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Thomas Sears and Wendy Sears

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO, NORTH DIVISION

LESLIE ERBE, an individual; MARTIN
CARTER, an individual,

Plaintiffs,

v.

THOMAS R. SEARS, an individual; and
WENDY SEARS, an individual; and DOES 1
through 20,

Defendants.

THOMAS R. SEARS, an individual; WENDY
SEARS, an individual,

Cross-Complainants,

v.

LESLIE ERBE, an individual; and MARTIN
CARTER, an individual, and DOES 1-20,
inclusive,

Cross-Defendants.

Case No.: 37-2021-00041602-CU-OR-NC

**DEFENDANTS AND CROSS-
COMPLAINANTS THOMAS SEARS'
AND WENDY SEARS' MEDIATION
BRIEF**

Judge: Hon. Earl H. Maas, III
Dept: N-28
Action Filed: September 29, 2021
Trial Date: May 26, 2023

[IMAGED FILE]

INTRODUCTION

Defendants and Cross-Complainants Tom Sears (“**Mr. Sears**”) and Wendy Sears (“**Mrs. Sears**”) (collectively, the “**Sears**”) hereby submit this mediation brief in advance of the mediation scheduled for September 14, 2022.

The Sears have an irrevocable license based on the 30+ years of oral and implied permission given by the immediate predecessor-in-interest (Tino, defined *infra*) to Plaintiffs and Cross-Defendants Leslie Erbe (“**Ms. Erbe**”) and Martin Carter (“**Mr. Carter**”) as to the Subject Land (defined *infra*).

The Sears will prevail in the underlying litigation as this irrevocable license defeats all of Plaintiffs and Cross-Defendants’ claims and affirmative defenses.

The Sears do not desire to spend tens of thousands – if not hundreds of thousands – of dollars litigating this case. For that reason, the Sears offer to settle this dispute as outlined in the Conclusion section below.

STATEMENT OF FACTS

A. Factual Background

Mr. Sears’ relationship with Constantino Medina, Jr. (“**Tino**”), who is the immediate predecessor-in-interest to Plaintiffs and Cross-Defendants, started in or about 1971 when Mr. Sears and Tino met and became close friends while attending construction technology class at El Camino College. Tino owned a house in Hermosa Beach where they would hang out. Tino got Mr. Sears interested in buying real estate.

In or about 1972, Tino sold his Hermosa Beach property and bought a three-acre property on the corner of Buena Vista and Valley Center in Carlsbad (the “**Ranch**”). Every so often, Mr. Sears would come down and stay and/or visit with Tino at the Ranch.

Tino and Mr. Sears’ relationship was so close that, in the mid-1970s, Mr. Sears even helped fund Tino’s sabbatical in exchange for a fractional interest in a piece of property Tino owned in Carmel Valley.

In or about 1979, Mr. Sears sold his Redondo Beach property and moved to Colorado. While in Colorado, Mr. Sears built a home that Tino bought and identified in a 1031 exchange.

1 In or about 1988, Mr. Sears and Mrs. Sears moved from Colorado to Carlsbad.

2 **B. The Subdivision of Tino's Parcel**

3 In or about 1989, Tino told Mr. Sears that he was subdividing a lot Tino owned that ran from
4 Knowles Street to Cynthia Lane in Carlsbad (the "**Parcel**"). Tino told Mr. Sears that he was interested
5 in selling what are now called Parcels 3 and 4, which abutted Cynthia Lane. Mr. Sears met Tino at
6 the Cynthia Lane cul-de-sac, and Tino showed Mr. Sears Parcels 3 and 4 from the cul-de-sac. At that
7 time, Parcels 3 and 4 were vacant empty lots; the only things standing on the Parcel were a house,
8 garage, and a fence that ran from the western edge of what is now called Parcel 1 to the
9 aforementioned garage ("**Tino's Fence**"). Tino had rented out the home on the Parcel to tenants for
10 years by that time.

11 Later in or about 1989, the Sears visited the Cynthia Lane cul-de-sac a couple times to look
12 at Parcels 3 and 4 and told Tino that they would like to buy what is now called Parcel 4. Tino informed
13 Mr. Sears that Parcel 4 was already taken by Larry Conery, a mutual contractor friend. Consequently,
14 the Sears decided to purchase what is now called Parcel 3.

15 A few months later, Tino informed Mr. Sears that Parcel 4 was available at the same price as
16 Parcel 3. The Sears decided to buy Parcel 4 and entered into an oral agreement with Tino for the
17 purchase. Per that oral agreement, the Sears would pay 50% of the purchase price of Parcel 4 as a
18 down payment and Tino would carry a note for the remainder until the funding of the construction
19 loan for the construction of the Sears' home on Parcel 4.

20 When the Sears decided to purchase what is now Parcel 4, Mr. Sears had an established and
21 trusting business and personal relationship with Tino spanning almost two decades.

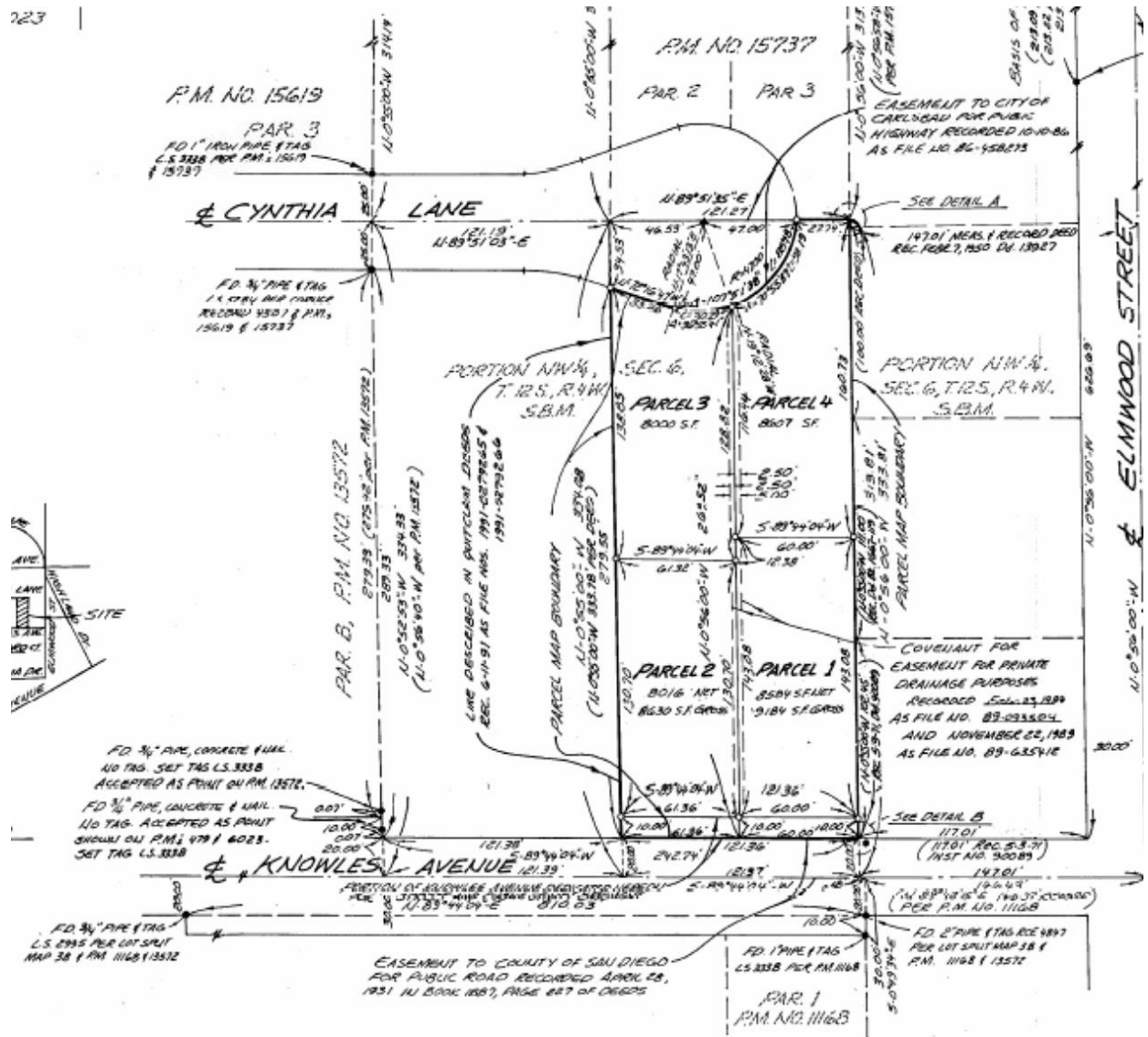
22 Around this time, Tino provided the Sears with an estimated timeline for the completion of
23 the subdivision conditions for the final map, which included the moving of the garage on Parcel 1.

24 On or about February 22, 1990, Mr. Sears applied for a building permit based on the estimated
25 timeline provided by Tino. However, due to delays, the plan check expired, and, on or about August
26 6, 1991, Mr. Sears reapplied for the building permit.

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On or about August 13, 1991, the parcel map showing the subdivision of the Parcel into four parcels was recorded in the Book of Parcel Maps of the San Diego County Recorder at page 16581 (the "Parcel Map"). See ERBE000122, which is attached hereto as **Exhibit A** and copied below.



Parcel 1 on the Parcel Map became commonly referred to as 1370 Knowles Avenue, Carlsbad, CA 92008 ("Knowles Property"); Parcel 4 became commonly referred to as 1387 Cynthia Lane, Carlsbad, CA 92008 ("Cynthia Property").

C. Post-Subdivision and the Building of the Sears Home on the Cynthia Property

Post recordation of the Parcel Map, Tino continued living at the Ranch and renting the Knowles Property. In the years that followed post recordation, the Sears' children would often go over to the Ranch to feed the chickens, look at the peacocks, and help feed the horses there.

SEARS00189, which is attached as **Exhibit B** and copied below, shows the Sears' daughter, Stephanie Sears, feeding horses at the Ranch:



SEARS00180 and SEARS00186, which are attached as **Exhibit C** and copied below, show the rural and undeveloped nature of the parcels and the area around them around this time:





Post recordation of the Parcel Map, escrow closed on the Sears' purchase of the Cynthia Property.

On or about October 1, 1991, Mr. Sears' building permit was approved.

Shortly thereafter, Mr. Sears started construction of his home on the Cynthia Property. When laying the house's foundation, Mr. Sears referenced the Site Plan for the front 20' minimum and east 6' minimum building setbacks. SEARS00183, which is attached as **Exhibit D** and copied below, shows the house at the framing stage with Tino's Fence before it was extended in the background (right side of picture, above car):



SEARS00185 and 00188, which are attached as **Exhibit E** and copied below, shows the house at the framing and later at the drywall stage. The pictures were taken looking towards the Knowles Property. The garage on the Knowles Property is visible; Tino's Fence, however, is not visible because it had not yet been extended the full length of the Knowles Property's property line:



1 On or about June 5, 1992, the Sears received their certificate of occupancy and they moved
2 into the house on the Cynthia Property. SEARS00174, which is attached as **Exhibit F** and copied
3 below, shows a picture of the completed house taken on October 9, 1992 from the Cynthia Lane cul-
4 de-sac:



16 Sometime between the building of the Sears' Cynthia Lane home and May of 1993, Tino had
17 his fence on Parcel 1 extended to run to the eastern edge of Parcel 1 as shown on the Parcel Map
18 (**"Tino's Extended Fence"**).

19 **D. Tino's Verbal and Implied Permission as to the Subject Land**

20 In or about May of 1993, the Sears started landscaping.

21 While laying out the west fence line on the Cynthia Property around that time, it was realized
22 that Tino's Fence was not on the Cynthia and Knowles Properties' common property line per the
23 Parcel Map.

24 Mr. Sears met with Tino on the Cynthia Property to discuss the property line issue. Mr. Sears
25 and Tino orally agreed that the Sears could enter the roughly 8' portion of the Knowles Property north
26 of Tino's Extended Fence to the southern boundary of the Cynthia Property (**"Subject Land"**), build
27 their wood fence along Tinos' Extended Fence, and use the Subject Land thereafter, which would
28 obviously and impliedly give the Sears continuous, exclusive, and uninterrupted entry, use, access,

1 enjoyment, and improvement of the Subject Land as if the Sears owned the Subject Land, thereby
2 making, effectively, Tino's Extended Fence the southern boundary of the Cynthia Property.

3 The Sears family installed irrigation in the Subject Land, planted a melaleuca tree in the
4 Subject Land, and planted other plants, including a honeysuckle hedge, in the Subject Land.
5 SEARS00175, which is attached as **Exhibit G** and copied below, shows the Sears' daughter,
6 Stephanie Sears, planting some plants in the yard:



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13 SEARS00176, which is attached as **Exhibit H** and copied below, shows Mr. Sears installing
14 irrigation along the common boundary between the Cynthia Property and Parcel 3; Tino's Extended
15 Fence is visible in the background as are the fence posts for the Sears' wooden in conformance with
16 Tino and Mr. Sears' oral agreement:



SEARS00177, which is attached as **Exhibit I** and copied below, shows the planting of a Shamel ash tree with Tino's Extended Fence in the background and the posts for the Sears' wooden fence in conformance with Tino and Mr. Sears' oral agreement (the right end of the blue tarp represents the original end of Tino's Fence before it was extended):



SEARS00178, which is attached as **Exhibit J** and copied below, show the now planted Shamel ash tree, the installed irrigation system, Tino's Extended Fence, and the fence posts for the Sears' wooden fence in conformance with Tino and Mr. Sears' oral agreement:



SEARS00173, which is attached as **Exhibit K** and copied below, shows the Sears family enjoying a birthday party in front of their completed wooden fence in or about January 1994:



In or about 1999, Mr. Sears installed a concrete slab and a jacuzzi on the slab in the Subject Land. Mr. Sears has used the jacuzzi regularly and now almost daily for his arthritis.

Also in or about 1999, Mr. Sears installed a garden bed in the Subject Land.

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1 In or about 2018, Mr. Sears replaced the garden bed by removing it and building a raised
2 masonry garden bed. Mrs. Sears tends to the plants in the raised masonry garden bed almost daily.
3 SEARS00201, which is attached as **Exhibit L** and copied below, shows Mrs. Sears tending to the
4 plants in the raised masonry garden bed:



18 Mr. Sears would go, with permission from the renter, on to the Knowles Property to maintain
19 the honeysuckle hedge; this continued until the Plaintiffs and Cross-Defendants purchased the
20 Knowles Property. SEARS00166, which is attached as **Exhibit M**, shows the permission given by
21 Tino's last renter before the sale of the Knowles Property.

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1 **E. The Subject Land Today and the Costs Incurred in Reliance on Tino's Promise**

2 SEARS00194, which is attached as **Exhibit N** and copied below, is a recent picture of the
3 Subject Land, the Sears' wooden fence, the mature Shamel ash tree (left side foreground), the
4 melaleuca tree (background behind the Shamel ash tree), the mature honeysuckle hedge, the jacuzzi
5 (left side), the raised masonry garden bed (center), and various plants and plantings:



14 The irrigation system is buried, so not visible.

15 As seen above, the melaleuca and Shamel ash trees now tower above the fences. The
16 honeysuckle hedge is also mature and has grown so thick that it is piercing through some of the boards
17 of the Sears' wooden fence. Other plants have matured over the years and grown to a height taller
18 than the fences.

19 In total, the Sears estimate that the cost to buy, install, plant, and build the improvements in
20 the Subject Land was no less than \$25,000.00; subject to inflation, the Sears estimate that the sum
21 totals roughly \$50,000.00 in today's dollars, which is roughly the demand made by Plaintiffs and
22 Cross-Defendants for the outright purchase of the Subject Land by the Sears. This does **not** include
23 the value of the Sears' labor in installing, planting, and building the foregoing, which is considerable
24 since Mr. Sears is a California licensed general contractor.

25 Throughout the years that followed, the Sears have also maintained and had
26 landscapers/gardeners maintain the Subject Land, including the melaleuca tree, plants, irrigation
27 system, and honeysuckle hedge therein. In total, the Sears estimate that they have spent no less than
28 \$10,000.00 in maintenance and repair costs for the Subject Land over the past almost 30 years; that

1 sum is much higher considering inflation over the last almost three decades. This does **not** include
2 the value of the Sears' labor in installing, planting, and building the foregoing, which is considerable
3 since Mr. Sears is a California licensed general contractor.

4 In doing the foregoing, including expending time, money, and labor in improving the Subject
5 Land, the Sears acted always in good faith and in reasonable reliance on the oral and implied
6 permission of Tino. In the almost 30 years leading to the sale of the Knowles Property to Plaintiffs
7 and Cross-Defendants, Tino (their predecessor-in-interest) made no objection to the Sears'
8 continuous, exclusive, and uninterrupted entry, use, access, enjoyment, and improvement of the
9 Subject Land, even though, as noted above: (1) the Sears' use of the Subject Land was not only
10 exclusive but was also open and obvious, especially since the Subject Land was visible from the
11 Knowles Property and the plantings now tower over the fences; and (2) Tino continuously owned the
12 Knowles Property and maintained a relationship with the Sears, as seen by the Sears children visiting
13 his home.

14 **F. The Sale of the Knowles Property to Plaintiffs and Cross-Defendants and Related**
15 **Settlement Attempts**

16 Although Tino and Mr. Sears had an oral agreement as to the Subject Land, Mr. Sears wanted
17 a recorded document. To that end, on or about November 19, 2018, Mr. Sears sent a letter to Tino
18 asking for a quitclaim deed and lot line adjustment for the Subject Land plus an additional four feet.

19 Sometime in or about April 2020, Tino posted the Knowles Property for sale. Sometime
20 thereafter, Plaintiffs and Cross-Defendants put an offer on the Knowles Property.

21 On May 23, 2020, Mr. Sears emailed Plaintiff and Cross-Defendant Martin Carter offering
22 \$20,000.00 for a recorded easement for the Subject Property plus an additional four feet of the
23 Knowles Property. Later that evening, Mr. Carter wrote, "Hi Tom thank you for this offer I will agree
24 to all the terms other than moving the fence another couple feet if you agree to put it exactly we're
25 [sic] it is now we have a deal thank you for reaching out to me on this matter." See ERBE000224-
26 000225 attached as **Exhibit O** for the email chain.

27 The next morning, Mr. Carter texted Mr. Sears stating, "Good morning Tom I wanted to thank
28 you for putting together this offer it looks ok in every regard aside from taking more land if we could

1 please leave new fence at same location it would be wonderful again thank you Tom RE:Marty.” In
2 response, Mr. Sears texted, “Marty. I don’t mind leaving the fence where it is but the 20K will be off
3 the table.” After some back and forth, Mr. Carter accepted Mr. Sears’ proposal by text, stating:

4 Hi Tom ok I will go for your proposal
5 Maybe we can have your tree guys
6 remove those ugly palms trees that
7 are full of rats.
8 You are a great negotiator and drive
9 a hard bargain, but and I thank you
10 for working with me on this matter
11 let’s do this



12 Right on. I’ll get with you tomorrow.

13 Perfect we are supposed to close
14 tomorrow so time is essences let me
15 know what I can do to get things in
16 order ok thank you Tom

17 See SEARS000075-000081 attached as **Exhibit P** for the text chain.

18 Based on this exchange, on May 28, 2020 Mr. Sears had an agreement drafted that he then
19 executed and emailed to Mr. Carter for execution that would settle the dispute. See SEARS000016
20 and ERBE000134-000136 attached as **Exhibit Q** for the email and attached agreement.

21 On May 29, 2020, Mr. Carter texted Mr. Sears reneging on the parties’ agreement and asking
22 for more money for the land. See SEARS000096 and SEARS000098 attached as **Exhibit R** for the
23 text chain.

24 On June 1, 2020, Plaintiff and Cross-Defendant Leslie Erbe emailed Mr. Sears demanding
25 \$60,000.00 to settle the dispute. See SEARS00025-00027, which is attached as **Exhibit S**.

26 [Rest of Page Left Intentionally Blank]

On June 1, 2020, Ms. Erbe also emailed Mr. Sears stating:

searswest@gmail.com

From: Leslie Erbe <lerbedesign@hotmail.com>
Sent: Monday, June 1, 2020 9:33 AM
To: Tom Sears
Subject: One other item...

Tom,
Please be aware you always have had, and currently do have permission to use that land on the north side of the fence belonging to recorded document PM 16581 APN 156-231-33-00.
Leslie

See SEARS00028, which is attached as **Exhibit T** and copied above.

On June 3, 2020, Plaintiffs and Cross-Defendants executed a “Release of Liability & Waiver of Claims” agreement with Tino that provided:

1. RECITALS. The BUYERS acknowledge the existence of a claim for prescriptive easement and/or adverse possession by Tom & Wendy Sears, (“SEARS”), Owners of 1378 Cynthia Ln, Carlsbad, CA 92008 involving the boundary between the SUBJECT PROPERTY and SEARS’ property. (“DISPUTE”) The SELLER knew the fence was not on the property line; but never agreed to sell any property to SEARS.... The SELLER, BUYERS and SEARS attempted to resolve the DISPUTE with an easement; but, the easement terms were not acceptable to the BUYERS. Despite the DISPUTE, the BUYERS desire to move forward with the purchase of the SUBJECT PROPERTY and accept the SUBJECT PROPERTY “as-is” per paragraph 11 of the CONTRACT.

2. CONSIDERATION AND RELEASE. Without any admission of liability whatsoever, the PARTIES agree to close escrow and the BUYERS agree to completely assume all risk of SEARS filing a legal action against the BUYERS to obtain the property in dispute.

See ERBE000012, a copy of which is attached as **Exhibit U**.

On or about June 5, 2020, Plaintiffs and Cross-Defendants purchased the Knowles Property from Tino with notice of the Sears’ almost thirty years of continuous, exclusive, and uninterrupted entry, use, access, enjoyment, and improvement of the Subject Land.

On June 19, 2020, Ms. Erbe emailed Mr. Sears offering to sell him the Subject Land for \$50,000.00, stating, “If you want to settle quickly pay the \$50K and be done with it.” Ms. Erbe repeated her \$50,000.00 settlement position on June 29, 2020 and July 8, 2020. See SEARS00030, 00032, 00035, and 00060 which are attached as **Exhibit V**. As seen on SEARS00060, Ms. Erbe’s

1 later communications to Mr. Sears included threats of calling the police on him for being in,
2 maintaining, repairing, or planting anything on the Subject Land.

3 Thereafter, settlement negotiations ceased for almost a year.

4 On May 16, 2021, Plaintiffs and Cross-Defendants had a survey performed that showed the
5 Sears' wooden fence as running parallel to the Cynthia and Knowles' Properties' shared property line
6 8.05 feet south of the Cynthia Property property line, which is in conformance with Tino and Mr.
7 Sears' almost 30 year oral and implied agreement. The survey is attached as **Exhibit W** and was
8 produced as ERBE000001.

9 On May 23, 2021, Mr. Sears sent a settlement proposal to Plaintiffs and Cross-Defendants to
10 settle the dispute. See SEARS00040-00042 which is attached as **Exhibit X**.

11 On or about September 23, 2021, by and through counsel, Plaintiffs and Cross-Defendants
12 attempted to revoke permission for the Sears to use the Subject Land.

13 On September 30, 2021, by and through counsel, Mr. Sears increased his settlement position
14 to \$50,000.00 for the Subject Land, which matched Ms. Erbe's June 2020 settlement position.

15 On July 24, 2022, Mr. Sears was notified that his longtime friend, Tino, had passed away
16 peacefully at home.

17 **G. Procedural History**

18 On September 29, 2021, Plaintiffs filed their complaint against the Sears alleging trespass,
19 private nuisance, quiet title, and ejectment.

20 On January 6, 2022, Plaintiffs filed their first amended complaint against the Sears, which is
21 attached as **Exhibit Y1**, raising, principally, the affirmative defense of estoppel.

22 On March 21, 2022, the Sears answered the complaint, which is attached as **Exhibit Y2**.

23 Also on March 21, 2022, the Sears filed their cross-complaint against the Plaintiffs, which is
24 attached as **Exhibit Z1**. The cross-complaint requested declaratory and injunctive relief to establish
25 and enforce an irrevocable license and/or equitable easement.

26 On April 27, 2022, Plaintiffs and Cross-Defendants answered the Sears' cross-complaint,
27 raising, principally, affirmative defenses of the statute of frauds, revocation of license, no
28

consideration, Civil Code § 1468, and failure to pay property taxes. The answer is attached as **Exhibit Z2**.

ARGUMENT

A. The Sears Will Prevail as to Their Causes of Action and Affirmative Defenses As They Have an Irrevocable License as to the Subject Land

Like an easement, licenses are rights that allow the holder to enter and use the land of another. (*Jenson v Kenneth I. Mullen Co.* (1989) 211 Cal.App.3d 653, 657). Licenses are not interests in land, however, and, thus, are not subject to the Statute of Frauds (Civil Code § 1624). (*Eastman v Piper* (1924) 68 Cal.App. 554, 560; see also Restatement: Servitudes §2.9.)

“Permission sufficient to establish a license can be express or implied. (Citation).... A license may also arise by implication from the acts of the parties, from their relations, or from custom. When a landowner knowingly permits another to perform acts on his land, a license may be implied from his failure to object. (Citation). In other words, ‘a license may result from circumstances as, for instance, where a person has continued in possession for such a length of time and under such circumstances that objection might well have been expected had there been no assent. (Citations).’” (*Richardson v. Franc* (2015) 233 Cal.App.4th 744, 755.)

Although licenses are generally revocable, the California Supreme Court held in seminal case *Stoner v. Zucker* (1906) 148 Cal. 516 (“**Stoner**”) that licenses can become **irrevocable**. Specifically, the Supreme Court found and held that:

Plaintiff pleaded that defendants had entered upon his land in 1899 under license, and had constructed thereon and thereover a ditch for the carrying of water; that he never conveyed or agreed to convey to the defendants any right of way, easement, or interest in the land for the purpose, and their right to construct and maintain the ditch rested wholly upon this license; that in 1900 he served notice upon them that the license to construct and operate the ditch had been revoked and abrogated by him.... Plaintiff therefore prayed that the defendants be adjudged trespassers and be enjoined from the use of the ditch or from in any manner entering upon the lands of the plaintiff to repair or otherwise maintain it....

So construing the findings, the question is squarely presented as to the revocability or nonrevocability of an executed parol license, whose execution has involved the expenditure of money, and where, from the very nature of the license given, it was to be continuous in use....

The recognized principle, therefore, is that where a licensee has entered under a parol license and has expended money, or it is equivalent in labor, in the

1 **execution of the license, the license becomes irrevocable, the licensee will have**
2 **a right of entry upon the lands of the licensor for the purpose of maintaining**
3 **his structures, or, in general, his rights under his license, and the license will**
4 **continue for so long a time as the nature of it calls for.**

5 For these reasons the judgment and order [in favor of defendants (licensees)]
6 appealed from are affirmed.

7 (*Stoner*, at 517-520 (emphasis added).) In *Miller & Lux v. Kern County Land Co.* (1908) 154 Cal.
8 785, (“**Miller**”) 789, the Supreme Court expressly and intentionally reaffirmed its holding in *Stoner*.

9 In *Cooke v. Ramponi* (1952) 38 Cal.2d 282, (“**Cooke**”) the California Supreme Court further
10 elaborated on its ruling in *Stoner*, stating:

11 As stated in *Stoner v. Zucker*, 148 Cal. 516, at page 520, it is well settled in this
12 state that "where a licensee has entered under a parol license and has expended
13 money, or its equivalent in labor, in the execution of the license, the license
14 becomes irrevocable, the licensee will have a right of entry upon the lands of the
15 licensor for the purpose of maintaining his structures, or, in general, his rights under
16 his license, and the license will continue for so long a time as the nature of it calls
17 for."

18 **The principal basis for this view is the doctrine of equitable estoppel; the**
19 **license, similar in its essentials to an easement, is declared to be irrevocable to**
20 **prevent the licensor from perpetrating a fraud upon the licensee.** (Citations).

21 (*Cooke*, at 286 (emphasis added).) See also Restatement: Servitudes 2:10.

22 Because an irrevocable license gives the license rights to the licensor’s property and cannot
23 be revoked, “An irrevocable license ... is for all intents and purposes the equivalent of an easement.”
24 (*Barnes v Hussa* (2006) 136 Cal.App.4th 1358, 1370; see also *Richardson v. Franc* (2015) 233
25 Cal.App.4th 744, 751 and Restatement: Servitudes §1.2(4) and Comment g.)

26 Moreover, a subsequent purchaser of a property subject to an irrevocable license who
27 purchases with notice is bound by the irrevocable license. (See *Noronha infra* and *Richardson infra*.)

28 In *Noronha v. Stewart* (1988) 199 Cal.App.3d 485 (“**Noronha**”), which is a case very similar
to the facts at hand, the defendants had purchased a house in a newly constructed residential
subdivision; the plaintiffs later purchased the home next door. (*Noronha*, at 487.) Shortly after
moving in, the defendants contacted the apparent owner of the adjacent lot (“**Jett**”) “about building
a wall between their properties.” (*Id.*) “Jett, along with two partners, had previously owned all the

1 land in the undeveloped subdivision, but sold it to the developer who constructed the houses.”
2 (*Noronha*, at 488). At that time, Jett was under contract for the adjacent property. (*Id.*)

3 The *Noronha* court found that, “Neither Jett nor the defendants wished to build a wall
4 following the properties’ actual boundaries along the bottom of the slope, however, as this would
5 provide no privacy to either lot.... Jett, therefore, agreed to allow defendants to construct the wall
6 along the top of the slope, thus leaving the slope on defendants’ side of the wall and encroaching on
7 lot 12 from about four inches in the front to eight feet in the back.” (*Noronha*, at 488). “After the wall
8 was constructed, Jett obtained legal title to the property, but held the lot only five days before selling
9 it to plaintiffs. Eight months after moving in, plaintiffs demanded that defendants tear down the wall
10 at their own expense and restore the slope to them.” (*Id.*)

11 Citing *Cooke*, the *Noronha* Court ruled the plaintiffs were bound by Jett’s oral promise to
12 defendants on the basis of “after acquired title” and the fact that “Jett repeatedly testified that he
13 informed plaintiffs [that the wall was not on the property line] and showed them the location of the
14 actual boundary.” (*Noronha*, at 490-491.)

15 Moreover, the *Noronha* Court ruled that the defendants had an irrevocable license to build
16 and maintain the wall and for the exclusive use of the encroached upon land of plaintiffs. (*Noronha*,
17 at 491 (“We conclude that the trial court erred in determining that no irrevocable license existed.”))

18 The *Noronha* Court further held that there were no restrictions on defendants’ rights as to the
19 wall and the encroached land (other than the height of the wall) as:

20 Jett stated that he had granted defendants a right to make use of [the encroached
21 land], and that there were no other restrictions in their agreement. No conditions
22 were expressed limiting the use that could be made of the encroached property,
23 other than the height of the wall.... No restrictions were made on the landscaping
24 of the slope and the agreement as to the height of the wall is insufficient to impose
a limitation on the structures or foliage that may be placed on the encroached
property.
(*Noronha*, at 491-492.)

25 The *Noronha* Court then ruled that defendants-licensees’ irrevocable license – just as with an
26 easement – **would be conveyed to defendants-licensees’ successors-in-interest upon sale of the**
27 **defendants-licensees’ property.** (*Noronha*, at 487.)

28 In a similar case, *Richardson v. Franc* (2015) 233 Cal.App.4th 744 (“***Richardson***”), the First

1 District found and held that an irrevocable license existed where:

2 **Over a 20-year period**, both respondents and their predecessors in interest
3 maintained landscaping, irrigation, and lighting appurtenant to both sides of the
4 road within the easement area **without any objection**.

5 In determining the essential terms of the irrevocable license, the court also relied
6 on the 20-year course of conduct of the parties and their predecessors with respect
7 to the installation and maintenance of the landscaping, irrigation and lighting within
8 the easement. As it was empowered to do, the trial court exercised its broad
9 equitable discretion and fashioned relief to fit the specific facts of this case. The
10 court found **“by a preponderance of the evidence that [respondents] hold an
11 irrevocable parol license for themselves and their successors-in-interest to
12 maintain and improve landscaping, irrigation, and lighting within the 30' wide
13 and 150' long easement.”...**

14 In accordance with this case law, the trial court properly characterized the effect of
15 its decision, stating appellants “continue to have a fee title interest in the easement
16 area ... and now will be subject to, and encumbered by, the irrevocable parol
17 license.” Far from granting respondents “an exclusive easement amounting to fee
18 title” as appellants' claim, **the court's decision simply maintains the status quo
19 that has existed for over 20 years and was obvious to appellants when they
20 purchased the property a decade ago.**

(Richardson, at 747-759 (emphasis added).)

21 In its “Neighbor Disputes: Law and Litigation” publication, the CEB concludes, citing *Cooke*,
22 *Richardson*, and *Noronh supra*, that, “the right to maintain a fence on a neighbor's property may arise
23 when oral permission to construct the fence has been converted into an irrevocable license by the
24 licensee's substantial expenditures in reliance on the license, such as construction of the fence itself.”
25 Neighbor Disputes: Law and Litigation (Cal. CEB 2022) §5.11.

26 Here, Tino orally agreed that the Sears could enter the Subject Land, build their wood fence
27 along Tinos' Extended Fence, and use the Subject Land thereafter, which would obviously and
28 impliedly give the Sears continuous, exclusive, and uninterrupted entry, use, access, enjoyment, and
improvement of the Subject Land as if the Sears owned the Subject Land, thereby making, effectively,
Tino's Extended Fence the southern boundary of the Cynthia Property.

Moreover, Tino also clearly impliedly agreed to the same as Tino never once objected to the
Sears' continuous, exclusive, and uninterrupted entry, use, access, enjoyment, and improvement of
the Subject Land over the past 30 years, even though Tino lived nearby, the Sears children visited his
Ranch, he continuously owned the Knowles Property, the melaleuca tree and honeysuckle hedge have

1 grown beyond the height of the fences, and it is possible to see the Subject Land from the Knowles
2 Property.

3 In reasonable reliance on Tino's express and implied permission, the Sears expended a
4 substantial amount of money, time, and labor in maintaining the Subject Land or making
5 improvements on the same. For instance, the Sears built their wooden fence along Tino's Extended
6 Fence, installed an irrigation system, a jacuzzi on a concrete slab, and a masonry garden bed, and
7 planted a melaleuca tree, a honeysuckle hedge, and other plants in the Subject Land. And, in total, the
8 Sears estimate that over the past thirty years they have spent no less than \$25,000.00 to buy, install,
9 plant, and build the improvements and another \$10,000.00 to maintain and repair the same in the
10 Subject Land. Subject to inflation, this combined \$35,000.00 figure well exceeds \$50,000.00. This
11 does **not** include the value of the Sears' labor, which is considerable since Mr. Sears is a California
12 licensed general contractor.

13 Since the Plaintiffs and Cross-Defendants bought the Knowles Property with knowledge of
14 the Sears' unrecorded irrevocable license, they are bound by the same.

15 Any revocation of Tino's oral and implied permission regarding the Subject Land would not
16 only result in the loss of use of the land that the Sears, their children, and their family and friends
17 have enjoyed for almost three decades, but also incur tens of thousands of dollars in cost, expense,
18 and losses to the Sears. Further, Plaintiffs and Cross-Defendants have been able to develop the
19 Knowles Property with an accessory dwelling unit, and, like Tino, have been able to rent the Knowles
20 Property and the accessory dwelling unit without the need for use or access to the Subject Land. Thus,
21 a greater injustice would result to the Sears if the permission given by Tino for almost thirty years
22 was revoked than if Plaintiffs and Cross-Defendants had to accept the status quo, which they had full
23 knowledge of before buying the Knowles Property.

24 Based on the foregoing, the Sears and their successors-in-interest have at a minimum, an
25 irrevocable license to continuous, exclusive, and uninterrupted entry, use, access, enjoyment, and
26 improvement of the Subject Land. Thus, the Sears will prevail as to their claims and affirmative
27 defenses of irrevocable license and estoppel.

28 **B. The Plaintiffs' Causes of Action and Affirmative Defenses All Fail**

1 **a. The Plaintiffs’ Trespass and Private Nuisance Claims Fail Due to the Sears’**
2 **Irrevocable License**

3 To establish a claim for trespass, the Plaintiffs must prove, *inter alia*, that “they did not give
4 permission for the entry or the entry exceeded the permission given.” 1 CACI 2000 (2021). Thus,
5 “Where there is a consensual entry, there is no tort, because lack of consent is an element of the
6 wrong.” *Civic Western Corp. v. Zila Industries, Inc.* (1977) 66 Cal.App.3d 1, 16–17.

7 To establish a claim for private nuisance, the Plaintiffs must prove, *inter alia*, “That they did
8 not consent to the conduct”. 1 CACI 2000 (2021). As with trespass, where there is consent, such as
9 in the case of an irrevocable license, there is no tort because lack of consent is an element of the
10 wrong. *Department of Fish & Game v. Superior Court* (2011) 197 Cal.App.4th 1323, 1352;
11 (*Bomberger v. McKelvey* (1950) 35 Cal.2d 607, 619.)

12 Here, as noted above, (1) the Sears have an irrevocable license (consent) that Plaintiffs cannot
13 revoke and (2) the Sears’ entry and use was in conformance with the express and implied permission
14 given by Tino.

15 Consequently, Plaintiffs’ claims for trespass and private nuisance fail as the Sears’ entry and
16 use was consensual.

17 **b. Plaintiffs’ Quiet Title and Ejectment Claims Fail Due to the Sears’**
18 **Irrevocable License**

19 Quiet title is a request for the court “to establish title against adverse claims to real or personal
20 property or any interest therein.” Code of Civil Procedure § 760.020.

21 Ejectment is a request for the court to remove a person and their possessions from real
22 property.

23 Here, the Plaintiffs seek to have the court establish that the Sears have no rights to the Subject
24 Land and that the court must order the removal of the Sears and their possessions from the same.

25 However, the Sears have an irrevocable license to the Subject Land and, thus, have the right
26 to continuous, exclusive, and uninterrupted entry, use, access, enjoyment, and improvement of the
27 Subject Land.

28 Thus, Plaintiffs’ quiet title and ejectment claims fail.

1 **c. The Plaintiffs' Affirmative Defenses All Fail**

2 As noted above, licenses are not subject to the Statute of Frauds (Civil Code § 1624). (*Eastman*
3 *v Piper* (1924) 68 Cal.App. 554, 560; see also Restatement: Servitudes §2.9.) Thus, Plaintiffs' statute
4 of frauds defense fails. Similarly, Plaintiffs' Civil Code § 1468 defense also fails. And since a license
5 does not require the payment of property taxes or consideration, Plaintiffs' failure to pay property
6 taxes and no consideration defenses also both fail.

7 Moreover, as held in *Noronha* and *Richardson*, Plaintiffs are bound to the irrevocable license
8 as they purchased the Knowles Property with notice of the irrevocable license. And, as held by the
9 California Supreme Court in *Stoner*, *Miller*, and *Cooke*, irrevocable licenses cannot be revoked. Thus,
10 Plaintiffs' revocation of license defense fails.

11 **CONCLUSION AND DEMAND**

12 The Sears will prevail in this litigation as to both their claims and their affirmative defenses;
13 the Plaintiffs and Cross-Defendants will lose. The Sears have spent tens of thousands of dollars in
14 this litigation and do want to spend tens of thousands – if not hundreds of thousands – of dollars more
15 litigating this case. For that reason, the Sears offer to settle this dispute as follows:

- 16 • The parties drafting and executing a mutually agreeable settlement and release
17 agreement;
- 18 • The parties drafting, executing, and recording a lot line adjustment granting the
19 Subject Land to the Sears;
- 20 • The parties dismissing with prejudice their Complaint and Cross-Complaint;
- 21 • The removal of the diseased pine tree on the Knowles Property and the removal
22 of the honeysuckle hedge on the Knowles Property abutting Tino's Extended
23 Fence, which is damaging the Sears' wooden fence;
- 24 • The installation of new 8' fence boards on the Knowles Property's side of the
25 Sears' wooden fence to match Plaintiffs' new wood fencing; and
- 26 • The payment by the Sears to the Plaintiffs of \$5,000.00 within seven (7)
27 calendar days of dismissal of Complaint and Cross-Complaint.
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