti Dec. ¶ 14)

Loforti also states in his undated letter to Ms. Yoder at Charlie Mike, Inc., "Due to the compassionate care work Charlie Mike, Inc. completes, a finding can be made that the general public benefit outweighs concerns regarding intensity of use and public health and safety. (Administrative Record, Ex. 1 pp 9-10)

Based upon the above, the challenged decision sets forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order… the grounds upon which the administrative agency acted have been clearly disclosed and adequately sustained, [conducing] the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision, facilitating orderly analysis and minimize the likelihood that the agency has randomly leaped from evidence to conclusions. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515-516.)

Therefore, Petitioners have not met their burden of establishing the elements required to obtain a stay. (*Board of Medical Quality Assurance v. Superior Court* (1980) 114 Cal.App.3d 272 [170 Cal.Rptr. 468].) (Administrative mandamus) In addition, based upon the pleadings and documents submitted, the Court is satisfied that issuing a stay would be against the public interest. (CA CCP § 1094.5; Declaration of Lo Forti ¶¶ 9, 14, 16, Administrative Record, Ex. 1 pp 9-10 )

In addition, based on the declarations of LoForti and Sweatt, it appears to the Court that the agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute. (*O.W.L. Foundation v. City of Rohnert Park* (2008) 168 Cal.App.4th 568, 585-586.)

Therefore, the request for a stay pursuant to traditional mandamus (CA CCP § 1085) is denied.

**RESPONDENT COUNTY/SCVA'S MOTION TO COMPEL DISCOVERY RESPONSES**

In "an action for administrative mandamus an order compelling discovery must rest upon a showing that such discovery is reasonably calculated to lead to evidence admissible under Code of Civil Procedure section 1094.5, subdivision (d). This section limits the admission of evidence additional to the administrative record to "relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing. (*Fairfield v. Superior Court of Solano County* (1975) 14 Cal.3d 768, 774-775 [122 Cal.Rptr. 543, 537 P.2d 375].)

Regarding the issue of standing, the "public right/public duty" is an exception to the general rule that ordinarily a writ of mandate will issue only to persons who are "beneficially interested." (Code Civ. Proc., § 1086.) [W]here the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced.(*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1116-1117 [40 Cal.Rptr.2d 402, 892 P.2d 1145].)

Based on discovery being limited to standing issues, the Court rules as follows on the motions to compel:

**Special Interrogatories To Colin Disheroon**

2. Granted.

3. Granted

5. Denied

6. Denied

9. Granted

12.Granted

13.Granted

14.Granted

21. Denied

22. Denied

23.Granted

24.Granted

28.Denied

29. Denied

30. Denied

**Special Interrogatories To ACT**

2. Granted.

3. Granted

5. Denied

6. Denied

11.Granted

12.Granted

14.Denied

15.Granted

16.Granted

**Requests for Production by Disheroon**

2. Granted

3. Denied

16.Denied

22. Granted

23. Granted

27.Denied

28. Granted

29. Granted

30. Denied

31. Denied

**Requests for Production by ACT**

2. Granted

3. Denied

12. Denied

18. Granted

22. Denied

23. Granted

24. Granted

**Sanctions**

The Court declines to award sanctions finding that Petitioners acted with substantial justification.

**No. 21CV00416**

**SCHWARTZ FOUNDATION V SCHWARTZ**

**DEMURRER**

An action to defeat a corporate election pursuant to Corp. Code § 709 is a broad-based equity action in which the court may examine the entire transaction without being limited to technical or procedural issues and may adjust the rights of the parties to do justice among them. By according standing to any person who claims to have been denied the right to vote, it appears that the Legislature intended to significantly lower the barriers to bringing an action under section 709, and allow the court to consider the merits of the action without first determining whether the petitioning party did in fact have a legal right to vote." (*Haah v. Kim* (2009) 175 Cal.App.4th 45, 53-55)

On demurrer, the complaint is to be given a reasonable interpretation, admitting the truth of all material facts properly pleaded. (*Aubry v. Tri-City Hospital Dist*. (1992) 2 Cal.4th 962, 967) Plaintiffs have sufficiently pleaded standing to bring a Corp. Code § 709 action, therefore the demurrer is overruled.

**Requests for Judicial Notice**

**Defendants' RJN**

1. The Articles of Incorporation filed November 14, 1979 for the Schwartz Foundation: Granted.
2. The Bylaws of the Schwartz Foundation dated December l, 1979: Granted.
3. The minutes of a special meeting of the Board of Directors of the Schwartz Foundation dated November 4, 1983: Granted.
4. Declaration of Shirley McGlaughlin in Support of ex parte application with Ex. A Articles of Incorporation filed in case no. 21CV00032: Granted
5. Declaration of Jessica Takano in support of ex parte application filed in case no. 21CV00032: Granted

**Plaintiffs' RJN**

1. The Amended Order Granting Schwartz Foundation's Motion for: 1. Order Setting Aside or, Alternatively, Staying Enforcement of This Court's January 12, 2021 Order Establishing Board of Directors (the "Order") inCase No. 21CV00032:Granted.

2. The results of an attorney licensee search for Donald Charles Schwartz, State Bar No. 122476, on the website of the State Bar of California: Granted.
3. The Opinion of the State Bar Court of California, filed July 2, 2019, In the Matter of Donald Charles Schwartz: Granted.

Case No. 19CV02950

**HERS v MILLER**

**MOTION TO COMPEL**

The motion is denied.

Special Interrogatories, Set Two, Interrogatories Nos. 7 and 10:

The motion to compel further responses to these two interrogatories is denied on both procedural and substantive grounds. Plaintiff has failed to file a Separate Statement as required by CRC 3.1345(a) when a party is requesting further responses. While this rule was modified in January 2020 to not require a Separate Statement when a court "has allowed the moving party to submit--in place of a separate statement--a concise outline of the discovery request and each response in dispute", Plaintiff has not requested nor has the court allowed Plaintiff to submit a concise outline in lieu of a Separate Statement.

Plaintiff asserts that these interrogatories are an attempt to understand Defendant's theory of the case. However, the interrogatories do not ask for facts supporting Defendants' theory, and instead ask for the terms and conditions of the license to use the Henfling's tradename which Defendants contend was granted to both Plaintiff and Defendants by the Fire Protection District, as owner of the tradename. Defendants provide evidence demonstrating that the property at issue has been associated with the Henfling's tradename for 73 years, as well as authority for their position that landlord of a property historically associated with a tradename is the owner of that tradename. (*Helpful Hound LLC v New Orleans Bldg*. Corp (E.D. La. 2018) 331 F. Supp. 3d 581, 597.) Defendants further contend that the parties' respective leases with the District, which contain restrictions requiring them to use the premises only under the tradename "Henfling's", or some variation thereof, constitute the license to use the tradename. Based on this position, Defendants referenced CCP §2030.230, and specified the leases as writings from which the answer to these interrogatories may be obtained. The fact that Plaintiff disagrees with

Defendants' position does not make their response defective. Given the length of the 30 page leases a summary of their contents would be burdensome, and Defendants' reliance on CCP §2030.230 is therefore justified.

Special Interrogatories, Set Three:

The motion to compel responses to these interrogatories is denied as moot. Defendants' counsel declares that responses to this set of interrogatories was served on April 24, 2021.

The court declines to award Defendants' request for sanctions.

Case No. 20CV02316

**LEMERE v. JEWETT**

**MOTION TO CHANGE VENUE**

Plaintiffs move for a change of venue on the basis that there is no remaining Defendant residing in Santa Cruz County following their dismissal of Defendant Victoria Elliot; and therefore Santa Cruz is not a proper court.

The motion is denied. Venue is determined at the outset of the action. Therefore, venue based on the residence of a bona fide defendant remains proper even though that defendant is later dismissed. Weil & Brown, Cal. Civ. Proc. Before Trial (TRG) §3:489, citing *Ferguson v Koerber* (1924) 69 Cal. App. 47, 49. The other defendants cannot compel transfer to their county of residence, and plaintiff cannot object if the remaining defendants want the action tried in the county of the dismissed defendant's residence. Id., §3:489.1.

Santa Cruz County was found to be a proper venue following the transfer of the action from Los Angeles County, based on the residence of a bona fide defendant, Victoria Elliott. Venue therefore remains proper in Santa Cruz County, despite Defendants' dismissal of Victoria Elliott from the action. By their opposition the remaining Defendants have indicated their desire to have the action tried at the dismissed Defendant's county of residence.

Case No 20CV01064

**WILLIAMS v WEST COAST HOSPITALS et al**

**MOTION TO VACATE ORDER STAYING PROCEEDINGS AND ELECTION TO WITHDRAW FROM ARBITRATION PER CCP §1281.98 AND REQUEST FOR SANCTIONS PER CCP §1298.99**

The motion is granted.

Pursuant to CCP §1291.98 (a), the party who drafted an arbitration agreement and is required by the agreement to pay arbitration fees, but fails to pay the arbitration fees within 30 days of the date they are due, is "in material breach of the arbitration agreement, is in default of the arbitration, and waives its right to compel the employee or consumer to proceed with that arbitration as a result of the material breach." Under subsection (b)(1), the consumer may then "unilaterally elect" to "withdraw the claim from arbitration and proceed in a court of appropriate jurisdiction". Defendants do not dispute that they are the party who drafted the arbitration agreement at issue, that the arbitration agreement required them to pay arbitration fees, and that they failed to pay the fees within 30 days of the date they were are due. They are therefore in material breach of the arbitration and waive the right to compel Plaintiffs to proceed with the arbitration agreement.

To the extent that the parties' arbitration agreement is governed by the FAA, the court is not persuaded by Defendants' argument that §1291.98 is in conflict with, and preempted by the FAA. Defendants' have not cited to any conflicting provision of the FAA, and instead rely on the asserted absence of any provision in the FAA allowing for the revocation of an arbitration agreement based on the failure to timely pay arbitration fees. However, the FAA does allow for the revocation of an agreements to arbitrate *"upon such grounds as exist at law or in equity for the revocation of any contract.*" ( 9 U.S.C. §2). Section 1291.98 provides such grounds, and is therefore consistent with this provision. The FAA further provides that the court shall stay the trial of the action until arbitration has been had, "*providing the applicant for the stay is not in default in proceeding with such arbitration*". (9 U.S.C. §3). Section 1291.98 is likewise consistent with this provision. The court therefore finds that §1291.98 is not preempted by the FAA.

The court is also not persuaded by Defendant's assertions that §1291.98 does not apply here, because (1) the statute's legislative history suggests that a mandatory arbitration agreement is required; and (2) Defendants' failure to timely pay the arbitration fees was inadvertent and was not in bad faith. Both of these contentions would require the court to interpret the statute in a manner that adds terms which are not found in the plain and unambiguous language of the statute. The court lacks discretion to do so.

The Court vacates the stay order, and Plaintiffs may proceed to litigate their claims in Superior Court. Plaintiffs have waived the mandatory monetary sanction to which they are entitled pursuant to §1291.99(a), and instead request an order requiring Defendants to answer the complaint within 15 days, and refrain from filing a demurrer or motion to strike in lieu of an answer. While this is not among the additional sanctions which the court is permitted to impose under §1291.99(b), the requested sanction is less punitive than the listed sanctions and is reasonable given the condition of Plaintiff Paul Williams' health, as evidenced by declaration of Samuel Forbes-Roberts (¶10). The Court therefore grants Plaintiffs' requested sanction pursuant to its inherent power to control, order, and regulate the proceedings before it. .CCP §128; *Cattle v. Super. Ct*, 3 (1992) Ca1.App.4th 1367, 1377-78.