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9 Hirsch and Charity Hirsch, Morris W. Hirsch
10 and Charity Hirsch as Trustees of the Morris W.
11 Hirsch and Charity Hirsch Living Trust dated
12 November 22, 1999

13 **SUPERIOR COURT - STATE OF CALIFORNIA**

14 **COUNTY OF MENDOCINO - UNLIMITED JURISDICTION**

15 ANDERSON VALLEY LAND TRUST,)
16 INC.)

17 Plaintiff.)

18 vs.)

19 CHRISTOPHER TERENCE ROWE;)
20 MORRIS W. HIRSCH AND CHARITY)
21 HIRSCH as TRUSTEES OF THE)
22 MORRIS W. HIRSCH AND CHARITY)
23 HIRSCH LIVING TRUST DATED)
24 November 22, 1999, AND DOES 1-10)

25 Defendants.)
26)
27)
28)

No. SCU-K-CVG-17-69470

DEFENDANTS' TRIAL BRIEF

DATE: December 17, 2018

TIME: 9:30 a.m.

JUDGE: Hon. Jeanine Nadel

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1 **I. Parties and Their Counsel**

2 Defendants Christopher Terence Rowe, and Morris W. Hirsch and Charity Hirsch, Trustees of
3 the Morris W. Hirsch and Charity Hirsch Living Trust dated November 22, 1999 (collectively
4 "Owners"), are represented by Peter De Golia of Clement, Fitzpatrick & Kenworthy. Plaintiff
5 Anderson Valley Land Trust, Inc., ("AVLT" or "Easement Holder") is represented by Brian Momsen
6 of Carter, Momsen & Knight.

7 **II. Preliminary Statement**

8 This case involves a Conservation Easement granted by the Owners to AVLT in 2005. In
9 this action AVLT asks this court for three things: (1) to order Owners not use vehicles off road for
10 recreational purposes; (2) to prohibit Owners from advertising the Property for rent until the
11 Owners comply with all County Codes and Regulations; and (3) to interpret the term "transient
12 hospitality" as it applies to the Owners' future use of the Property. In response, the Owners assert
13 that (1) Owners do not use vehicles off-road for recreational purposes; (2) that advertising the
14 Property for rent is not a violation of the Conservation Easement and that AVLT does not have the
15 right to enforce County Codes and Regulations; and (3) the term "transient hospitality" is clear on
16 its face.

17 **III. Facts**

18 Morris W. Hirsch and Charity Hirsch, Trustees of the Morris W. Hirsch and Charity Hirsch
19 Living Trust dated November 22, 1999 ("Hirsch") own a 66% interest in the property located at
20 9625 Peachland Road, Boonville, CA 95415 (the "Property"). Christopher Rowe's mother, Briana
21 Burns ("Burns"), was a co-owner of the Property before her death on February 15, 2017. Her 34%
22 ownership interest has been distributed from her trust to her son, Christopher Rowe ("Rowe" or
23 "C.T."). Burns and Hirsch purchased the 115-acre Property in 1970 and used the Property for
24 personal, residential, agricultural, transient hospitality, and recreational purposes. Prior to Hirsch
25 and Burns's purchase of the property, previous owners had commercially logged the property.

26 Burns and Hirsch wanted to discourage the clear-cut logging trend of prior owners by
27 protecting the redwoods and the creek located at the property, thus minimizing sediment in the
28 creek and preserving the redwoods. On October 25, 2005, Burns and Hirsch executed a Grant

1 Deed of Conservation Easement (öEasementö) and Baseline Report with AVLТ, whereby Burns
2 and Hirsch granted AVLТ a conservation easement over the property.

3 Beginning on or around April 2014, Burns and Hirsch contacted AVLТ to clarify some of
4 the provisions in the Easement, and to possibly amend those provisions that needed clarification.
5 Ever since, there has been a dispute between the parties as to what is and what is not permitted on
6 the property pursuant to the Easement. The Owners have responded to requests AVLТ has made
7 regarding conformance with the Easement. Otherwise, AVLТ has ignored requests by the Owners
8 to make improvements to the Property allowed by the Easement. As to the alleged violations that
9 are the subject of this lawsuit, AVLТ did not advise the Owners of these alleged violations in
10 writing until the Owners were served with the complaint.

11 On numerous occasions, Burns, Hirsch and now Rowe, requested AVLТ approve work on
12 the Property proposed by the Owners, all allowed under the terms of the Easement.
13 Unfortunately, at least since September, 2015, AVLТ has stated that "...(N)o Board member
14 should have any discussions with Briana, Charity, Morris or C.T. about your easement...". When
15 AVLТ did make a request to the Owners regarding matters AVLТ believed were a violation of the
16 Easement, the Owners have responded to those requests. Specifically, AVLТ demanded the
17 Owners move a motor home being utilized by the Hirsch's grandson for camping onto a road on
18 the Property as AVLТ considered it to be a vehicle in öuseö off road for recreation. The Owners
19 moved the motor home onto a road on the Property as requested. Thereafter, AVLТ stated the
20 Owners could not östor(e) junked vehiclesö on the Property (which the easement does forbid),
21 even though the motor home was in running condition and often being used, and demanded it be
22 removed altogether. In an effort to appease AVLТ, the Owners removed the motor home and have
23 attempted to continue to communicate with AVLТ to address issues the Owners have relating to
24 the Easement.

25 In the Fall of 2016, and at the request of AVLТ, the Owners addressed three other
26 demands by AVLТ which included filling a small hole in a field, removal of an old metal tank and
27 trailer which predated the easement by decades, and enlargement of a pond culvert. A discussion
28 ensued whereby the parties attempted to resolve, by amendment to the easement, various issues

1 relative to the Easement such as the use of vehicles for camping and the use of the property by
2 guests (ötransient hospitalityö).

3 However, the amendment proposed by AVLТ imposed limitations on camping-an activity
4 that the Easement does not even address-as the Owners have always considered camping in all
5 forms to be allowed. For example, AVLТ proposed that when a campsite was not being actively
6 camped in, it must be removed; not just the tent taken down but all traces of human activity
7 removed. Camping gear was not even to be stored on the property. Further, AVLТ sought strict
8 limits on how many people could camp on the Property.

9 As to the matters complained of in the complaint, the Owners dispute that they have
10 violated the terms of the Easement.

11 The Easement states, at paragraph 9, page C-2 of Exhibit C: "The use of motorcycles, all
12 terrain vehicles or any other type of motorized vehicle is prohibited except on the permanent roads
13 as identified in the Report, providing however, that vehicles may be used off the roads for
14 permitted forestry, agricultural, animal husbandry or restoration uses." The Owners do use a golf
15 cart to get around the 115-acre property, as it is much lighter than a truck and less damaging to the
16 property. The golf cart is used as a utility vehicle. It does not have a place for golf clubs. It has a
17 utility trailer attached to it for transporting equipment necessary to perform the functions allowed
18 on the Property by the Easement. AVLТ contends that it is a recreational vehicle and therefore not
19 permitted. C.T. will testify that the golf cart, when taken off-road, is for property maintenance and
20 work purposes as provided for in the Easement, not for recreational purposes.

21 And as noted above, AVLТ never advised the Owners, in writing, as required by the
22 Easement, that use of the golf cart was considered off-road recreational use of a vehicle. Further,
23 AVLТ did not refer the matter to mediation prior to filing suit as required by the Easement.

24 The Owners posted on Facebook that cabins and land were for rent on the Property, as
25 such activity is allowed by the Easement as "transient hospitality." Even if this was considered an
26 advertisement, the act of advertising is not a violation of the Easement. No one responded to this
27 öad.ö Again, such use is nonetheless allowed under the terms of the Easement and advertising
28 does not violate the Easement. AVLТ asserts that the Owners must obtain County Permits prior to

1 such use. While it may be true that in some instances such permits are required, enforcement of
2 that requirement is under the purview of the County and not AVLT. The Easement does not grant
3 AVLT the right to enforce County Codes and Regulations.

4 Further, AVLT failed to advise the Owners, in writing, as required by the Easement, that
5 AVLT required County Use Permits prior to the Owners advertising the Property for transient
6 hospitality and did not refer the matter to mediation prior to filing suit as required by the
7 Easement.

8 Despite not communicating with the Owners and failing to advise the Owners of the issues
9 complained of in the complaint, AVLT filed and served the subject lawsuit in the summer of 2017.
10 They did not provide the owners with prior notice of the alleged violations as required in the
11 Easement. They did not request mediation as required in the Easement. The owners do not
12 believe they are in violation of any terms of the Easement.

13 Of particular note, on February 6, 2018, AVLT prepared and sent to the Owners its annual
14 monitoring report, arising from an inspection by AVLT of the property that occurred on December
15 9, 2017. In that report, AVLT does not note any violations by the owners and states there were no
16 significant changes or alterations observed since its last report a year earlier.

17 Owners ask this court to determine that the use of the golf cart, off road or otherwise, is not
18 a violation of the Easement, that AVLT does not have the right to enforce County Codes and
19 Regulations and that "transient hospitality" as set forth in the Easement allows Owners to rent
20 camp sites and cabins for short term rentals.

21 **IV. Legal Analysis**

22 The Easement is defined by the agreement of the parties. And no dispute exists as to a
23 number of fundamental issues. For instance, the parties agree the Easement prohibits motorized
24 vehicles from being driven off the roads recreationally. The parties agree the Easement does not
25 prohibit commercial transient hospitality in the residences or existing cabins, that the cabins are
26 not residences and cannot be used, rented or lived in as permanent residences and that residences
27 are restricted to three single family houses. Finally, the parties agree that the reserved right for
28 transient hospitality is not an open-ended allowance to develop the property.

1 To the extent they cannot agree, Civil Code Section 815 et. seq. provides some guidance.
2 "... ÷(C)onservation easementö means any limitation in a deed, will, or other instrument in the
3 form of an easement, restriction, covenant, or condition, which is or has been executed by or on
4 behalf of the owner of the land subject to such easement and is binding upon successive owners of
5 such land, and the purpose of which is to retain land predominantly in its natural, scenic,
6 historical, agricultural, forested, or open-space condition." Civil Code Section 815.1. Generally, a
7 conservation easement is a legal agreement between a landowner and an eligible organization that
8 restricts future activities on the land to protect conservation values. The easement keeps property
9 in private hands and on the tax rolls, and it protects the specific conservation values of a property
10 according to the wishes of the landowner and the easement holder. Each easement's restrictions
11 are tailored to the particular property, to the interest of the landowner, and to the policies and
12 purposes of the easement holder.

13 The specific rights a property owner gives up and retains when granting a conservation
14 easement are spelled out in the easement document. The owners and the prospective easement
15 holder first identify the conservation values of the property, and then decide which uses and
16 activities will be allowed and those that need to be restricted. In conservation easement litigation,
17 courts refer to the language in the easement to determine whether a violation has occurred. If an
18 easement does not have clear and precise language, the court will try to determine the intent of the
19 parties.

20 "All interests not transferred and conveyed by the instrument creating the easement shall
21 remain in the grantor of the easement, including the right to engage in all uses of the land not
22 affected by the easement nor prohibited by the easement or by law." Civil Code Section 815.4.
23 Some easements prohibit all activities except for the continuation of current uses. Other
24 agreements, such as the subject Easement, allow for a variety of uses that have been determined to
25 be appropriate by both the owner and easement holder. Most easements allow for land uses that
26 are not harmful to the conservation values of the land, or limit activities that might be detrimental.
27 For instance, easements often designate specific sites for future houses and balance the owner's
28 need for residential use with the public interest in protecting the property's conservation resources.

1 AVLT's first cause of action is for Declaratory Relief. But it asks the court to interpret the
2 Easement in a manner that changes the nature and extent of activities on the property from the
3 agreed terms of the Easement as drafted. The second cause of action asks the court for injunctive
4 relief to mandate the cessation of alleged ongoing violations of the Easement by the Owners,
5 specifically using vehicles for recreational purposes off road and advertising the property for rent.

6 The Owners contend that the language contained in the Easement is clear and was
7 purposely drafted not to severely restrict the impact of human activity but to continue to allow and
8 further the recreational, sustainable agriculture, and homesteading type of use of the Property,
9 while limiting or restricting clear-cut logging, deforestation for mono-crop agri-business type
10 development. The entire property has been logged, farmed, and impacted by human activity for
11 over 100 years. The Easement was written to continue to allow those traditional uses.

12 What the AVLT is having a hard time recognizing is that many impacts of the Property
13 that affect the conservation values are allowed and encouraged. Building a third house or roads
14 that cover 5% of the Property, activities allowed under the Easement, will obviously have an
15 impact and an effect on the Property. AVLT and the Owners realized this when they created the
16 Easement, even if the current AVLT board does not. Other identified, allowed uses, will also
17 impact the property. Transient hospitality will certainly have an effect on the property. 100 sheep
18 will impact the soil and grassland ecosystem. Vehicles driving on the land for work and
19 maintenance will create some tracks. All these impacts are clearly allowed by the Easement. The
20 AVLT seeks to prevent impacts to the Property that are agreed to in the Easement as being
21 allowable impacts. When the document was signed by both parties, both parties agreed and were
22 aware that this Property was a working farm and ranch and the described impacts were desired by
23 both parties so that the Property could continue to be a viable and flexible source of income for the
24 Owners.

25 A contract must be so interpreted as to give effect to the mutual intention of the parties as
26 it existed at the time of contracting, so far as the same is ascertainable and lawful. (Civil Code
27 Section 1636). The language of a contract is to govern its interpretation, if the language is clear
28 and explicit, and does not involve an absurdity. (Civil Code Section 1638). When a contract is

1 reduced to writing, the intention of the parties is to be ascertained from the writing alone, if
2 possible. A contract may be explained by reference to the circumstances under which it was
3 made, and the matter to which it relates. (Civil Code Section 1647). However broad may be the
4 terms of a contract, it extends only to those things concerning which it appears that the parties
5 intended to contract. (Civil Code Section 1648). In interpreting a contract, the objective intent,
6 as evidenced by the words of the contract is controlling. We interpret the intent and scope of the
7 agreement by focusing on the usual and ordinary meaning of the language used and the
8 circumstances under which the agreement was made. (Lloyd's Underwriters v. Craig & Rush,
9 Inc. (1994) 26 Cal.App.4th 1194, 1197-1198 [32 Cal.Rptr.2d 144], internal citations omitted.). If
10 the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the
11 sense in which the promisor believed, at the time of making it, that the promisee understood it.
12 (Civil Code Section 1649). All things that in law or usage are considered as incidental to a
13 contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are
14 expressly mentioned therein, when all other things of the same class are deemed to be excluded.
15 (Civil Code Section 1656).

16 The above rules of contract interpretation preclude AVL T's effort to change the Easement
17 to restrict the uses that were agreed to in the Easement. Through this litigation, AVL T seeks to
18 gain more power and control than the Easement granted them. While other AVL T easements may
19 seek to protect wilderness and include language such as "freeze development," "preserve
20 undeveloped land," "minimize human impact" and the like, the subject Property, which has long
21 been a ranch and been used for commercial purposes, has very little wilderness, having been
22 logged and farmed since the early 1900s. As a result, the subject Easement does not include
23 similar language freezing development. Quite the opposite: the Easement here expressly allows for
24 many human activities, including, within limits, commercial activity such as farming, livestock,
25 transient hospitality, road-building, and even logging.

26 Despite its desire, AVL T cannot change the terms of the Easement without agreement from
27 the Owners. The Easement, at Section 13, page 11, allows an amendment only through agreement
28 by the parties: "If circumstances arise under which an amendment to or modification of the

1 Easement would be appropriate, Grantor and Grantee may jointly amend this easement..."

2 AVLT is motivated by two central principles: on an altruistic level, they see themselves as
3 saviors of the environment, and simply cannot countenance that the subject Easement permits
4 many of the things it does. On a more base level, recent Board Members of AVLT simply do not
5 like C.T. Rowe, who recently acquired his mother's interest in the property, and his desire to use
6 the property as it has been used historically and as allowed by the terms of the Easement. They
7 detest the idea of campers and they want to eliminate anything that is not classy enough and up to
8 their personal standards of land use. They consider camping in a tent or motor home somewhat
9 lowbrow; the presence of an outhouse or an old propane tank offends their sensibilities. C.T.
10 installing a pond or a road on a shoestring budget, doing most of the work himself with a bobcat
11 rather than hiring a landscape architect or engineer and crew, is anathema and not the way they
12 want their properties kept up. AVLT's solution is to say no to every request the Owners present,
13 and when the Owners point out that the Easement expressly permits the activity in question,
14 AVLT asserts a standard of environmental and professional review that far exceed County
15 standards and make it impossibly expensive for the Owners to proceed. Activities fully permitted
16 by the Easement AVLT defines as environmentally harmful (despite having presented no evidence
17 of the alleged harm) and refuse permission or claim a violation. AVLT has now filed this action
18 to further restrict use despite those uses being allowed by the Easement. The Owners simply want
19 AVLT to respect the fact that the Easement permits many human activities. AVLT's oversight
20 should involve the evaluation of environmental impacts and preservation, but must also be done
21 relative to the agreed use as set forth in the Easement, not by a standard independent of the
22 Easement.

23 The parties bargained for the terms of the Easement and the language in the Easement is
24 clear as to its intent. The Owners have no intent of using the property for an improper purpose. As
25 to each specific claim asserted in the complaint, the Owners respond as follows:

26 **A. Use of the Golf Cart:**

27 AVLT alleges, at page 7, paragraph 24 of their complaint that the Owners have
28 been using golf carts and other vehicles off-road on the Property for Recreational purposes. The

1 Owners do use a golf cart on the Property. However, it is not being used recreationally. Instead, it
2 is being used for the purposes as identified and allowed in the Easement to service the Property.
3 Section I.9 of Exhibit C of the Easement states "[t]he use of motorcycles, all terrain vehicles or
4 any other type of motorized vehicle is prohibited except on the permanent roads as identified in
5 the Report, providing however, that vehicles may be used off the roads for permitted forestry,
6 agricultural, animal husbandry or restoration uses."

7 The golf cart does not have a place to store golf clubs. It is used to tow a utility
8 trailer to hold tools and materials for forestry, agricultural, animal husbandry and restoration uses.
9 And it is used off road for these allowed uses under the Easement. Simply because the vehicle is a
10 golf cart does not make its use off-road recreational. The Owners do not use any other vehicles
11 off-road recreationally on the Property. AVL T can produce no evidence, because none exists, that
12 the Owners have used a vehicle off-road for any purpose other than that allowed by the Easement.

13 AVL T did not notify the Owners that the golf cart "and other vehicles" as set forth
14 in the complaint were being used recreationally and were, in AVL T's belief, violating the
15 Easement, nor did AVL T request mediation prior to filing the complaint.

16 **B. The Right of AVL T to Enforce County Codes and Regulations:**

17 AVL T contends that the Easement allows AVL T to enforce County Codes and
18 other applicable governmental regulations and requests this court enjoin the Owners from
19 advertising the property and cabins for rent without first obtaining all necessary permits. In its
20 prayer, AVL T seeks to prohibit the Owners from advertising the property and cabins for rent
21 without first obtaining the required use permits for transient hospitality use from Mendocino
22 County. See complaint, p. 8 lines 20-23.

23 The owners, as is their right, posted a page on Facebook stating "cabins and land
24 are available for rent." However, no cabins or land have been rented as a result of this posting.
25 While the owners fully agree that they are subject to governmental regulations, and further agree
26 that they have, when required, complied with all governmental regulations, they do not believe,
27 nor does the Easement state, that AVL T has the right to enforce governmental codes and
28 regulations. Nothing in the Easement grants AVL T this right. And certainly advertising for

1 transient hospitality, a use clearly allowed in the Easement, is not a violation of the Easement.

2 It is not necessary, and generally not a good idea, to incorporate local land use
3 regulations by reference into a conservation easement. Doing so can create confusion, and may
4 imply that the Easement holder will enforce those regulations on the property. Even AVLT has
5 acknowledged they do not have the right to enforce governmental regulations by stating so in their
6 February 24, 2015 letter: "It is important for all easement holders to understand that the AVLT
7 does not set nor enforce County policies about land use."

8 AVLT holds 27 easements in Mendocino County. Since its formation in the
9 1980s, AVLT has not issued a notice of violation to any of the owners subject to those easements
10 let alone sued an owner for a violation. Indeed, at least two AVLT Board Members whose
11 property is subject to an AVLT easement currently are in violation of their easements yet have not
12 received a notice of violation from AVLT. Barbara Goodell is allowing tenants to reside in an
13 unpermitted structure on her property. This is a violation of County code. In addition, pursuant to
14 the terms of Ms. Goodell's easement, the residents of this unit must be over the age of 55. They
15 are not. Board member Steve Snyder stores an RV on his property, in precisely the same manner
16 that the Owners stored an RV on their property. Yet, AVLT earlier had sent a notice of violation
17 to the Owners in this case complaining that the RV stored on the subject property was in violation
18 of their easement and must be removed. No such notice has been sent to Mr. Snyder. In an effort
19 to appease AVLT, the Owners have complied with AVLT's request and removed the RV. The
20 RV on Mr. Snyder's property remains.

21 Finally, AVLT did not advise the Owners, in writing, of this alleged violation and
22 did not request mediation as required by the terms of the Easement prior to filing this complaint.

23 This court should deny AVLT's request to prohibit Owners from advertising the
24 property and cabins for rent without first obtaining use permits, which may not be required for
25 such activity.

26 **C. Use of the Property for Transient Hospitality:**

27 AVLT claims the Easement does not allow commercial use of the Property for
28 camping and that only the three proposed residences on the property can be used for transient

1 hospitality for vacationers or guests. Further, AVLT contends that improvements of the existing
2 cabins beyond the total size of 600 square feet for all three cabins is prohibited and that additional
3 cabins cannot be constructed for use for camping and transient hospitality.

4 This is based upon AVLT's interpretation of the language in Exhibit C and Section
5 II of the Easement, which AVLT states was intended to limit the impacts of human habitation on
6 the Property. . . (Complaint, ¶18). AVLT alleges that even though "transient hospitality" is
7 permitted in Exhibit C of the Easement, it "does not abrogate the limit on residential use or
8 sanction additional development as a recreational business for transient or temporary habitation, or
9 sanction using cabins as residences." (Complaint, ¶18). From these allegations, AVLT
10 extrapolates that the Owners seek to construct an unlimited number of cabins of an unlimited size,
11 as well as allowing campsites, and this will burden the land and would require more improvements
12 on the property.

13 Section I.3. of Exhibit C states: "Any commercial use, as defined in the Mendocino
14 County General Plan 1986, as amended, and current as of the date of the execution of this
15 Easement, of any kind is prohibited; except that Grantor reserves the right to home occupations
16 and transient hospitality, as well as agricultural use consistent with Section III below and forestry
17 uses consistent with Section IV below, when such uses are conducted in a manner that is otherwise
18 consistent with the purposes, terms and conditions of this Easement."

19 The Easement does not prohibit the building of more cabins on the property nor
20 does it prohibit camping. The Easement grants to the Owners, at page 4, Section 6 "...a right to
21 engage in or permit or invite others to engage in all uses of the Property that are not expressly
22 prohibited herein and are not inconsistent with the purpose of the Easement."

23 The Owners claim that the words mean exactly as they were intended, that the
24 Owners have the right to use the property for commercial use relating to home occupations and
25 transient hospitality. Commercial use of cabins and camping constitutes transient hospitality.

26 The Owners entered into the Easement with the understanding that "transient
27 hospitality" means family or friends may stay in cabins or camp without violating the Easement,
28 so long as the camping does not burden the land in a way that damages the conservation values of

1 the Easement. The cabins on the property are not located in residential zones and they are not
2 used as residences. Because the structures exist outside of residential zones, they are not subject
3 to residential restrictions. This is true for all non-residential structures on the property.

4 AVLT does not dispute that such use is allowed, they simply contend that the right
5 is not unlimited. The Owners have never claimed nor do they now claim the right to build an
6 unlimited number of cabins on the property nor do they contend that they have the right to rent
7 cabins as permanent residences or that they have the right to have an unlimited number of
8 campsites on the Property. The Owners simply assert, correctly, that the Easement contains no
9 limits on the number of cabins or use of the property for camping.

10 The fact is the Owners have not built cabins since creating the Easement, nor have
11 they created or rented out camping sites on the property. Limiting such use by way of this action
12 would be against the intent and purpose of the Easement. Nonetheless, the easement does not
13 prevent non-residential development and structures in non-residential zones. In fact, it allows it.

14 AVLT is seeking to limit future use by the Owners. AVLT agrees that the Owners
15 have not violated any County Codes or even that the Owners are in violation of this provision in
16 the Easement. Instead, AVLT filed suit to preclude potential future violations.

17 **D. Construction and Expansion of Roads on the Property:**

18 Finally, AVLT alleges that the Owners seek to develop new roads of unlimited size
19 on the property and that Owners disregarded Section I.12 that limits the size of roads, landings,
20 and parking areas to 5% of the Property's area. (Complaint, ¶17). This claim by AVLT is untrue
21 and unfounded.

22 Section I. 12 of the Easement allows for construction of new roads or expansion of
23 existing roads as long as such roads are limited to less than 5% of the Property's acreage.

24 The Owners have not constructed any new roads on the Property nor have they
25 expanded the existing roads. However, AVLT has failed to respond to the Owners numerous
26 requests regarding construction of new roads and expansion of existing roads that are allowed by
27 the Easement. The Owners agree that section I.12 limits roads to 5% of the Property's acreage.
28 The current roads make up less than 1% of the Property's acreage, while roads proposed by the

1 Owners constitute less than 2% of the Property's acreage, including the current, existing roads.

2 The Owners have not used off-road vehicles recreationally. The Owners do have
3 the right to advertise the property for rent and AVL T does not have the right to enforce County
4 Codes and Regulations. The Owners deny that there has been an inappropriate use of the real
5 property or that imminent development of the Property is pending. The Owners further deny a
6 claim of right to build unlimited structures, roads, cabins or campsites on the subject Property. The
7 Owners deny a claim of right to permanent residences in the form of cabins on the subject
8 Property. Finally, the Owners do have the right to construct new roads or expand existing roads as
9 long as such roads are limited to less than 5% of the property's acreage. On the other hand, while
10 the Owners have put forth an effort to limit and define cabins, campsites, and roads, all of these
11 proposals have been denied by AVL T without cause.

12 **E. Plaintiff has the Burden of Proof:**

13 AVL T has the burden of proof, as the party desiring relief must carry the burden of
14 proof thereon. Cal. Evid. Code Section 500. The burden of proof that is applicable is proof by a
15 preponderance of evidence for civil actions and applicable to contractual causes of action. *Buss v.*
16 *Superior Court* (1997) 16 Cal.4th 35.

17 AVL T will not be able to meet this burden as it cannot present testimony on many
18 of the allegations made in the suit. Most significantly, AVL T did not disclose experts and
19 therefore cannot offer testimony regarding the environmental impact of the Owners' actions and
20 activity on the land, the rules, codes, procedures, enforcement and compliance for County Codes
21 and Regulations, and the definition of "transient housing" or "off-road recreational use of a
22 vehicle."

23 As to other areas, AVL T does not have personal knowledge of the scope of
24 maintenance on the Property or the use of vehicles to perform that maintenance.

25 Finally, no development that is complained of in the complaint has occurred on the
26 property. It is speculative that such work will be performed and even if any improvements or use
27 of the Property took place no evidence exists that such improvements or use would violate any
28 conditions of the Easement.

1 **F. The Baseline Report Does not Limit Changes or Increased Use of the**
2 **Property:**

3 While Baseline documentation provides detailed information on the condition of
4 the property at the time the Easement is transferred, and may be added to when conditions change,
5 it is prepared to record the conservation resource values and contains the facts that will be used to
6 determine if any damage has resulted from a violation. Other than being used for this purpose it
7 does not constitute a part of the agreement and should not be used to limit or preclude changes or
8 increased use otherwise granted in the Easement.

9 As indicated on page 1 of the Baseline Report, the purpose of the Easement is to
10 keep the property in Ag Preserve; to preserve its historic qualities as an Italian immigrant
11 homestead which includes the restored apple drier; to prevent agribusiness/monoculture type
12 development of the property; and to restore eroded hillsides and streambed and prevent future
13 erosion by limiting logging to selective harvesting. Further, the primary conservation values of
14 the Property, as noted on page 1 of the Baseline Report, are the Property's relatively natural
15 second growth redwood/Douglas-fir forest and oak woodland ecosystems, its native grassland and
16 its diverse water resources, all of which provide important fish and wildlife habitat.

17 Further, the Owners ask the Court to confirm that improvements that existed on the
18 Property, and that still remain on the Property today, are not a violation of the Easement.

19 **G. AVLT Itself is in Breach of the Easement:**

20 Ironically, AVLT itself is guilty of breaching the Easement. If AVLT had
21 complied with the procedures set forth in the Easement, responding to the Owners' requests, and
22 notifying the Owners of violations, it is likely the disputes giving rise to this complaint would
23 have been resolved and this action avoided. Further, the Owners do not know if AVLT will
24 respond to future efforts to address development on the property. It is possible the only way the
25 Owners will know if AVLT contends they are in violation of the Easement is when the Owners are
26 served with the next lawsuit.

27 When an easement holder acquires an easement, it enters into a long term
28 relationship with a landowner. Easement holders typically develop strong, supportive

1 relationships with landowners who grant easements because both parties recognize that they are
2 partners in doing something important for the land and the community. Regular contact with the
3 landowner provides opportunities for discussion about the conservation easement, and avoids
4 potential misunderstandings.

5 Unfortunately, this relationship and reasonable process to resolve simple issues in
6 this case broke down. AVLT took an adversarial approach to dealing with the Owners evidenced
7 by the following: Since 2015, AVLT has failed to respond to the Owners' requests for
8 development of the property allowed by the Easement. Section 7, page 4, of the Easement,
9 entitled "Notice of Intention to Undertake Certain Actions; Clarification of Easement Terms"
10 requires the Owner to notify AVLT if it has a question as to whether an activity is consistent with
11 the terms of the Easement. Section 7.1, page 5 of the Easement requires AVLT to give a written
12 response with 30 days of receipt of the Owners' request.

13 In its September 9, 2015 letter to Owners, AVLT states: "The AVLT Board has
14 decided that no Board member should have any discussions with Briana, Charity, Morris, or C.T.
15 about your easement at this time." The Owners sent a letter to AVLT stating the Owners
16 sentiment that "(w)e hope the AVLT would desire to develop a positive partnership with us and
17 our heirs" (Owners letter dated December 26, 2017) and that the Owners desire "to talk through
18 and agree on the aspects of the easement that are ambiguous or in dispute" (Owners letter dated
19 December 29, 2015).

20 The Easement further provides that "unassisted consultation" should be attempted
21 before mediation and then mediation performed before a lawsuit is filed (Easement, Section 7.2).
22 Despite this, AVLT has refused to consult with the Owners and filed this lawsuit before
23 mediation.

24 AVLT also failed to give written notice of violations as required by the Easement.
25 Section 8. (a) of the Easement requires AVLT to give the Owners written notice of a violation of
26 the terms of the Easement and demand corrective action sufficient to cure the violation or
27 terminate the threat. 8.(b) states if Owner fails to begin to cure the violation within 30 days,
28 AVLT may bring an action against the Owners. AVLT did not send the required notice regarding

1 use of the golf cart, advertising, enforcement of County Codes and Regulations or future use of the
2 Property for transient hospitality.

3 Finally, AVLТ failed to request mediation of the matters in dispute. Section 7.2 at
4 page 5 of the Easement requires mediation of a dispute. No mediation occurred until after this suit
5 was filed, and only after the Owners requested mediation.

6 These three Easement requirements were ignored by AVLТ. Yet they are vital to
7 the intent and spirit of the Easement. For the Easement to work as intended, the AVLТ and the
8 Owners must act as partners in protecting the land in the specific way that the Easement
9 prescribes. For a partnership to work, both parties must acknowledge the requirements to talk and
10 work together before filing lawsuits. The current AVLТ board has ignored that part of the
11 Easement obligating AVLТ to perform, yet has sued the Owners, claiming the Owners have
12 breached the Easement. The mandate to communicate with Owners cannot be ignored in favor of
13 legal action. The AVLТ board's demands for injunctive relief and easement interpretation only
14 fits the current Board's personal views of land use and does not reflect the terms of the Easement.
15 This new Board cannot and must not change the wording and intent of an Easement, so as to
16 reinterpret the Easement to fit a more restrictive current goal. All conservation easements in
17 Mendocino County will be negatively affected if the AVLТ is permitted to ignore easement
18 requirements that directly apply to them.

19 An easement holder should have every intention of resolving a possible violation as
20 amiably as possible. In the majority of instances, minor violations can be resolved quickly and
21 without rancor. A voluntary, negotiated resolution to a violation is the most common, and highly
22 preferred, solution. Landowners are often willing to voluntarily respond to reasonable requests
23 made by the easement holder or be given an opportunity to present their position on the issue. An
24 easement holder should pursue this route until it is clear that it is not workable, or unless the
25 property's conservation values face imminent harm or are already endangered by activities on the
26 property that violate the easement. AVLТ did not avail itself of the former and it is clear there
27 was no threat of the latter.

1 **V. Conclusion**

2 When Burns and Hirsch entered into the Easement with AVLT, their intent, just as it was
3 at the time of their original purchase, was to protect the redwoods and the creek on the Property
4 and discourage the previous trend of clear-cut logging on the Property. For many years the
5 Property has been used for agriculture, forestry, fish and wildlife habitat, recreation, transient
6 hospitality, and residential use, and it was and still is intended by the Owners that the Easement
7 with AVLT supports and sustains the furtherance of these traditional uses. (See Grant Deed,
8 Recitals H.) AVLT seeks very specific and narrow relief in this case, yet cannot prove any
9 violation occurred, giving rise to that relief. The Owners request the Court deny the relief sought
10 by AVLT and order judgment in Owners favor. It would also be beneficial if the Court found
11 that the AVLT not bring suit without complying with the Easement requirements of 30 days
12 notice, unassisted consultation and mediation, as required by the document signed by AVLT.

13 DATED: December __, 2018 CLEMENT, FITZPATRICK & KENWORTHY

14
15 By: _____
16 PETER C. De GOLIA
17 Attorneys for Defendants Christopher Terence Rowe;
18 Morris W. Hirsch and Charity Hirsch, Morris W.
19 Hirsch and Charity Hirsch as Trustees of the Morris
20 W. Hirsch and Charity Hirsch Living Trust dated
21 November 22, 1999
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27
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