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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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AMERICAN NATIONAL RED CROSS, a  
non-profit corporation created  
by an act of Congress,

Plaintiff,

v.

UNITED WAY CALIFORNIA CAPITAL  
REGION, a California corporation;  
APIP 220, LLC, a California  
limited liability company; VOLEN  
PROPERTIES 10, LLC, a California  
limited liability company; and DOES  
1-10, inclusive,

Defendants.

NO. CIV. S-07-1236 WBS DAD

ORDER RE: MOTIONS TO EXPUNGE  
NOTICE OF PENDENCY OF ACTION  
AND DISMISS; REQUEST FOR  
PRELIMINARY INJUNCTION

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Plaintiff, the Sacramento-Sierra Chapter of the  
American National Red Cross ("Red Cross"), brought this action  
seeking confirmation of a contractual option to purchase an  
ownership interest in the property it leases from defendant Volen  
Properties 10, Inc. ("Volen"). Before this court are (1) Volen's

1 motion to expunge the lis pendens; (2) Volen's motion to dismiss  
2 for failure to state claim upon which relief may be granted; and  
3 (3) Red Cross's request for a preliminary injunction.

4 I. Factual and Procedural Background

5 Beginning in 1988, Red Cross leased a 26,099-square-  
6 foot building, located at 8928 Volunteer Lane in Sacramento  
7 ("building"), as well as a pro rata share of the property's  
8 common areas. (Pl.'s First Am. Compl. ("FAC") Ex. A.) At that  
9 time and continuing until May 3, 2007, the building was located  
10 on a parcel that had a second building on it. (Def.'s Request  
11 for Judicial Notice Ex. A.)

12 In recognition of Red Cross's contributions to the  
13 community, the original lessor, O.K. and B, agreed to donate the  
14 building to Red Cross at the end of the twenty-year lease. (Van  
15 Dooren Decl. Ex. B ("Agreement to Donate").) The Agreement to  
16 Donate anticipated that the parcel had to be subdivided into two  
17 parcels, with one building on each parcel, before title could be  
18 transferred to Red Cross. (Agreement to Donate ¶ 5.6.) O.K. and  
19 B later sold the property to California Center, who subsequently  
20 sold it to co-defendant United Way California Capital Region  
21 ("United Way") on April 7, 1994. (FAC Ex. C.)

22 When California Center sold the property to United Way,  
23 the parties executed a Second Amendment, which terminated the  
24 Agreement to Donate and created, in Red Cross, an option to  
25 purchase the property for \$1.00 on April 10, 2010. (Id. Ex. D.)  
26 The Second Amendment incorporated the terms of the Agreement to  
27 Donate as the terms for the sale if Red Cross exercised its  
28 option. (Id.)

1 On July 1, 1996, United Way and Red Cross executed a  
2 Third Amendment, which reduced Red Cross's lease from the entire  
3 two-story building to only the first floor. (Id. Ex. E.) Based  
4 on its square footage, the first floor comprises of exactly  
5 48.87% of the building. (Id.) Red Cross's rent, as well its  
6 tax, maintenance, and utilities expenses, were also reduced to  
7 48.87% of their previous amounts. (Id.) As of August 1, 2001,  
8 Red Cross's option to purchase was automatically amended, via the  
9 Third Amendment, to an option to purchase only a 48.87% ownership  
10 interest in the building. (Id. ¶ 3.5.)

11 Beginning in approximately mid-2006, Red Cross began to  
12 question the veracity of the expenses and taxes United Way  
13 charged. (Id. ¶ 29.) Red Cross requested documentation to  
14 support the charges, and it asserts that United Way refused to  
15 provide such documentary support. (Id. ¶ 30.)

16 On May 3, 2007, at the request of United Way, the  
17 County of Sacramento issued a Certificate of Compliance for the  
18 subdivision of the lot the building was on.<sup>1</sup> (Def.'s Request for  
19 Judicial Notice Ex. A.) About one month later, Red Cross learned  
20 that United Way intended to sell the building under the position  
21 that Red Cross could not exercise its option. (FAC ¶ 23.)

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22  
23 <sup>1</sup> The County of Sacramento issued the Certificate of  
24 Compliance pursuant to section 66428 of the California Government  
25 Code, which allows a local agency to waive the requirements for a  
26 parcel map. Cal. Gov't Code § 66428; see also Cal. Gov't Code §  
27 66499.35 ("The certificate of compliance shall identify the real  
28 property and shall state that the division thereof complies with  
applicable provisions of this division and of local ordinances  
enacted pursuant thereto."). It is unclear whether Volen is  
arguing that the Certificate of Compliance would be insufficient  
under the Agreement to Donate if it was recorded before the  
option was granted. (Def.'s Mot. to Expunge 6:18-19; 7:20-21.)

1           On June 25, 2007, Red Cross filed suit, alleging: 1)  
2 breach of contract--refusal to provide short form memorandum of  
3 lease; 2) breach of contract--refusal to provide a tentative  
4 parcel map for Red Cross's approval; 3) accounting; and 4)  
5 declaratory relief. On the same day, Red Cross also recorded a  
6 Notice of Pendency of Action, alleging its right to purchase  
7 48.87% of the building in 2010. In early June of 2007, after  
8 learning Volen was the potential buyer, Red Cross sent a letter  
9 to Volen that detailed Red Cross's position about its option to  
10 purchase. (Wilcox Decl. Ex. A.)

11           After Volen inspected the property, (Van Dooren Decl.  
12 ¶ 7), United Way sold the property on September 12, 2007 to APIP  
13 220, LLC ("APIP 220"), which transferred it to Volen sixteen days  
14 later. (Def.'s Req. for Judicial Notice Exs. B & C.) Red Cross  
15 subsequently amended its complaint, adding Volen as a defendant  
16 in this action.

17           On September 20, 2007, Volen demanded that Red Cross  
18 vacate the first-floor lobby, which Red Cross had been using as  
19 its reception area, and subsequently demanded that Red Cross  
20 remove or replace its exterior signs. (Van Dooren Decl. ¶ 10-11,  
21 19.) Volen also began renovating the second floor of the  
22 building and first-floor lobby, which created noise, fumes,  
23 debris, and dust that Red Cross considers unacceptable. (Van  
24 Dooren Decl. ¶ 9.) Volen also enacted new rules and regulations,  
25 which, in part, prohibited overnight parking, restricted access  
26 to the building at certain hours, charged for after-hours HVAC  
27 use, prohibited moving equipment into the building, banned  
28 soliciting and distributing written materials, and required

1 Volen's permission to maintain vending machines in the building.  
2 (Volen Decl. ¶ Ex. B.) Disagreements about the new rules and  
3 Volen's demands continued and Red Cross began to fear that Volen  
4 was trying to force Red Cross to terminate the lease or default  
5 on it. (Pl.'s Reply in Supp. of App. for TRO 1:8-9.)

6 On November 8, 2007, Red Cross moved for a preliminary  
7 injunction prohibiting Volen from disturbing Red Cross's status  
8 quo operations with the conduct described above. The following  
9 day, Volen moved to expunge the lis pendens and dismiss Red  
10 Cross's complaint for failure to state a claim. Volen bases both  
11 motions primarily on its contention that Red Cross's option to  
12 purchase is invalid. Volen and Red Cross also request attorneys'  
13 fees and costs incurred because of the motion to expunge.

14 II. Discussion

15 A. Motion to Expunge Lis Pendens

16 "A lis pendens is a recorded document giving  
17 constructive notice that an action has been filed affecting title  
18 to or right to possession of the real property described in the  
19 notice.'" Kirkeby v. Superior Court, 33 Cal. 4th 642, 647 (2004)  
20 (quoting Urez Corp. v. Superior Court, 190 Cal. App. 3d 1141,  
21 1144 (1987)). "At any time after notice of pendency of action  
22 has been recorded, any party, . . . may apply to the court in  
23 which the action is pending to expunge the notice." Cal. Civ.  
24 Proc. Code § 405.30. The court shall expunge the lis pendens  
25 unless 1) plaintiff's pleading contains a real property claim;  
26 and 2) plaintiff proves, by a preponderance of the evidence, the  
27 probable validity of plaintiff's real property claim. Id. at §§  
28 405.3 ("Probable validity . . . means that it is more likely than

1 not that the claimant will obtain a judgment against the  
2 defendant on the claim"); 405.31 (establishing when a court shall  
3 expunge a lis pendens); 405.32 (establishing the standard of  
4 proof); see also 28 U.S.C. § 1964 (directing federal courts to  
5 apply the state's lis pendens law).

6 1. Real Property Claim

7 For purposes of a lis pendens, a real property claim is  
8 one that would, "if meritorious, affect (a) title to, or the  
9 right to possession of, specific real property or (b) the use of  
10 an easement identified in the pleading . . . ." Cal. Civ. Proc.  
11 Code § 405.4. To determine if plaintiff asserts a real property  
12 claim, the court looks only to plaintiff's pleading. Kirkeby, 33  
13 Cal. 4th at 648, 651. A claim that seeks an actual interest in  
14 the property or that "affects ownership of the disputed property"  
15 is a real property claim. Campbell v. Superior Court, 132 Cal.  
16 App. 4th 904, 913 (2005); see also Kirkeby, 33 Cal. 4th at 649.  
17 A claim that seeks "an interest in real property merely for the  
18 purpose of securing a money damage judgment" is not a real  
19 property claim. See, e.g., Campbell, 132 Cal. App. 4th at 912,  
20 914 (2005) (it is improper to use a lis pendens as a tool to  
21 secure a debt against a defendant).

22 In its first amended complaint (FAC), Red Cross  
23 requests this court to declare "the existence of the Red Cross's  
24 option in a document that the Red Cross can record with the  
25 Sacramento County Recorder and thereby provide notice of the Red  
26 Cross's exercise of its option to purchase 48.87% of the  
27 Building." (FAC 19:15-53.) The court disagrees with Volen's  
28 argument that Red Cross's claim regarding the option to purchase

1 does not "affect title, or the right of possession of, specific  
2 real property." Cal. Gov't Code § 405.4.

3           When included in a lease, an option to purchase is an  
4 indefeasible right. Joaquin v. Joaquin, 193 Cal. App. 3d 1529,  
5 1532-33 (1987). It is also a real covenant that runs with the  
6 land. Chapman v. Great W. Gypsum Co., 216 Cal. 420, 426 (1932).  
7 Upon exercising the option, the optionee gains an ownership  
8 interest that can be enforced by specific performance. Joaquin,  
9 193 Cal. App. 3d at 1533. The optionee's ownership of the  
10 property also relates back to the time the option was acquired.  
11 Claremont Terrace Homeowners' Ass'n v. U.S., 146 Cal. App. 3d  
12 398, 407-08 (1983); Joaquin, 193 Cal. App. 3d at 1533; Anthony v.  
13 Enzler, 61 Cal. App. 3d 872, 877 (1976); see also Allen v.  
14 Chatfield, 172 Cal. 60, 66, 69 (1916) (an option creates a  
15 "cloud" on title that can render title unmarketable). Therefore,  
16 a judgment enforcing Red Cross's option to purchase will clearly  
17 affect title to the real property at issue.

18           Allowing Red Cross's lis pendens to remain is also  
19 consistent with the main purpose of the lis pendens statute,  
20 which is to "preserve the court's jurisdiction over the  
21 property." Lewis v. Superior Court, 30 Cal. App. 4th 1850, 1860  
22 (1994). In this case, if Red Cross has a valid option, a  
23 subsequent purchaser who has notice of its option would take  
24 title subject to the option; however, a subsequent purchaser who  
25 takes title without notice would prevail over Red Cross. Utley  
26 v. Smith, 134 Cal. App. 2d 448, 451 (1955). Filing a lis pendens  
27 would give notice to potential purchasers and ensure that a  
28 subsequent transfer of the property could not frustrate a

1 judgment in favor of Red Cross. Lewis, 30 Cal. App. 4th at 1860.

2 2. Probable Validity of Claim

3 In the second inquiry, Red Cross must prove, by a  
4 preponderance of the evidence, that it is more likely than not  
5 that it will prevail on its real property claim. To determine  
6 the probable validity of a real property claim, the court must  
7 look beyond the plaintiff's pleadings and examine the factual  
8 merit of the claim. Kirkeby v. Superior Court, 33 Cal. 4th 642,  
9 648, 651 (2004); Cal. Civ. Proc. Code § 405.30. In its inquiry,  
10 the court may examine declarations and oral testimony and "make  
11 any orders it deems just to provide for discovery by any party  
12 affected by a motion to expunge the notice." Cal. Proc. Code §  
13 405.30; Howard S. Wright Constr. Co. v. Superior Court, 106 Cal.  
14 App. 4th 314, 319 (2003).

15 a. Section 66499.30(e): Offer Expressly  
16 Conditioned

17 To be valid, Red Cross's option must comply with  
18 section 66499.30 of the SMA. Section 66499.30(b) prohibits the  
19 sale of real property "for which a parcel map is required by [the  
20 SMA] or local ordinance" before the required map is recorded.  
21 Cal. Gov't Code § 66499.30(b). Section 66499.30(e) allows,  
22 however, an "offer or contract to sell" real property prior to  
23 the recording of the requisite parcel map if the offer or  
24 contract is "expressly conditioned upon the approval and filing  
25 of a final subdivision or parcel map."<sup>2</sup> Cal. Gov't Code §

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26  
27 <sup>2</sup> In its entirety, section 66499(e) provides: "Nothing  
28 contained in subdivisions (a) and (b) shall be deemed to prohibit  
an offer or contract to sell, lease, or finance real property or



1 66499(e); see also Black Hills Invs., Inc. v. Albertson's, Inc.,  
2 146 Cal. App. 4th 883, 892-95 (2007). To be valid under the SMA,  
3 the Second Amendment to the lease, which terminated the Agreement  
4 to Donate and created Red Cross's option to purchase,<sup>3</sup> must  
5 comply with the exception under section 66499(e). See Bekins  
6 Moving & Storage Co. v. Prudential Ins. Co. of Am., 176 Cal. App.  
7 3d 245, 250 (1985) (an option is an irrevocable offer).

8           The Agreement to Donate states that recording the  
9 parcel map is a condition precedent to the close of escrow, which  
10 is required to occur before the sale can be completed. (Agreement  
11 to Donate ¶ 5.1 ("The provisions of this Paragraph 5 are  
12 conditions precedent to the CLOSE OF ESCROW and unless otherwise  
13 provided expressly or by context, are covenants.")); Cal. Civil  
14 Code § 1436 (defining condition precedent); U.S. v. Schaeffer,  
15 319 F.2d 907, 911 (9th Cir. 1963). In the Agreement to Donate,  
16 the seller also promises to record the map, which means the  
17 seller would be in breach if it does not do so. (Agreement to  
18 Donate ¶ 5.6); Britschgi v. McCall, 41 Cal. 2d 138, 144 (1953);  
19 see generally 1 Wikin Summary of California Law § 775 (10th ed.  
20 2005) (distinguishing between conditions and covenants).

21 Therefore, because recording the map is both a condition  
22 precedent and a covenant, the seller's failure to record it prior

23 \_\_\_\_\_  
24 to construct improvements thereon where the sale, lease, or  
25 financing, or the commencement of construction, is expressly  
26 conditioned upon the approval and filing of a final subdivision  
map or parcel map, as required under this division." Cal. Gov't  
Code § 66499.30(e).

27 <sup>3</sup> The Second Amendment incorporated the terms from the  
28 Agreement to Donate as the terms for the option to purchase.  
(FAC Ex. D.) The court will substitute "seller" for "donor" and  
"buyer" for "donee" when discussing the Agreement to Donate.

1 to the sale would put the seller in breach and entitle the buyer  
2 to sue for breach of contract.

3           Analogizing to a contract that was void because it  
4 violated the SMA, Volen argues that the option does not come  
5 within 6499(e). Black Hills, 146 Cal. App. 4th at 894. In Black  
6 Hills, however, recording the map was a condition precedent, but  
7 was not a covenant. Id. at 893. The Black Hills contract gave  
8 the seller "the right to terminate the contract 'without  
9 liability' in the event [that the seller], before the closing  
10 date, either (1) failed to obtain governmental approval of the  
11 creation of the two parcels, or (2) 'waived' the condition in  
12 writing." Id. Under that language, if the seller failed to  
13 perform the condition and did not waive it, the buyer's  
14 performance would be excused, but the buyer would have no  
15 recourse against the seller. Kadner v. Shields, 20 Cal. App. 3d  
16 251, 258 (1971); Britschgi, 41 Cal. 2d at 144. Because the  
17 seller did not covenant to record the map and had the sole  
18 discretion to determine whether it would record the map, the sale  
19 was clearly not "expressly conditioned" on that act. Black  
20 Hills, 146 Cal. App. 4th at 893-94. The contract was also void  
21 at the time it was executed because, by allowing the seller to  
22 waive the SMA requirements, the contract permitted a sale that  
23 would be illegal under the SMA. Id.

24           Unlike Black Hills, the Agreement to Donate does not  
25 give Red Cross the ability to waive the SMA requirements. The  
26 language in the Agreement to Donate underscores that the sale is  
27 "expressly conditioned" on the recording of the map:

28           The parties acknowledge that approval and recordation of

1 a final parcel map ("FINAL MAP") must occur before the  
2 property may legally be conveyed; . . . . Upon execution  
3 of this AGREEMENT, [seller] will, . . . promptly apply  
4 for, and diligently take all reasonable and necessary  
5 steps to obtain, approval and recordation of the FINAL  
6 MAP [that divides the property and complies with the  
7 SMA].

8 (Agreement to Donate ¶ 5.6 (emphasis added).)

9 Defendant also argues that the option is invalid  
10 because Red Cross "has the right to approve or disapprove of the  
11 conditions" of the parcel map in violation of the SMA. (Def.'s  
12 Mem. 7:8, 13-15.) In the Agreement to Donate, paragraph 5.6(b)  
13 requires the seller to give Red Cross ten days to review and  
14 "reasonably object" to a Tentative Parcel Map, and if Red Cross  
15 fails to respond within ten days, its "silence shall be deemed  
16 approval thereof." (Agreement to Donate ¶ 5.6(b).) Paragraph  
17 5.6(c) also gives Red Cross "reasonable approval" over  
18 "conditions imposed by any applicable government entity regarding  
19 the subdivision." (Agreement to Donate ¶ 5.6(c).)

20 The rights of approval in the Agreement to Donate in  
21 this case, however, are distinguishable from the invalid approval  
22 rights in Black Hills. First, the power of approval in the  
23 Agreement to Donate does not amount to the power to waive the  
24 requirements of the SMA, which the court found fatal in the Black  
25 Hills contract. Black Hills, 146 Cal. App. 4th at 893-94.  
26 Second, the seller's approval in Black Hills was within its "sole  
27 discretion," whereas Red Cross must be reasonable. Id. This  
28 merely gives Red Cross, as a future owner of one of the parcels,  
the right to object to an unreasonable division of the property.  
It does not, however, give it the power to waive or ignore the  
SMA.



1 (FAC Ex. E.) Neither party disputes that the Third Amendment  
2 reduced Red Cross's option to purchase from the entire building  
3 to 48.87% of the building. The parties do dispute, however, the  
4 consequence of United Way's sale of the property to Volen under  
5 the Third Amendment. Three possibilities exist: 1) the option to  
6 purchase terminated when the property was sold and Red Cross was  
7 entitled to 48.87% of the proceeds; 2) the option to purchase  
8 survived the sale and Red Cross is not entitled to any proceeds  
9 from the sale; or 3) the option to purchase survived the sale and  
10 Red Cross is entitled to 48.87% of the proceeds from the sale.  
11 Because Red Cross's could not prevail on its option to purchase  
12 claim under the first possibility, Red Cross must prove, by a  
13 preponderance of the evidence, that the second or third  
14 possibility is more likely than not.

15           The sale to Volen, alone, could not have terminated Red  
16 Cross's option because an "unexercised option to purchase  
17 contained in a lease constitutes a covenant running with the  
18 land. . . . Subsequent purchasers of property subject to an  
19 option who take with notice of its existence take subject to the  
20 right of the optionee to complete the purchase." Claremont  
21 Terrace Homeowners' Ass'n v. U.S., 146 Cal. App. 3d 398, 406  
22 (1983). In this case, however, the Agreement to Donate  
23 establishes that Red Cross's option would "automatically  
24 terminate upon the termination of the LEASE." (Agreement to  
25 Donate ¶ 10.) Under the first sentence of paragraph 4 of the  
26 Third Amendment, the option to purchase would have terminated if  
27 United Way sold the property before June 30, 2001 because the  
28 lease would have terminated as a result of a sale before that

1 date. United Way did not, however, sell the property before that  
2 date.

3           With a sale after June 30, 2001, the contract is silent  
4 as to whether the option would terminate. Pointing to the second  
5 sentence of paragraph four, Volen argues that the sale to Volen  
6 extinguished the option because the second sentence entitles Red  
7 Cross to 48.87% of the proceeds of "any" sale. Volen argues  
8 that, "[t]o interpret the Third Amendment to Lease to require a  
9 distribution to the Red Cross from the net sales proceeds and  
10 also allow the subsequent exercise of the option would 'involve  
11 an absurdity' in the form of double compensation, in violation of  
12 Civil Code § 1638." (Def.'s Mem. 8:12-14.) According to Volen,  
13 the parties must have intended any sale to terminate the option.

14           While Volen's interpretation is plausible when the  
15 second sentence is read in isolation, "[t]he whole of a contract  
16 is to be taken together, so as to give effect to every part, if  
17 reasonably practicable, each clause helping to interpret the  
18 other." Cal. Civil Code § 1641; see also Bank of the W. v.  
19 Superior Court, 2 Cal. 4th 1254, 1265 (1992) and Southgate  
20 Recreation & Park Dist. v. Cal. Ass'n for Park & Recreation Ins.,  
21 106 Cal. App. 4th 293, 298 (2002). Because the second sentence  
22 immediately follows the sentence establishing that the option  
23 would terminate if the property is sold before June 30, 2001, the  
24 most plausible interpretation is that parties intended the second  
25 sentence to read, "In the event of any sale before June 30, 2001  
26 of the Building . . . ."

27           Reading the second sentence as applying to "any" sale  
28 regardless of the date would also be inconsistent with the

1 preceding paragraphs in the Third Amendment. Specifically, in  
2 paragraphs 3.1-3.5, Red Cross is given the option to reinstate  
3 the lease for both floors of the building and, if it declined to  
4 do so before June 30, 2001, its option to purchase would be  
5 reduced to an option to purchase a 48.87% ownership in the  
6 building. (Agreement to Donate ¶¶ 3.1-3.5.) Under Volen's  
7 interpretation, if Red Cross reinstated the lease to include the  
8 entire building, paragraph 3.5 would entitle it to an option to  
9 purchase the entire building, but the second sentence in  
10 paragraph four would entitle it to only to 48.87% of the  
11 proceeds.

12           Accordingly, because it is more likely than not that  
13 Red Cross's option is valid and survived the sale to Volen, Red  
14 Cross has established the probable validity of its real property  
15 claim.<sup>5</sup>

16           3.    Attorneys' Fees and Costs

17           California Civil Procedure section 405.38 requires the  
18 court to award reasonable attorneys' fees and costs to the  
19 prevailing party on a motion to expunge, "unless the court finds

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20  
21           <sup>5</sup> In its reply brief, Volen raised an entirely new  
22 argument against the validity of the option to purchase. Volen  
23 argues that the option is invalid because it does not contain a  
24 sufficient description of the real property and leaves the  
25 determination of the exact parcel to be conveyed to future  
26 negotiation. (Def.'s Reply 1-5, 10.) The court will not  
27 consider Volen's argument because plaintiff, who carries the  
28 burden of proof on this motion, did not have the opportunity to  
respond. If Volen wants to pursue the argument, it must file  
another motion raising the issue; however, the parties are  
cautioned against filing too many successive motions. Zaldivar  
v. City of Los Angeles, 780 F.2d 823, 832 n.10 (9th Cir. 1986)  
("The filing of excessive motions, for example, even if each is  
well grounded in fact and law, may under particular circumstances  
be 'harassment' under Rule 11 or sanctionable under some other  
provision of law . . . .").

1 that the other party acted with substantial justification or that  
2 other circumstances make the imposition of attorney's fees and  
3 costs unjust." Cal. Civ. Proc. Code § 405.38. Red Cross is the  
4 prevailing party and has requested \$8,869.50 in attorneys' fees  
5 and costs to oppose Volen's motion to expunge.

6 As originally enacted, section 405.38 granted courts  
7 the discretion to determine whether to award fees; however, the  
8 California Legislature amended the statute in 1992 to "make an  
9 award of attorney fees mandatory" unless the court finds that one  
10 of the two aforementioned exceptions applies. Castro v. Superior  
11 Court, 116 Cal. App. 4th 1010, 1018 (2004). Because denying fees  
12 to the prevailing party is the exception, not the rule, Volen has  
13 the burden of convincing the court that it "acted with  
14 substantial justification." See Cal. Shellfish, Inc. v. United  
15 Shellfish Co., 56 Cal. App. 4th 16, 25 (1997) (holding that the  
16 losing party has the burden to show "substantial justification"  
17 under a discovery sanction statute, which uses the same language  
18 as section 405.38).

19 From the plain language of the statute and the  
20 legislative intent favoring an award of fees, one might think  
21 that in order to defeat a motion for attorneys fees the courts  
22 would require the losing party to make something more than the  
23 minimal showing that is required to defeat a motion for sanctions  
24 under Federal Rule of Civil Procedure 11.<sup>6</sup> For example, in order  
25

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26 <sup>6</sup> Rule 11 provides:  
27 (b) **Representations to the Court.** By presenting to the  
28 court a pleading, written motion, or other paper--whether  
by signing, filing, submitting, or later advocating  
it--an attorney or unrepresented party certifies that to



1 to show that it acted with "substantial justification," the  
2 losing party might be required to show that its position had a  
3 "high probability" or "strong likelihood" of success. Instead,  
4 the California courts applying the same language used in section  
5 405.38 seem to have taken the teeth out of "substantial  
6 justification" by requiring the losing party to show only that it  
7 acted "reasonably."

8 Specifically, "California cases have defined a  
9 'substantially justified' position to mean one which is justified  
10 to a degree that would satisfy a reasonable person." Wertin v.  
11 Franchise Tax Bd., 68 Cal. App. 4th 961, 977 (1998); see also

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12  
13 the best of the person's knowledge, information, and  
14 belief, formed after an inquiry reasonable under the  
circumstances:

15 (1) it is not being presented for any improper  
16 purpose, such as to harass, cause unnecessary  
delay, or needlessly increase the cost of  
litigation;

17 (2) the claims, defenses, and other legal  
18 contentions are warranted by existing law or by a  
nonfrivolous argument for extending, modifying, or  
reversing existing law or for establishing new law;

19 (3) the factual contentions have evidentiary  
20 support or, if specifically so identified, will  
likely have evidentiary support after a reasonable  
opportunity for further investigation or discovery;  
21 and

22 (4) the denials of factual contentions are  
23 warranted on the evidence or, if specifically so  
identified, are reasonably based on belief or a  
lack of information.

24 (c) **Sanctions. (1) In General.** If, after notice and a  
25 reasonable opportunity to respond, the court determines  
that Rule 11(b) has been violated, the court may impose  
26 an appropriate sanction on any attorney, law firm, or  
party that violated the rule or is responsible for the  
violation. Absent exceptional circumstances, a law firm  
27 must be held jointly responsible for a violation  
committed by its partner, associate, or employee.

28 F. R. Civ. P. 11(b)-(c) (emphasis in original).

1 U.S. v. Marolf, 277 F.3d 1156, 1161 (9th Cir. 2002) (applying the  
2 same standard for "substantial justification" in federal  
3 statutes); Pierce v. Underwood, 487 U.S. 552, 565 (1988) ("[A]s  
4 between the two commonly used connotations of the word  
5 "substantially," the one most naturally conveyed . . . is not  
6 'justified to a high degree,' but rather, 'justified in substance  
7 or in the main'--that is, justified to a degree that could  
8 satisfy a reasonable person.").

9           Thus, the court cannot award Red Cross its fees if  
10 Volen shows that, under the "totality of the circumstances,"  
11 Fujitsu IT Holdings, Inc. v. Franchise Tax Bd., 120 Cal. App. 4th  
12 459, 488 (2004), it had a "reasonable basis in law and fact" in  
13 moving to expunge the lis pendens. Wertin, 68 Cal. App. 4th at  
14 977. The test, therefore, as applied by the courts, is  
15 tantamount to requiring the court to find that no reasonable  
16 litigant would have moved to expunge the lis pendens. If this is  
17 any different than the minimal showing which a party must make in  
18 order to avoid Rule 11 sanctions, it is at best difficult to  
19 articulate and even harder to apply.<sup>7</sup>

20           Volen's first argument, that Red Cross's claim to  
21 establish the validity of its option to purchase is not a real  
22 property claim, was clearly unreasonable because it ignores the

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23  
24 <sup>7</sup> See, e.g., Hudson v. Moore Bus. Forms, Inc., 836 F.2d  
25 1156, 1159 (9th Cir. 1988) ("The new standard for appraising the  
26 actions of a signing attorney is one of objective reasonableness  
27 under the circumstances.") (citations omitted); see also Castro  
28 v. Superior Court, 116 Cal. App. 4th 1010, 1023 n.13 (2004)  
("[t]he discretionary language in section 405.38 is similar to  
the discretionary standard for awarding discovery sanctions"  
because section 405.38 and California discovery sanctions  
statutes use the same language to create the two exceptions).

1 precise nature of an option to purchase real property. However,  
2 with its second argument, that Red Cross cannot show it is more  
3 likely than not to prevail on its option claim, the court cannot  
4 find that no reasonable litigant would have attacked a  
5 plaintiff's ability to prove its case. Specifically, while  
6 Volen's use of Black Hills ignored dispositive differences  
7 between the contract in that case and the Agreement to Donate,  
8 and Volen's interpretation of the Agreement to Donate is  
9 plausible only if the remainder of the contract is ignored, the  
10 court cannot find that the arguments are entirely unreasonable.

11 Therefore, because the court cannot find that Volen  
12 moved to expunge the lis pendens without substantial  
13 justification as that term is interpreted by the California  
14 courts the court must deny Red Cross its fees.

15 B. Motion to Dismiss

16 On a motion to dismiss, the court must accept the  
17 allegations in the complaint as true and draw all reasonable  
18 inferences in favor of the pleader. Scheuer v. Rhodes, 416 U.S.  
19 232, 236 (1974); Cruz v. Beto, 405 U.S. 319, 322 (1972). To  
20 survive a motion to dismiss, a plaintiff needs to plead "only  
21 enough facts to state a claim to relief that is plausible on its  
22 face." Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007).  
23 Dismissal is appropriate, however, where the pleader fails to  
24 state a claim supportable by a cognizable legal theory.  
25 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
26 1988); see also Conley v. Gibson, 355 U.S. 41, 47 (1957)  
27 (complaint must "give the defendant fair notice of what the  
28 plaintiff's claim is and the grounds upon which it rests").

1 "However, the court is not required to accept legal conclusions  
2 cast in the form of factual allegations if those conclusions  
3 cannot reasonably be drawn from the facts alleged." Clegg v.  
4 Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994).

5 In general, the court may not consider material other  
6 than the facts alleged in the complaint when ruling on a motion  
7 to dismiss. Anderson v. Angelone, 86 F.3d 932, 934 (9th Cir.  
8 1996). The court may, however, consider materials that are  
9 "properly submitted as part of the complaint." Hal Roach  
10 Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1555  
11 n.19 (9th Cir. 1990). In deciding this motion, the court  
12 considers the original lease between the parties, the Agreement  
13 to Donate, and the First, Second, and Third Amendments to the  
14 Lease because each are included as exhibits in Red Cross's FAC.  
15 The court may also consider materials of which it may take  
16 judicial notice, including matters of public record. Mir v.  
17 Little Co. of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988); Fed.  
18 R. Evid. 201(b) (defining the scope of judicial notice).  
19 Accordingly, the court takes judicial notice of the Certificate  
20 of Compliance issued on May 3, 2007, the Grant Deed conveying the  
21 property from United Way to APIP 220, and the Grant Deed  
22 conveying the property from APIP 220 to Volen. (Def.'s Req. for  
23 Judicial Notice Exs. A-C.)

24 1. First and Fourth Causes of Action

25 In its First and Fourth Causes of Action, Red Cross  
26 seeks a memorandum of lease and a declaratory judgment to  
27 establish the validity of its option to purchase. Unlike Red  
28 Cross's burden of proving the probable validity of those claims

1 to survive Volen's motion to expunge the lis pendens, Red Cross  
2 need only prove that the claims are plausible on their face to  
3 survive Volen's motion to dismiss. In support of its motion to  
4 dismiss the claims regarding the option to purchase, Volen's  
5 arguments are the same as in its motion to expunge the lis  
6 pendens. Therefore, because the court concludes Red Cross is  
7 more likely than not to prevail on its option to purchase claims  
8 in the above analysis, Volen's motion to dismiss the First and  
9 Fourth Causes of Action must be denied.

10 2. Second and Third Causes of Action

11 In the Second Cause of Action, Red Cross seeks damages  
12 from United Way for United Way's subdivision of the property  
13 without Red Cross's approval. In the Third Cause of Action, Red  
14 Cross seeks an accounting from United Way and a constructive  
15 trust on any overpaid funds. In both causes of action, Red Cross  
16 does not mention Volen; however both claims are against  
17 "defendants." (FAC 13, 15.)

18 In arguing that the claims are properly asserted  
19 against Volen, Red Cross first draws the court's attention to  
20 paragraph 14 of its complaint, which alleges that an agency  
21 relationship existed between United Way and Volen. The FAC does  
22 not, however, allege one fact that suggests such an agency  
23 relationship. This bare legal conclusion is not sufficient to  
24 withstand a motion to dismiss. Clegg v. Cult Awareness Network,  
25 18 F.3d 752, 754-55 (9th Cir. 1994).

26 Second, Red Cross argues that, under the terms of the  
27 lease, the lease "could be interpreted to render Volen liable to  
28 Red Cross under the Red Cross's breach of contract and/or

1 accounting claims, in addition or alternatively to United Way."  
2 (Pl.'s Opp'n 15:15-18.) The relevant paragraph from the lease  
3 states:

4 Lessor's Liability: The term "Lessor" as used herein  
5 shall mean only the owner or owners at the time in  
6 question of the fee title or a lessee's interest in a  
7 ground lease of the Premises, and except as expressly  
8 provided in Paragraph 15, in the event of any transfer of  
9 such title or interest, Lessor herein named (and in case  
10 of any subsequent transfers then the grantor) shall be  
11 relieved from and after the date of such transfer or all  
12 liability as respects Lessor's obligations thereafter to  
13 be performed, provided that any funds in the hands of the  
14 Lessor or the then grantor at the time of such transfer,  
15 in which Lessee has an interest, shall be delivered to  
16 the grantee. The obligations contained in this Lease to  
17 be performed by Lessor shall, subject to aforesaid, be  
18 binding on Lessor's successors and assigns, only during  
19 their respective periods of ownership.

20 (FAC Ex. A ¶ 17 (emphasis added).) Even read in the light most  
21 favorable to the plaintiff, this paragraph does not hold a  
22 successive landlord liable for breaches by the previous landlord  
23 that occurred while the previous landlord owned the property. It  
24 also releases the previous landlord from liability only if "any  
25 funds in the hands of the Lessor or the then grantor at the time  
26 of such transfer, in which Lessee has an interest," are delivered  
27 to the successive landlord. Id.

28 United Way's acts that Red Cross seeks recovery for in  
the Second and Third Causes of Action occurred while United Way  
owned the property. Red Cross has not asserted that Volen  
assumed those liabilities or asserted any facts to suggest Volen  
is liable for the injuries alleged in those claims. Therefore,  
Volen's motion dismiss must be granted, and the Second and Third  
Causes of Action must be dismissed without prejudice.

///

1 C. Preliminary Injunction

2 "It frequently is observed that a preliminary  
3 injunction is an extraordinary and drastic remedy, one that  
4 should not be granted unless the movant, by a clear showing,  
5 carries the burden of persuasion.'" Mazurek v. Armstrong,  
6 520 U.S. 968, 972 (1997) (quoting 11A Wright, A. Miller, & M.  
7 Kane, Federal Practice and Procedure § 2948 (2d ed.1995)). "To  
8 obtain a preliminary injunction, the moving party must  
9 demonstrate either (1) probable success on the merits and the  
10 possibility of irreparable injury, or (2) that serious questions  
11 are raised and the balance of hardships sharply favors the moving  
12 party. These are not separate tests, but are the ends of a  
13 continuum; the greater the relative hardship to the moving party,  
14 the less probability of success must be shown." Nat'l Ctr. for  
15 Immigrants Rights, Inc. v. I.N.S., 743 F.2d 1365, 1369 (9th Cir.  
16 1984) (internal citations omitted). Under the first test, while  
17 the plaintiff does not have to show actual injury, the plaintiff  
18 must show a "strong threat of irreparable injury." Diamontiney  
19 v. Borq, 918 F.2d 793, 795 (9th Cir. 1999).

20 Red Cross is asking this court to enjoin conduct by  
21 Volen that Red Cross believes is aimed at forcing Red Cross to  
22 vacate the building or default on its lease, thereby terminating  
23 its option to purchase. Red Cross's option to purchase is worth  
24 a purported two million dollars; however, if its interest were  
25 purely monetary, this court would not be justified in granting  
26 equitable relief. Sampson v. Murray, 415 U.S. 61, 90 (1974).  
27 The harm, however, is not based on the value of the property, but  
28 on the interest in the real property that Red Cross seeks to

1 enforce. Real property is unique and the loss of an interest in  
2 real property cannot be compensated with money alone. Sundance  
3 Land Corp. v. Cmty. First Fed. Sav. & Loan Ass'n, 840 F.2d 653,  
4 661-62 (9th Cir. 1988) ("Since the property at issue is unique,  
5 [plaintiff's] legal remedy-i.e., damages-is inadequate.  
6 [Plaintiff's] complaint therefore meets the equitable criteria  
7 for stating a cause of action for injunctive relief.").

8 Here, Red Cross has occupied the building since 1988  
9 with the anticipation of obtaining an ownership interest in it.  
10 The location of the property undoubtedly has gained familiarity  
11 in the community, which is pivotal to Red Cross's success. (Van  
12 Dooren Decl. ¶¶ 19, 23.) Loss of its option to purchase an  
13 interest in the property, therefore, would irreparably harm Red  
14 Cross.

15 Even though Red Cross could suffer irreparable harm if  
16 an injunction is not granted, "a party seeking injunctive relief  
17 must show 'a relationship between the injury claimed in the  
18 party's motion and the conduct asserted in the complaint.'" Brown II v. Salinas Valley State Prison, No. 05-1423, 2007 WL  
19 2782856, at \*1 (N.D. Cal. Sept. 25, 2007) (quoting Devose v.  
20 Herrington, 42 F.3d 470, 471 (8th Cir. 1994)). In Devose, the  
21 Eighth Circuit explained that a preliminary injunction could not  
22 be granted "based on new assertions of mistreatment that [were]  
23 entirely different from the claim raised and the relief  
24 requested" in the complaint, even if the "new assertions might  
25 support additional claims against the same" defendants. Devose,  
26 42 F.3d at 471. Therefore, "[a] district court should not issue  
27 an injunction when the injunction in question is not of the same  
28



1 character, and deals with a matter lying wholly outside the  
2 issues in the suit." Kaimowitz v. Orlando, 122 F.3d 41, 43 (11th  
3 Cir. 1997); see also Camacho v. Jones, No. 07-0812, 2007 WL  
4 3342714, at \*2 (D. Ariz. Nov. 7, 2007).

5 While some of Volen's conduct does appear to be aimed  
6 at forcing Red Cross to terminate the lease or default on it,  
7 that conduct is not related to Red Cross's claims against Volen.  
8 Even if Red Cross prevails on its claim to establish the validity  
9 of its option, a final judgment for Red Cross would not prevent  
10 Volen from returning to the very conduct that is the subject of  
11 this injunction. The court cannot enjoin conduct to protect the  
12 option when, at the end of the trial, the court could not render  
13 similar relief to protect against the very risk at issue now.  
14 See Omega World Travel, Inc. v. Trans World Airlines, 111 F.3d  
15 14, 16 (4th Cir. 1997) ("The purpose of interim equitable relief  
16 is to protect the movant, during the pendency of the action, from  
17 being harmed or further harmed in the manner in which the movant  
18 contends it was or will be harmed through the illegality alleged  
19 in the complaint.").

20 The only statement about Volen's conduct in Red Cross's  
21 FAC appears in its requests for a declaratory judgment and an  
22 order compelling Volen to issue a short form memorandum of lease:

23 The Red Cross seeks a declaration from this Court  
24 affirming the Red Cross's (a) option to purchase 48.87%  
25 of the Building, . . . and a pro rata share of the common  
26 areas (i.e., the parking lot and other areas surrounding  
27 the Building, . . . and (b) right to a "short form"  
28 memorandum of lease affirming the existence and viability  
of that option, for immediate recording. . . . Such a  
declaration is necessary . . . to resolve disputes that  
have arisen and may continue to arise between the Red  
Cross and Volen over the disposition and use of the  
Building until the time.

1 (FAC ¶¶ 71-72 (emphasis added).) The allegation in the last  
2 sentence, however, is not an affirmative request for relief. A  
3 memorandum of lease is simply a recordable document that provides  
4 notice of the lease; it is not a remedy to determine the rights  
5 and obligations of the parties or provide relief when one party  
6 breaches the lease. In the quoted language above, Red Cross also  
7 requests the court to declare the validity of the option. Red  
8 Cross does not, however, make an equivalent request with respect  
9 to the conduct at issue. Therefore, the court does not have the  
10 power to enjoin the conduct because Red Cross's complaint does  
11 not contain a legal basis to complain about it. See Kaimowitz,  
12 122 F.3d at 43 (11th Cir. 1997) ("A district court should not  
13 issue an injunction when the injunction . . . deals with a matter  
14 lying wholly outside the issues in the suit.").

15 At the heart of Red Cross's arguments to enjoin Volen's  
16 conduct is an assumption that the conduct violates the terms of  
17 the lease. If Red Cross is correct that the conduct is a breach  
18 of the lease, then Red Cross would suffer irreparable harm if it  
19 lost its option because of the breach, and a request for a  
20 preliminary injunction would be sufficiently related to a claim  
21 for breach of the lease. If Red Cross chooses to amend its  
22 complaint, it is free to seek any preliminary relief, including a  
23 temporary restraining order or preliminary injunction, based on  
24 any newly asserted claims. The court's equitable powers,  
25 however, do not extend to implying a cause of action to achieve  
26 an equitable result. See Nagrampa v. MailCoups, Inc., 469 F.3d  
27 1257, 1277 n.6 (9th Cir. 2006) ("The type of claim asserted in  
28 the complaint dictates the nature of the relief that may be

1 afforded to the plaintiff."). Accordingly, the court must deny,  
2 without prejudice, Red Cross's request for a preliminary  
3 injunction because the conduct at issue lacks a sufficient nexus  
4 to the injury alleged in the FAC.

5 IT IS THEREFORE ORDERED that:

6 (1) Volen's motion to expunge be, and the same hereby  
7 is, DENIED;

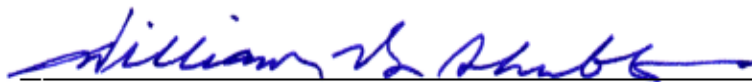
8 (2) Red Cross's request for attorneys' fees  
9 and costs in connection with defending the motion to expunge the  
10 lis pendens be, and the same hereby is, DENIED;

11 (3) Volen's motion to dismiss be, and the same hereby  
12 is, GRANTED as to the Second and Third Causes of Action only;

13 (4) Red Cross's motion for a preliminary injunction  
14 be, and the same hereby is, DENIED;

15 Red Cross is given 30 days from the date of this order  
16 to file an amended complaint consistent with this order.

17 DATED: December 18, 2007

18  
19 

20 WILLIAM B. SHUBB  
21 UNITED STATES DISTRICT JUDGE  
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