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SUPERIOR COURT OF CALIFORNIA

COUNTRY OF CONTRA COSTA

ROBERT TIERNAN, et al,

Plaintiffs,

v.

DIABLO COMMUNITY SERVICES DISTRICT, et al.,

AND RELATED CROSS-ACTION AND ACTION IN INTERVENTION

Case No. MSC17-02529

REPLY REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF THIRD-PARTY DAVID HAMMOND'S MOTION TO SET ASIDE STIPULATED JUDGMENT BETWEEN INTERVENORS AND U.S. BANK

Date: May 31, 2024
Time: 9:00 a.m.
Dept.: 18
Judge: Hon. Danielle Douglas

Pursuant to California Evidence Code section 452 and California Rules of Court, Rule 3.1306(c) Third Party David Hammond requests that the Court take judicial notice of the following:

Exhibit	Description	Authority
A	Minute Order in Contra Costa County Superior Court, Case No. C23-02578 regarding Hearing on Motion in re: Preliminary Injunction, issued on February 7, 2024.	Evid. Code §§ 452(d), 452(h)

Dated: May 23, 2024

PATTON SULLIVAN BRODEHL LLP

By: _____
KEVIN R. BRODEHL
Attorneys for Third-Party David Hammond

EXHIBIT A

Superior Court of California, Contra Costa County

Department 27
925-608-1000
www.cc-courts.org

K. Bieker
Court Executive Officer

MINUTE ORDER

DAVID HAMMOND VS. U.S. BANK NATIONAL ASSOCIATION **C23-02578**

HEARING DATE: 02/07/2024

PROCEEDINGS: *HEARING ON MOTION IN RE: FOR PRELIMINARY INJUNCTION

DEPARTMENT 27
JUDICIAL OFFICER: TERRI MOCKLER

CLERK: MEGAN HANING
COURT REPORTER: Joan Marie Columbini, CSR#5435

JOURNAL ENTRIES:

Counsel: Kevin Brodehl for the Plaintiff appears in person.
The Plaintiff, Hal Seibert appears via Zoom.
Counsel: Dominic Signorotti for the Defendant, Bart Wooten, appears in person.
Counsel: Crystal Davieau for the Defendant, U.S. Bank National Association appears via Zoom.

After hearing oral argument of counsel, the tentative ruling shall stand as follows:

TENTATIVE RULING:

Before the Court is a motion for a preliminary injunction filed by plaintiffs David Hammond and Hal F. Seibert. For the reasons set forth, the motion is **denied**.

Background

Plaintiffs David Hammond and Hal Seibert filed a complaint for quiet title, declaratory relief, and interference with an easement. They allege that there is a public easement (referred to as the "Cut-Through") over a portion of a residential property located at 2354 Alameda Diablo in Diablo to which defendant U.S. Bank obtained title by foreclosing on its deed of trust secured by that property (the "US Bank Property"). Defendant Bart Wooten is the owner of an undeveloped lot ("Wooten Property") adjacent to the US Bank Property. (Compl. ¶ 4.)

They allege the Cut-Through is an easement over a strip of land approximately 25 feet wide by 100 to 125 feet long reflected the Minor Subdivision Map MS 263-78 recorded September 19, 1979 in Book 81, Page 1 of Parcel Maps in the Official Records of Contra Costa County that offers to dedicate the easement for "riding and hiking." (Compl. ¶¶ 8, 9 and Exh. B.) Hammond alleges he has used the Cut-Through since the 1990s for bicycle riding to reach Mt. Diablo. (Compl. ¶ 12.) Seibert alleges he has been a resident of Diablo since 1978 and has used the Cut-Through "continually" since then to "traverse between Mt. Diablo Scenic Boulevard and Alameda Diablo." (Compl. ¶ 13.)

Plaintiffs allege that on or about September 28, 2023, an iron fence was constructed that is located in part on the Wooten Property which is not subject to the alleged easement but "extends by several feet" onto the US Bank Property where the Cut-Through is located, "effectively blocking all public access" to

the alleged easement. (Compl. ¶¶ 14, 22.) In their third cause of action for interference with an easement and their motion, Plaintiffs seek an injunction compelling US Bank to remove the portion of the fence on the US Bank Property that they contend impedes the public use of the Cut-Through subject to the alleged public easement. (Compl. ¶ 22.)

The Related Case and US Bank Stipulated Judgment

Plaintiffs filed Notices of Related Case indicating this case is related to the action *Robert Tiernan v. Diablo Community Services District*, and related cross-action and complaint-in-intervention, Case No. MSC17-02529 ("Prior Action"). In the Prior Action, cross-complainant Winston Cervantes asserted that there was a public easement over the Cut-Through. Other residents of Diablo, with Jeff Mini as lead intervenor ("Intervenors"), filed a complaint-in-intervention seeking a declaration that there was no public easement over the Cut-Through, or that any such easement was limited to use for horseback riding or hiking, and also alleging a private nuisance cause of action. Cervantes dismissed his cross-complaint without prejudice prior to any final determination of the merits of his claims, and he was dismissed as a defendant by the Intervenors in their complaint-in-intervention. The Intervenors reached settlements with the remaining defendants in the Prior Action, with separate stipulated judgments entered against Bart Wooten ("Wooten Stipulated Judgment") and US Bank ("US Bank Stipulated Judgment").

The US Bank Stipulated Judgment provides for the dismissal with prejudice of the private nuisance cause of action and for entry of judgment in favor of the Intervenors on the declaratory relief cause of action. (11/3/2023 US Bank Stip. Judg. ¶¶ 2 and 3.) It also obligates US Bank to maintain a barrier on the US Bank Property that prevents the public from using the Cut-Through to pass between Mt. Diablo Scenic Boulevard and Alameda Diablo Road, makes US Bank's obligations under the judgment binding on its successors, makes the obligation "run with the land," and requires the judgment to be recorded in the Official Records of the County of Contra Costa. (11/3/2023 US Bank Stip. Judg. ¶¶ 4-6.) The Complaint in this case does not mention the US Bank Stipulated Judgment or the Wooten Stipulated Judgment.

Plaintiffs filed a motion to set aside the US Bank Stipulated Judgment in the Prior Action. That motion was heard on February 2, 2024, and was denied without prejudice.

Preliminary Issue – Objection to Consideration of Wooten's Opposition

Plaintiffs object to the Court's consideration of defendant Wooten's opposition to the motion on three grounds. As to Wooten's failure to answer within the deadline, Wooten's default has not been entered, and he filed an answer on January 18, 2024. A court has the discretion to consider a brief that exceeds the page limit under the rules, and Plaintiffs do not claim any prejudice as a result of the brief being one page too long. (Cal. R. Ct. 3.1113(g); *Rancho Mirage Homeowners Association v. Hazelbaker* (2016) 2 Cal.App.5th 252, 262.)

Plaintiffs also object to the Wooten opposition on the ground it is "moot" because they do not seek the preliminary injunction against Wooten, only US Bank. Wooten is the adjacent property owner, however, whose interests may be impacted under the circumstances if relief were granted against the Bank as requested, as the result would be to allow public use of the Cut-Through immediately next to Wooten's property, and Plaintiffs are asking the Court to order US Bank to cut down part of the Wooten fence that

extends onto the US Bank Property. (Compl. ¶ 14 and Exh. C [photo showing continuous line of fence].) It is not clear an order for removal of a portion of the fence on the US Bank Property would not impact the rest of the fence on the Wooten Property. (Compl. Exh. C.) The Court addresses Plaintiffs' evidentiary objection to the Wooten evidence below.

Requests for Judicial Notice

A. Plaintiffs' RJN and Reply RJN

Plaintiffs ask the Court to take judicial notice of two recorded documents (Pl. RJN Exhs. A and M), and the Court grants the unopposed requests as to those documents. (Evid. Code § 452(c); *Linda Vista Village San Diego Homeowners Assn., Inc. v. Tecolote Investors, LLC* (2015) 234 Cal.App.4th 166, 184 [judicial notice of recorded documents].) In a Reply RJN, Plaintiffs ask the Court to take judicial notice of two maps and a 1931 grant deed to a 60 foot right of way described in the document as well as additional copies of Subdivision Map MS 263-78 and MS 154-76 (Reply RJN Exhs. A-C), of which the Court takes judicial notice on the same grounds.

Plaintiffs ask the Court to take judicial notice of certain court records filed in the Prior Action (Pl. RJN Exhs. C-L). The Court takes judicial notice of the existence of the filed documents but not the truth of allegations made in the pleadings. (Evid. Code § 452(d); *South Lake Tahoe Property Owners Group v. City of South Lake Tahoe* (2023) 92 Cal.App.5th 735, 751-752; *StorMedia, Inc. v. Superior Court* (1999) 20 Cal.4th 449, 457, fn. 9.) As to court orders and judgments (Exhs. D, G, H, K, L), the Court may take judicial notice "of the truth of results reached" but not of "the truth of hearsay statements in decisions." (*South Lake Tahoe Property Owners Group, supra,* 92 Cal.App.5th at 751.) The Court addresses Plaintiffs' RJN Exhibit B and the evidentiary objection to that document below.

B. Wooten's RJN

Wooten requests judicial notice of certain recorded documents and/or government records (Wooten RJN Exhs. 7, 8, 10, 11, 12, 13, 14. 15, 16, 21) to which no objection was made. The Court grants the request for judicial notice of those records. (Evid. Code § 452(c); *Linda Vista Village San Diego Homeowners Assn., Inc., supra,* 234 Cal.App.4th at 184.) Plaintiff requests judicial notice of a judgment, cross-complaint, and dismissal filed in the Prior Action (Wooten RJN Exhs. 20, 22, 24). The Court takes judicial notice of the existence of the filed documents as well as "the truth of results reached" in the judgment, but not the truth of allegations made in the cross-complaint or "the truth of hearsay statements in the decisions." (Evid. Code § 452(d); *South Lake Tahoe Property Owners Group, supra,* 92 Cal.App.5th at 751-752; *StorMedia, Inc. v. Superior Court* (1999) 20 Cal.4th 449, 457, fn. 9.)

As to the five declarations from the Prior Action, the Court denies the request. (*South Lake Tahoe Property Owners Group, supra,* 92 Cal.App.5th at 751-752.) " 'Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter. ' [Citation omitted.] . . . [¶] The underlying theory of judicial notice is that the matter being judicially noticed is a law or fact that is not reasonably subject to dispute. [Citation omitted.]" (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882.) The Court may take judicial notice of the existence of documents in a court file, but "Courts may not take judicial notice of

allegations in affidavits, declarations and probation reports in court records because such matters are reasonably subject to dispute and therefore require formal proof. [Citations omitted.]" (*South Lake Tahoe Property Owners Group, supra,* 92 Cal.App.5th at 752 [emphasis added].) *(See also Lockley, supra,* 91 Cal.App.4th at 882.)

Standards for Granting a Preliminary Injunction

Code of Civil Procedure section 526 sets forth alternative grounds on which a preliminary injunction may be issued. Moving parties contend a preliminary injunction is warranted because (a) Plaintiffs are "entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of the act complaint of, either for a limited time or perpetually (Code Civ. Proc. § 526(a)(1)); (b) "the commission or continuance of some act during the litigation would produce . . . great or irreparable injury, to a party to the action" (Code Civ. Proc. § 526(a)(2)); and (c) "pecuniary compensation would not afford adequate relief" (Code Civ. Proc. § 526(a)(4)). (Memo. ISO Mot. p. 9, ll. 2-10.)

The decision to grant or deny a preliminary injunction " 'rests in the sound discretion of the trial court.' " (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal. App. 4th 1459, 1470 [quoting *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69.) The California Supreme Court has explained that "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 moving party must prevail on both factors to obtain an injunction." (*Pittsburg Unified School Dist. v. S.J. Amoroso Construction Co., Inc.* (2014) 232 Cal.App.4th 808, 813-814.) (*See also Butt v. State of California* (1992) 4 Cal.4th 668, 677-678 [though the issuance of a preliminary injunction generally lies in the trial court's discretion, "[a] trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim. [Citation omitted.]"].) Nevertheless, the determination of a motion for preliminary injunction is "guided by a 'mix' of the potential-merit and interim-harm factors; 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, 677-78.) The burden is on the Plaintiffs as the moving parties to prove all elements necessary to support issuance of the injunction. (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1461.)

" 'The *ultimate* goal of any test to be used in deciding whether a preliminary injunction should issue is *to minimize the harm which an erroneous interim decision may cause*. [Citation.]' " (*White v. Davis, supra,* 30 Cal.4th at 554 [emphasis by Court, quoting *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 73].) Further, " '[t]he granting or denying of a preliminary injunction does not constitute an adjudication of the ultimate rights in controversy. [Citations.]' [Citations omitted.]" (*Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 295.)

Mandatory Versus Prohibitory Injunction and Court's Finding as to "Last Peaceable Status"

If an injunction mandates a change in the parties' relationship to one another from the *status quo* at the

time the action was filed, the injunction is generally considered a mandatory injunction as opposed to a prohibitory one. (*Agricultural Labor Relations Bd. v. Superior Court* (1983) 149 Cal.App.3d 709, 713 [injunction ordering employer to terminate workers hired during strike and rehire strikers was mandatory and therefore stayed by appeal].) Preliminary mandatory injunctions are rarely granted. (*Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 295; *People v. Uber Technologies, Inc.* (2020) 56 Cal.App.5th 266, 284 [general rule that preliminary mandatory injunctions are limited to extreme cases where the right is clearly established].)

"[T]he general rule is that an injunction is prohibitory if it requires a person to refrain from a particular act and mandatory if it compels performance of an affirmative act that changes the position of the parties. [Citations omitted.]" (*Davenport v. Blue Cross of California* (1997) 52 Cal.App.4th 435, 446-447.) (*See also Daly v. San Bernardino County Bd. of Supervisors* (2021) 11 Cal. 5th 1030, 1041.) In some instances, the *status quo* is considered the state of affairs when the motion for relief is sought; in others, courts have defined the status quo as "the last actual peaceable, uncontested status which preceded the pending controversy." (*Daly v. San Bernardino Co. Bd. of Supervisors* (2021) 11 Cal. 5th 1030, 1045-1046 [quoting *United Railroads v. Superior Court* (1916) 172 Cal. 80, 87, [internal quotation marks omitted].) In *Daly*, the Court held the preliminary injunction was mandatory, explaining "[H]ere, the requirement to remove Rowe from the Third District supervisor position and seat the Governor's replacement cannot plausibly be described as merely incidental to other aspects of the order; it was not a necessary means to a prohibitory end, but the end in itself. Under the circumstances, any prohibitory elements in the order might better be described as incidental to the mandatory, rather than vice versa." (*Id.* at 1047 [emphasis added].)

The Court should issue a mandatory preliminary injunction "only in those []'extreme cases where the right thereto is clearly established'[] [citation, internal quotation marks omitted]. We ordinarily review a trial court's issuance of a preliminary injunction for an abuse of discretion [citation omitted], but []'more closely'[] 'scrutinize' injunctions that []'change[] the status quo'[] [citation, internal quotation marks omitted]." (*Integrated Dynamic Solutions, Inc. v. VitaVet Labs, Inc.* (2016) 6 Cal.App.5th 1178, 1184 [emphasis added].)

Based on the evidence, the Court finds that the *status quo*, the last peaceable status of the condition of the US Bank Property, was the status before the vandalism of the wall on the US Bank Property in August 2023, not the status in September 2023 after the wall was torn down by vandals and before the metal fence was installed. (Wooten Exh. 1; Wooten Decl. ¶ 4; Geisler Decl. ¶ 2; Wallunas Decl. ¶ 3; Brant Decl. ¶ 3; Tiernan Decl. ¶ 7.) The photographic evidence shows a bend in the pathway that is inconsistent with the diagrams and maps of the easement which show the easement with a straight line on the border of the Wooten Property and US Bank Property. (*See, e.g.,* Pl. RJN Exh. A; Wooten Exh. 1 [DeBolt survey]; Stoffel Decl. Exhs. A and B; Hammond Decl. Exh. A; Hammond Reply Decl. Exh. G.) The survey showing the wall as of 2019 (Wooten Exh. 1) shows the wall extended to the property line of the US Bank Property. Other declarations attest that the wall replaced fencing in the same location that blocked off the end of the US Bank Property near Mt. Diablo Scenic Drive since the property was developed after Subdivision Map MS 263-78 was approved. (Wallunas Decl. ¶3; Brant Decl. ¶ 3; Geisler Decl. ¶ 2; Wooten Decl. ¶ 4.)

Hammond in his Reply Declaration estimates the length of the wall that was vandalized at 5 to 6 feet; the Contra Costa County Sheriff estimated it as 5 to 7 feet, and Brant and Geisler estimated it at 10 feet, but these estimates do not address the relation of the wall that was vandalized to the US Bank Property line. (Hammond Reply Decl. ¶ 16; Stoffels Decl. ¶ 6; Geisler Decl. ¶ 6.) The photograph of the metal fencing with the line purporting to mark where the property/easement line between the Wooten Property and US Bank Property attached as Exhibit C to the Complaint appears to indicate the portion on the US Bank Property is approximately 5 to 7 feet in length, essentially the same width as the wall that was vandalized. Further, Plaintiffs have essentially conceded in their reply that the fence/wall that had been on the US Bank Property blocked the Cut-Through and access to and from Mt. Diablo Scenic Blvd. (Reply p. 5, ll. 21-25 [stating the "fence/wall had no practical impact on the public's use" of the Cut-Through because they just had to walk around it "onto a portion of Wooten's then-unmarked an unfenced property."].)

The Court finds therefore Plaintiffs are not seeking a prohibitory injunction but rather than a mandatory injunction mandating affirmative acts by US Bank to remove a pre-existing barrier on its property and alter the *status quo* on the US Bank Property during the pendency of the case, before a final judgment on the merits of Plaintiffs' claimed for a public easement based on implied acceptance by public use. This is "the end in itself" of the relief sought in the action. (*Daly, supra,* 11 Cal.5th at 1047.) Plaintiffs must therefore demonstrate this is an "extreme" case where they have clear unequivocal right to relief, which is essentially the same relief they would obtain if they prevail in the action.

Procedural Issue – Lack of Sufficient Notice of Relief Sought

Plaintiffs' Notice of Motion only states that they move for a Preliminary Injunction "as detailed herein," and the conclusion merely asks generally for "a preliminary injunction to restore the *status quo* and protect the public's long-standing use of the Easement pending trial." They have not lodged a proposed order detailing the specific relief they seek with the specificity required by California Rule of Court 3.1151. (Cal. R. Ct. 3.1151 ["A petition for an injunction to . . . restrain real property encroachments, or protect easements must depict by drawings, plot plans, photographs, or other appropriate means, or must describe in detail the premises involved, including, if applicable, the length and width of the frontage on a street or alley, the width of sidewalks, and the number, size, and location of entrances." (Emphasis added.)].)

While they have provided copies of Subdivision Map 263-78 showing the location and dimension of the Cut-Through, they have not defined with precision the *status quo* as it existed before the stucco wall in place since 2007 was vandalized. They provide no definitive measurements of the portion of the fence they contend should be removed with evidence demonstrating the portion they seek removed is not merely of the same dimensions that existed before the wall was vandalized, or demonstrated with dimensions, plans, or drawings the existence of space between the US Bank Property line at the edge of the Cut-Through and where the wall on the US Bank Property ended before it was torn down by vandals. Plaintiffs' own photographic evidence attached to the Complaint and the Hammond Reply Declaration suggest that the metal fence is essentially the same width as the destroyed portion of the wall, as discussed above. (Compl. Exh. C; Hammond Reply Decl. ¶ 16; Stoffels Decl. ¶ 6; Geisler Decl. ¶ 6.)

As a result, Plaintiffs have not provided is a precise description of what specifically they are asking the Court to order US Bank to do if the preliminary injunction were granted; the memorandum in support of the motion only generally describes the relief. (*See, e.g.*, Memo. ISO Mot. p. 2, ll. 6-8, p. 10, ll. 5-8; p. 15, ll. 11-19 [referring generally to restoring "access" to the Cut-Through by removing the "portion of the fence currently blocking the Easement" that was installed September 28, 2023, which is not the *status quo* as found by the Court.) Plaintiffs' failure to precisely describe the *status quo* to be restored and to set forth the relief they seek with the precision required for preliminary injunctive relief under California Rule of Court 3.1151 warrant denial of the motion on those grounds alone.

Analysis of Element 1 – Plaintiffs' Proof of Likelihood of Prevailing on the Merits

A. Legal Background to the Substantive Claims for Relief

Civil Code section 1009(b) was enacted effective March 4, 1972 in response to the California Supreme Court decision in *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29 which allowed implied dedication of private land by public use. Civil Code section1009(b) provides that there can be no implied dedication by public use of private property after March 4, 1972, the effective date of the statute, unless "an express written irrevocable offer of dedication of such property to such use, made by the owner thereof in the manner prescribed in subdivision (c) of this section, which has been accepted by the county, city, or other public body to which the offer of dedication was made, in the manner set forth in subdivision (c)." (Civ. Code § 1009(b).)

Civil Code section 1009(c) provides: "In addition to any procedure authorized by law and not prohibited by this section, an irrevocable offer of dedication may be made in the manner prescribed in Section 7050 of the Government Code to any county, city, or other public body, and may be accepted or terminated, in the manner prescribed in that section, by the county board of supervisors in the case of an offer of dedication to a county, by the city council in the case of an offer of dedication to a city, or by the governing board of any other public body in the case of an offer of dedication to such body." (Civ. Code § 1009(c) [emphasis added].) Government Code section 7050 provides in part that an offer of dedication "executed, acknowledged, and recorded in the same manner as a conveyance of real property" when recorded is "irrevocable."

The parties dispute whether after March 1972, a public easement may result from an express offer of dedication of land to the public coupled with implied acceptance through the public use of property expressly and irrevocably dedicated by the private landowner. (*Mikkelson v. Hanson* (2019) 31 Cal.App.5th 170, 178-179; *Biagini v. Beckham* (2008) 163 Cal.App.4th 1000, 1009 [stating a statutory dedication which fails because the public agency has not accepted the offer of dedication made under the Subdivision Map Act can operate as a common law dedication when accepted by the public]; Civ. Code § 1009(b).) However, in *Prout v. Department of Transportation* (2018) 31 Cal.App.5th 200, the Court found such an implied acceptance after an express offer of dedication made in 1990, though without addressing Civil Code section 1009(b). (*Id.* at 208 [affirming judgment for CalTrans on plaintiff's inverse condemnation claim, finding a completed common offer of dedication by acceptance through use of the property offered for dedication]. (*See also Biagini, supra,* 163 Cal.App.4th at 1009 [stating a statutory dedication which fails because the public agency has not accepted the offer of dedication

made under the Subdivision Map Act can operate as a common law dedication when accepted by the public, but finding no dedication or implied acceptance both because public use was insufficient and parties making use of property had express private easements].)

In *Mikkelson*, the Court explained that where there is an offer of dedication, including an express offer, " 'acceptance on the part of the public is necessary to a valid dedication'," which may be actual or implied. (*Mikkelson, supra,* 31 Cal.App.5th at 176 [*dicta*, as there was no express written offer of an irrevocable dedication of the property in that case, so the statutory exception stated in Civil Code section 1009(b) did not apply].) Acceptance is " 'actual when formal acceptance is made by the proper authorities, and implied, when a use has been made of the property by the public for such a length of time as will evidence an intention to accept the dedication.' [Citation omitted.]" (*Id.* [quoting *County of Inyo v. Given, supra,* 183 Cal. at 418].) "[T]he use which implies an acceptance must occur within a reasonable time after the offer is made. [Citation omitted.] What constitutes a reasonable time depends upon the circumstances in each case. [Citation omitted.] The sufficiency of a use to constitute acceptance as well as the timeliness thereof ordinarily are matters which involve questions of fact." (*McKinney v. Ruderman* (1962) 203 Cal.App.2d 109, 116.) In addition, in *Biagini*, the Court also affirmed the trial court determination that an express irrevocable offer of dedication can be revoked under common law principles so as to terminate the public's ability to accept the offer by public use, though the offer must remain open for acceptance by the public entity to which it has been offered. (*Id.* at 1016-1017.)

In addition to disputes over whether there was acceptance of the offer of dedication, the parties dispute the scope of any use granted by the offer of dedication even if it was accepted as defendants contend the use was limited to hiking and equestrian riding, not bicycle riding. Contract principles generally govern offers of dedication, including in this case whether the easement was granted to cover bike riding or only horseback riding. (*Shenson v. County of Contra Costa* (2023) 89 Cal.App.5th 1144, 1172.) " 'If the language is clear and explicit in the conveyance, there is no occasion for the use of parol evidence to show the nature and extent of the rights acquired.' [Citations omitted.] (*Van Klompenburg v. Berghold* (2005) 126 Cal.App.4th 345, 349 [quoting *Scruby v. Vintage Grapevine, Inc.* (1995) 37 Cal.App.4th 697, 702].) (*See also* Civ. Code § 806 ["The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired."]; Civ. Code § 1066 ["Grants are to be interpreted in like manner with contracts in general, except so far as is otherwise provided in this article."].)

"The circumstances existing at the time of and giving rise to the conveyance determine the nature and extent of the easement. [Citations omitted.] The use may change or increase, but only so long as the change does not materially increase the burden on the servient tenement. [Citations omitted.] Any permissible change would be limited 'to such uses as the facts and circumstances shown were within the reasonable contemplation of the parties at the time of the conveyance.' [Citation omitted.] (*Friends of Hastain Trail v. Coldwater Development, LLC* (2016) 1 Cal.App.5th 1013, 1031.) (*See also* Code Civ. Proc. § 1860.)

B. <u>Application to the Case and Evidence</u>

In their Complaint and motion, Plaintiffs do not contend that the alleged public easement runs over any portion of the Wooten Property. They contend (a) there has been some form of public use of the Cut-

Through for decades from the 1980s after the offer of dedication was made in Subdivision Map MS 263-78 until September 2023, (b) that though the offer of dedication refers to "riding" and hiking, the use includes biking and not just horseback riding, and (c) the metal fence was erected on the US Bank Property that creates a barrier obstructing the use of the Cut-Through that must be ordered removed during the pendency of the case before trial on the merits because of the irreparable harm denial of access is causing users of the Cut-Through.

Plaintiffs submit 49 declarations in support of the motion, of which 29 are from current or former residents of Diablo. The other declarations are from nonresidents who have used the Cut-Through to varying degrees, during varying time frames, and generally for purposes of walking, hiking or biking. The evidence shows the Perlows made an express offer of dedication of the Cut-Through when their proposed "minor subdivision" of their property was approved as reflected in Subdivision Map MS 263-78. However, after a house was developed on the US Bank Property, the US Bank Property had a wooden fence crossing the Cut-Through at the end near Mt. Diablo Scenic Blvd. (That fence was later replaced with a stucco/concrete wall in 2007. (Wooten Exh. 1; Wooten Decl. ¶ 4; Geisler Decl. ¶ 2; Wallunas Decl. ¶ 3; Brant Decl. ¶ 3; Tiernan Decl. ¶ 7.)

The evidence shows that there was use by nonresidents of the Cut-Through up to the US Bank fence/wall by walkers, hikers, horseback riders, and bicyclists, including bike clubs with small groups to 20 or so bikers in some instances making weekly rides, during the 1980s and 1990s. (*See* Decls. of Bloom, Gilbert, Gorman, Green, Gutierrez, Hammond [10 to 20 times each year since 1994], Kelly, Nelson, Palmer, Parker, Powers, Scott, Trambley, Tyler.) The evidence supports a finding of public use of the Cut-Through up to the fence/wall on the US Bank Property which could support an implied acceptance of the proposed easement by the public.

The evidence also indicates some understanding that the easement included bicycling based on the uses of the Cut-Through to which these declarants, and others, attest. But the evidence of the blockage of the Cut-Through at the end of the US Bank Property, the "narrow" path Kelly attests to during that same time frame, and other evidence that users had to use the Wooten Property to pass to or from Mt. Diablo Scenic Blvd. raises serious questions as to what property was actually being traversed by users and whether the blockage revoked the offer of dedication, and whether the usage of the "Cut-Through" was merely permissive by the owners. (Hammond Reply Decl. ¶ 13 [addressing 1970s and that users "had no reason to question whose property they were crossing"]; Kelly Decl. ¶ 5 [fencing from the two properties "came close together leaving a narrow gap" but not stating how narrow or on which property the gap existed]; Wooten Exh. 1; Wooten Decl. ¶ 4; Geisler Decl. ¶ 2; Wallunas Decl. ¶ 3; Brant Decl. ¶ 3; Tiernan Decl. ¶ 7.) (*See also* Hammond Decl. Exh. A; Compl. Exh. C.) According to users, the purpose of the Cut-Through was to traverse between Alameda Diablo and Mt. Diablo Scenic Blvd. but the evidence indicates the US Bank Property blocked access to or from Mt. Diablo Scenic Blvd. apparently from the time it was developed shortly after the offer of dedication in the 1980s. This raises questions of whether the blockage was an attempt to revoke the offer of dedication to the public in the Subdivision Map 563-78 and whether the use of the Cut-Through at least up to the fencing/wall on the US Bank Property was instead permissive, so long as users did not directly access Mt. Diablo Scenic Blvd. from the US Bank Property.

The Kelly Declaration acknowledges there was fencing on both the Wooten Property and US Bank Property in the "1980s," and only a "narrow gap" between the fences, but does not dispute that the fence on the US Bank Property running along Mt. Diablo Scenic Blvd. extended to the US Bank Property line where the mapped Cut-Through on MS 263-78 ends, blocking the end of the Cut-Through along Mt. Diablo Scenic Blvd, nor is it clear to the Court that the narrow path described in that declaration was actually on the US Bank Property in whole or in part given the evidence that users had to use the Wooten Property to reach Mt. Diablo Scenic Blvd. (Kelly Decl. ¶ 5; Wooten Decl. ¶ 4.) The current photographs show, consistent with the Wooten Stipulated Judgment, that Wooten has now erected a metal fence on his property as a barrier to public access as required by that judgment. (Compl. Exh. C.)

The Hammond Reply Declaration includes maps and documents annotated by Hammond. He states in that declaration he is a researcher of historical documents but not a surveyor or the basis on which he has proficiency to make the annotations of the documents attached to that declaration, particularly where the rights of way or other information is based on metes and bounds identifications. (*See, e.g.*, Hammond Reply Decl. Exhs. A-D, F, G.) Plaintiffs point to the 1931 roadway right of way for Mt. Diablo Scenic Blvd. which Plaintiff contends extends past the end of the US Bank Property with the fencing; it is not clear to the Court from the evidence or authorities cited by Plaintiffs that the existence of a recorded a right of way for a roadway or street but not used by the State for that purpose affects whether there is an implied public acceptance of a recreational use easement, particularly when the easement has apparently been blocked at that location since not long after it was offered.

Plaintiffs have shown some likelihood of prevailing if they can overcome the issues regarding the fencing and blockage of the Cut-Through on the US Bank Property and potential revocation and permissive use. The Court, however, does not find that Plaintiffs have established a clear implied acceptance by public use of the offer of dedication of the Cut-Through for purposes of obtaining a mandatory preliminary injunction sufficient to support a mandatory preliminary injunction under the case law.

Analysis of Element 2 – Relative Balance of Interim Harms to the Parties

Plaintiffs contend that they along with other residents of Diablo and the public users of the Cut-Through are being "irreparably harmed" by having to use alternate routes as a result of the metal fence erected on the US Bank Property in September 2023. They argue the Court should consider not just the interests of Plaintiffs but the public at large because a public interest is involved. (*Tulare Lake Canal Co. v. Stratford Public Utility Dist.* (2023) 92 Cal.App.5th 380, 398 [in CEQA cases, "the standard for granting injunctive relief involves balancing competing public interests—the harm if an injunction issues versus the harm if the project is allowed to proceed."].)

There is evidence that Diablo Road and Mt. Diablo Scenic Blvd. are heavily travelled and can be dangerous. (Wooten Exh. 15 [MS 263-78 Page 4 of County Staff Report 3/26/1979].) However, there is also evidence that persons seeking to traverse between from Alameda Diablo to Mt. Diablo Scenic Blvd. or to access Mt. Diablo have alternate routes available, including use of the streets by car rather than walking, use of two trails that are 300 to 1,000 feet from the Cut-Through and passable but not as good as the Cut-Through (Kay's Trail and Calle Los Callados), as well as use of Summit Trail and Green Valley Trail. (Geisler Decl. ¶¶ 4, 5, 9-11; Brant Decl. ¶ 4; Hammond Reply Decl. ¶ 25; Wooten Exhs. 3, 6, 8, 32

[Summit Trail and Green Valley Trail].)

The Hammond Reply Declaration provides evidence that bicycle users cannot use Kay's Trail (Hammond Reply Decl. ¶ 18 and Exh. K), and contends that Calle Los Callados has a narrow gate, is not an easement and so could be at some point be closed, and ends at a busy location by the Athenian School. (Hammond Reply Decl. ¶¶ 23, 24.) He does not address the Summit Trail but states the Green Valley Trail is three-quarters of a mile farther. (Hammond Reply Decl. ¶ 25 and Exh. M.)

Collectively, the harm described in the declarations in support of the motion is not that users of the Cut-Through cannot reach their intended destinations but that they would have to reach them by alternative means. They may need to drive to their destinations, walk dogs or ride bikes on other available trails or streets until a trial can be held on the Complaint and a determination made regarding the existence and scope of any impliedly accepted public easement over the Cut-Through.

On the other hand, the relief sought as preliminary relief would compel US Bank as owner in effect to create new, previously nonexistent access to its property by removing a portion of the US Bank Property fencing that has blocked the end of the Cut-Through since the 1980s. US Bank contends it will be forced to violate its obligations under the US Bank Stipulated Judgment. More important, US Bank points to the substantial risk of liability it will face if it is forced to allow the public access to the US Bank Property. It argues it faces having to defend claims from use by the public if injuries should occur. The Reply does not contest these concerns by US Bank, but merely contends the bond amount suggested by the bank is not founded and excessive.

Summary Conclusion on Balancing of the Two Elements

Plaintiffs have shown some probability of prevailing on the merits of their claim to a public easement over the Cut-Through by an express offer of dedication that was impliedly accepted by public use, and they have demonstrated they will suffer some harm or inconvenience until trial can be held to determine their claim. However, the relief they seek is not to restore the *status quo* but to obtain an affirmative, mandatory preliminary injunction against US Bank to open up access on its property that has been blocked since not long after the US Bank Property was originally developed. The relief they seek is essentially the relief they would obtain if they prevail on the merits at trial and to alter the *status quo*, which they ultimately concede in their Reply as cited above.

They have not cited any reported decision in support of their motion in which a mandatory preliminary injunction was issued in the case of a disputed public easement over private land since the enactment of Civil Code section 1009(b) or in these circumstances where one end of the easement has been blocked by the landowner for roughly 40 years, and where the roadway right of way Plaintiffs rely on has not been used as a roadway in the location over the private property since the right of way was recorded. Though Plaintiffs have presented evidence that users of the Cut-Through may be inconvenienced until a judgment is rendered in the case, they have not addressed the risks to US Bank of public use of its property and its exposure to lawsuits and claims if a mandatory preliminary injunction is issued. Balance against those potential risks with the alternatives available and the fact the uses most impacted according to Hammond are recreational uses until trial can be held, the Court finds the balance of harms tips against granting mandatory injunctive relief before judgment.

Plaintiffs have not demonstrated that this is an extreme case where their rights are so clearly established that issuance of a mandatory preliminary injunction is warranted.

Evidentiary Objections

A. Wooten Obj. to Pl. Exh. B

Plaintiffs have asked the Court to take judicial notice of an exchange of letters from 1979 between Agnes Finch of the East Bay Area Trails Council and William Gray of the Contra Costa Public Works Department (Pl. RJN Exh. B). Defendant Wooten made an evidentiary objection to this document on multiple grounds, including lack of foundation and hearsay.

The letter from the County Assistant Public Works Director responding to Finch's inquiry refers to the Subdivision Map MS 263-78 and the condition that the "owner establish a riding and biking trail easement" connecting Alameda Diablo and Mt. Diablo Scenic Boulevard and indicated a copy of the inquiry was being forwarded to the Planning Department, where the Planning Director was responsible for working out the "final details" of the easement the Perlows would grant. (Pl. RJN Exh. B.) The Court will take judicial notice of the letters not for the truth of statements made but as government records reflecting an inquiry to a public agency and action taken by the public agency in response. (Evid. Code § 452(c).) (*See also* Evid. Code §§ 1280 [record by public employee], 1321, 1322, 1331.)

B. Plaintiffs' Objections

Obj. No. 1 (Wooten Decl. ¶ 3) – **overruled**; court interprets the statements as the declarant's personal observations, and any question as to sufficiency of declarant's knowledge of the facts stated goes to the weight of the testimony, not its admissibility.

Obj. No. 2 (Brant Decl. ¶ 4) – **sustained**.

Obj. No. 3 (Geisler Decl. ¶ 5 [erroneously identified as ¶ 4]) - sustained.

Obj. Nos. 4-8 (Tiernan Decl. ¶¶ 3, 5, 7, 8) -**overruled**; see Obj. No. 1 above.

DATED: 2/7/2024

BY:_____

M. HANING, DEPUTY CLERK

Robert Tiernan, et al v. Diablo Community Services District; et al.

Contra Costa County Superior Court No. MSC17-02529

PROOF OF SERVICE

I, Jennifer Ann Harvey, declare:

I am over 18 years of age and not a party to this action. My business address is Patton Sullivan Brodehl LLP, 12647 Alcosta Blvd., Suite 430, San Ramon, California 94583. On the date set forth below, I served the within:

REPLY REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF THIRD-PARTY DAVID HAMMOND'S MOTION TO SET ASIDE STIPULATED JUDGMENT BETWEEN INTERVENORS AND U.S. BANK

on the parties in this action as listed below:

Dominic V. Signorotti, Esq. McKenna, Brink, Signorotti LLP 1350 Treat Blvd, Ste 105 Walnut Creek, CA 94597 Email: dominic@mckennabrink.com service@mckennabrink.com	*Attorneys for Intervenors* *Jeff Mini, Christine Mini, et al.* Accepting Service on behalf of Bart Wooten
Melissa Robbins Coutss, Esq. Crystal R. Davieau, Esq. McCarthy & Holthus, LLP 2763 Camino Del Rio S, Suite 100 San Diego, CA 92108 Tel.: (619) 685-4800 E-mail: cdavieau@mccarthytholthus.com cdouangchanh@mccarthyholthus.com	*Defendant* U.S. Bank National Association, as Trustee for Master Adjustable Rate Mortgages Trust 2007-2 Mortgage Pass-Through Certificates, Series 2007-2

[X] (By Email) Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed above.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on May 23, 2024 at San Ramon, California.

JENNIFER ANN HARVEY