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7 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
8 **COUNTY OF SAN MATEO**

10 DARRYL GAY, SR., Individually and as
Successor in Interest to THE ESTATE OF
11 KAHLIL GAY and TUNISIA PEDEN,
Individually,

12 Plaintiffs,

13 v.

14 ARE-819/863 MITTEN ROAD, LLC, a
Limited Liability Company, GACHINA
15 LANDSCAPE MANAGEMENT, INC., a
Corporation, the davey tree expert company, A
16 Corporation, ROCKRIDGE BUILDERS &
DESIGNERS, a Business Entity Form
17 Unknown, ARBORWELL, INC., a
Corporation, REED ASSOCIATES
18 LANDSCAPE ARCHITECTURE
CORPORATION, a Corporation and DOES 1
19 through 100, inclusive,,
20

21 Defendants.

Case No. 21-CIV-01684
Assigned for All Purposes to:
Hon. V. Raymond Swope, Dept. 23

**PLAINTIFFS' EX PARTE APPLICATION
TO SET TRIAL DATE**

*[Filed concurrently with [Proposed] Order;
Declaration of Robert Glassman]*

Date: April 8, 2022
Time: 1:30 p.m.
Dept: 23

Action Filed: March 29, 2021
Trial Date: None

22
23 **TO THE HONORABLE COURT, ALL PARTIES AND TO THEIR RESPECTIVE**
24 **ATTORNEYS OF RECORD:**

25 **PLEASE TAKE NOTICE** that on April 8, 2022 at 1:30 p.m., or as soon as this matter
26 may be heard in Department 23 of the above-entitled Court, Plaintiffs DARRYL GAY, SR.,
27 Individually and as Successor in Interest to THE ESTATE OF KAHLIL GAY and TUNISIA
28 PEDEN, Individually, will appear *ex parte* to request that the Court set a trial date in this action.

1 This application is made pursuant to California Rule of Court 3.1200-3.1207, relevant case law
2 and on the following grounds:

3 1. This wrongful death case is about a tragic incident that happened on February 26,
4 2021 in Burlingame.

5 23-year-old Kahlil Gay, a physics researcher at a Bay Area COVID-19 testing lab, was
6 killed by a Brazilian pepper tree that uprooted and fell on him as he was walking to a meeting
7 outside his office. The tree was located on property owned and maintained by a wholly-owned
8 subsidiary of the real estate investment trust Alexandria Real Estate called ARE-819/863 Mitten
9 Road, LLC ("ARE") that allowed the tree to remain in a hazardous condition on its property until
10 it fell on and killed Kahlil. Sadly, it was not until after Kahlil's death that ARE belatedly
11 discovered that all of the other trees at this location were hazardous, too, and had them removed.
12 Kahlil recently graduated from Cal State East Bay and started work at the lab only four days
13 earlier.

14 His death sent shockwaves across the Bay Area and was widely covered in the news. His
15 mother, Tunisia (48), and father, Darryl (56), survive him in addition to his three brothers and
16 dozens of other family members and friends whose lives he touched so deeply during his life.

17 2. The plaintiffs filed this wrongful death lawsuit on March 29, 2021. The parties
18 appeared at a CMC on July 27, 2021 and were ordered to complete ADR by February 28, 2022.
19 No trial date has been set yet. At this time, 16 depositions have been taken, including each of the
20 defendants' respective PMQs, first responders and an eyewitness. The parties and their respective
21 consultants and experts have also already attended a number of non-destructive and destructive
22 inspections of the subject tree.

23 3. The parties in the above-entitled action appeared for a private mediation with Matt
24 Conant, Esq. at ADR Services, Inc. on January 27, 2022 and April 4, 2022. After two full days of
25 private mediation, through no fault of the mediator, no meaningful progress was made and the
26 parties did not reach a settlement.

27 4. Counsel for plaintiffs met and conferred with counsel for defendants about
28 requesting that the Court set a trial setting conference in this matter. There was no objection to

1 plaintiffs making that request. Plaintiffs now request that the Court set this case for trial within
 2 the next 90 days.

3 5. All parties have been given proper notice of this *ex parte* application pursuant to
 4 Rules 3.1203 and 3.1204 of the California Rules of Court. (*Ex Parte* Notice attached as Exhibit 1
 5 to the Glassman Decl.). This notice was given within the applicable time under California Rule of
 6 Court 3.1203, and informed opposing counsel where and when the application would be made.
 7 (Glassman Decl. at ¶ 4).

8 6. Pursuant to Rule 3.1202(a) of the California Rules of Court, attorneys for
 9 defendants may be reached as follows:

10 ARE-819/863 Mitten Road, LLC

11 Susan Chelsea, Esq.
 12 Burke, Williams & Sorensen LLP
 13 Phone: (619) 814-5800
 14 Email: schelsea@bwslaw.com

14 Arborwell, Inc.

15 Paul Herp, Esq.
 16 Law Offices of Thomas Burns
 17 Phone: (415) 227-2351
 18 Email: paul.herp@zurichna.com

18 Gachina Landscape Management, Inc.

19 Laurie Elza, Esq.
 20 Law Offices of John Hauser
 21 Phone: (714) 371-2311
 22 Email: laurie.elza@thehartford.com

22 Rockridge Builders

23 Evan Williams, Esq.
 24 Mokri Vanis & Jones, LLP
 25 Phone: (916) 306-0434
 26 Email: ewilliams@mvjllp.com

26 Reed Associates Landscape Architecture

27 Ernest Isola, Esq.
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Gordon & Rees
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This *ex parte* application is further based on the attached memorandum of points and authorities, the Declaration of Robert Glassman and exhibits thereto, the [proposed] order filed concurrently herewith, the papers and records on file herein, and upon such oral and documentary evidence which may be presented at the time of the hearing on this application.

DATED: April 5, 2022

PANISH | SHEA | BOYLE | RAVIPUDI LLP

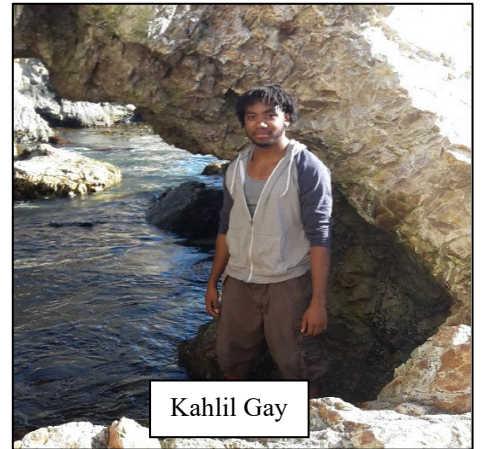
By: 
Robert S. Glassman
Attorneys for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

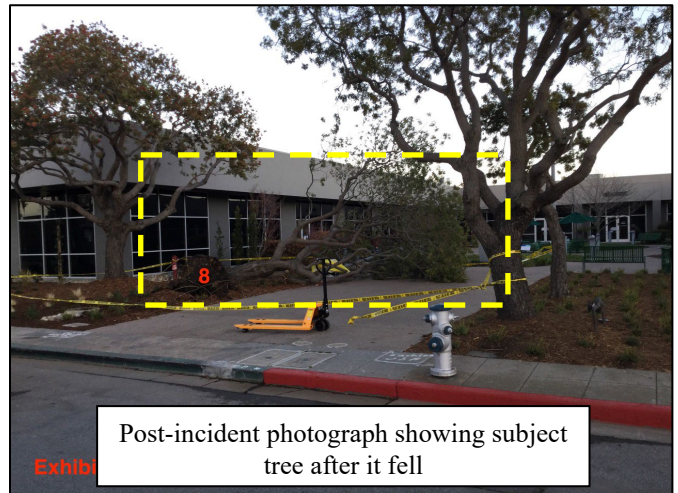
This wrongful death case is about a tragic incident that happened on February 26, 2021 in Burlingame.

23-year-old Kahlil Gay, a physics researcher at a Bay Area COVID-19 testing lab, was killed by a Brazilian pepper tree that uprooted and fell on him as he was walking to a meeting outside his office. The tree was located on property owned and maintained by a wholly-owned subsidiary of the real estate investment trust Alexandria Real Estate called ARE-819/863 Mitten Road,



LLC ("ARE") that allowed the tree to remain in a hazardous condition on its property until it fell on and killed Kahlil. Sadly, it was not until after Kahlil's death that ARE belatedly discovered that all of the other trees at this location were hazardous, too, and had them removed. Kahlil recently graduated from Cal State East Bay and started work at the lab only four days earlier.

His death sent shockwaves across the Bay Area and was widely covered in the news. His mother, Tunisia (48), and father, Darryl (56), survive him in addition to his three brothers and dozens of other family members and friends whose lives he touched so deeply during his life.



The plaintiffs filed this wrongful death lawsuit on March 29, 2021. The parties appeared at a CMC on July 27, 2021 and were ordered to complete ADR by February 28, 2022. No trial date has been set yet. At this time, 16 depositions have been taken, including each of the defendants'

1 respective PMQs, first responders and an eyewitness. The parties and their respective consultants
2 and experts have also already attended a number of non-destructive and destructive inspections of
3 the subject tree.

4 The parties in the above-entitled action appeared for a private mediation with Matt Conant,
5 Esq. at ADR Services, Inc. on January 27, 2022 and April 4, 2022. After two full days of private
6 mediation, through no fault of the mediator, no meaningful progress was made and the parties did
7 not reach a settlement.

8 Counsel for plaintiffs met and conferred with counsel for defendants about requesting that
9 the Court set a trial setting conference in this matter. There was no objection to plaintiffs making
10 that request.

11 Plaintiffs now respectfully request that the Court set this case for trial within the next 90
12 days.

13 **II. BRIEF BACKGROUND ON THE CASE**

14 The incident took place at 863 Mitten Road in Burlingame. 863 Mitten Road is a
15 commercial property comprised of one-story offices that is owned by ARE. Kahlil was working
16 for one of ARE's tenants in that office space called Color Genomics.

17 A few years prior to the incident, ARE decided to renovate, or do a "refresh", of the
18 interior and exterior spaces at 863 Mitten. We will focus on the exterior work. ARE hired a
19 general contractor named William Hinkamp dba Rockridge Builders to oversee the project. The
20 landscape architectural plans were prepared by Paul Reed of Reed Associates. Part of those
21 plans included landscaping and irrigation renovations to the front of the property. The subject
22 tree, which was identified as Tree No. 8 on the plans, was located on the front of the property
23 where the landscaping and irrigation renovations were to be performed. Rockridge hired Gachina
24 Landscape to perform the landscaping and irrigation work.
25
26
27
28

1 Sometime in between November and early December of 2020, Gachina admittedly cut
 2 the roots of the subject tree while it was performing the landscaping and irrigation renovations
 3 on the property¹. Approximately two months later on February 26, 2021, the tree collapsed onto
 4 Kahlil and killed him.

5 Following the incident, ARE suspended all ongoing work with Gachina at this location
 6 and determined, after consulting with its retained arborist, Joe McNeil, that all of the remaining
 7 trees located in the front courtyard area of 863 Mitten Road near the street were in a hazardous
 8 condition and had them removed. In particular, on April 9, 2021, Mr. McNeil wrote to the City
 9 of Burlingame seeking approval to remove the remaining Brazilian pepper trees from the front
 10 courtyard area stating that the roots on those trees had been "severed...around a full, 360 degree
 11 circle at a distance of from two to three and a half" and that "the pepper trees remaining in the
 12 courtyard area at this address have a significantly elevated potential to fail from the root
 13 because of this severance." ARE Senior VP of Operations & Development, Dan Tsang, then sent
 14 an email to his colleague dated June 9, 2021 repeating the conclusion reached by ARE's
 15 expert arborist:
 16
 17

18 *"It is now clear that every tree across the frontage of this property,
 19 both to the northeast, trees 4, 5, 6, and to the southwest, trees 12,
 20 13, 14 and 15 are a hazard. Trees 4 and 5 can fall either to the
 21 street or across the single remaining front entrance used by parties
 coming and going from this building...It is urgent to remove all
 these trees"*

22 Within only a few months after Kahlil's death, all of the trees had been deemed hazardous by
 23 ARE and its consultants and were removed.
 24
 25

26 _____
 27 ¹ The Gachina foreman, Manuel Junior Sandoval, who oversaw the work being performed at 863
 28 Mitten had multiple felony arrests prior to the incident and is now serving time at Wasco State
 Prison.

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From Joe McNeil's 4/9/21 letter to the City of Burlingame:

Roots were severed from both trees around a full, 360 degree circle at a distance of from two to three and a half. Tree number 7 is pictured below. The yellow shading outlines many of the ends of the severed roots.

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The photo below is of the south side of the root plate of tree #9. Roots have been severed approximately along the yellow shaded line.



It is our opinion that the pepper trees remaining in the courtyard at this address have a significantly elevated potential to fail from the root because of this severance. The resulting risk cannot be abated without an ongoing pruning program so severe that the trees would no longer be an asset to the property. For this reason we understand the request of the owner to remove these trees is reasonable.

But even before Gachina cut the roots of the subject tree, there were concerns expressed about the trees in the front courtyard area at 863 Mitten Road. As early as June of 2017, ARE was advised by Gachina that there was a tree on the property “that is showing severe decay.” And in an April 18, 2019 email from the building architect Greg Bunton to Paul Reed, Mr. Bunton stated: "The only thing about this property is that it's very wet – close to the bay/low elevation. So many of the existing street trees have raised roots and appear to be unhealthy...". Furthermore, Arborwell, who had been hired by ARE to maintain the trees on the property prior to the renovation project, concluded during a site visit at 863 Mitten Road at the end of 2019 that there were dead, dying, diseased branches, weak branches and water sprouts

1 on the Brazilian pepper trees at the property (but failed to investigate the problem further or
2 make any efforts to abate the risk).

3 But what is perhaps more shocking is that neither the property owner, ARE, nor the
4 general contractor, Rockridge, ensured that a certified arborist was consulted with by Reed or
5 Gachina in connection to the work to be performed in the front courtyard area of the property. In
6 fact, no one did consult with a certified arborist before starting the landscaping and irrigation work
7 at the property.
8

9 Further, it was Gachina who had raised concerns about the scope of the work outlined in
10 Reed's landscape plans. Specifically, Gachina communicated to Reed and others that it was going
11 to be impossible for Gachina to accomplish the grade that was specified in Reed's plans in light of
12 the existing topography, including the raised tree roots, in the front courtyard area of 863 Mitten
13 Road. And on two separate occasions in the fall of 2020, Edwin Palomino from Gachina suggested
14 to Reed that the safest and easiest option to accomplish the work in Reed's plans was to simply
15 remove the trees in the front courtyard area, which would have included Tree No. 8. However, Mr.
16 Palomino's suggestion was rejected because the removal of the subject tree and the others would
17 cost too much money and it was not in the budget.
18

19 To be clear, despite the recommendation by Gachina to remove the tree that would later
20 fall on and kill Kahlil Gay, it was not done because the companies involved in the renovation
21 wanted to save money.
22

23 **III. THE COURT MAY SPECIALLY SET THE TRIAL DATE FOR GOOD CAUSE**

24 California Rules of Court, Rule 3.1335 states that a party may specially set a case for trial
25 by *ex parte* application upon an affirmative showing of good cause.

26 Good cause exists for this *ex parte* to specially set the trial date. As discussed above, the
27 case has already been thoroughly litigated and the parties have fully exhausted the ADR process
28

1 by participating in all day mediations with Matt Conant on January 27, 2022 and April 4, 2022.
 2 Further, at this time, 16 depositions have been taken, including each of the defendants' respective
 3 PMQs, first responders and an eyewitness. The parties and their respective consultants and
 4 experts have also already attended a number of non-destructive and destructive inspections of the
 5 subject tree. (Glassman Decl. at ¶ 2).
 6

7 Finally, defendants will not be prejudiced in any way by having this case set for trial
 8 without delay. Indeed, defendants have not noticed a single deposition in this case and the last
 9 time they served any written discovery was in the summer of 2021. It would appear as though
 10 defendants do not have outstanding discovery to conduct. Plaintiffs submit that global resolution
 11 of this case is really only realistic and achievable pursuant to a trial or, at the very least, the setting
 12 of a trial date. (Glassman Decl. at ¶ 3).
 13

14 **IV. CONCLUSION**

15 For the foregoing reasons, Plaintiffs respectfully request that the Court grant this *ex parte*
 16 application and set the case for trial in the next 90 days.

17 DATED: April 5, 2022

PANISH | SHEA | BOYLE | RAVIPUDI LLP

19 By: 
 20 _____
 Robert S. Glassman
 Attorneys for Plaintiffs

DECLARATION OF ROBERT S. GLASSMAN

I, Robert S. Glassman, declare as follows:

1. I am an attorney duly admitted to practice before this Court. I am a partner with Panish Shea Boyle Ravipudi LLP, attorneys of record for Plaintiffs. I have personal knowledge of the facts set forth herein. If called as a witness, I could and would competently testify to the matters stated herein.

2. Good cause exists for this *ex parte* to specially set the trial date. As discussed in the moving papers, the case has already been thoroughly litigated and the parties have fully exhausted the ADR process by participating in all day mediations with Matt Conant on January 27, 2022 and April 4, 2022. Further, at this time, 16 depositions have been taken, including each of the defendants' respective PMQs, first responders and an eyewitness. The parties and their respective consultants and experts have also already attended a number of non-destructive and destructive inspections of the subject tree.

3. Finally, defendants will not be prejudiced in any way by having this case set for trial without delay. Indeed, defendants have not noticed a single deposition in this case and the last time they served any written discovery was in the summer of 2021. It would appear as though defendants do not have outstanding discovery to conduct. I submit that global resolution of this case is really only achievable pursuant to a trial or, at the very least, the setting of a trial date.

4. This notice was given within the applicable time under California Rule of Court 3.1203, and informed opposing counsel where and when the application would be made. **Attached hereto as Exhibit 1 is a true and correct copy of my *ex parte* notice sent by email.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed April 5, 2022 at Los Angeles, California.



 Robert S. Glassman

EXHIBIT 1

Kimberly Vo

From: Robert Glassman
Sent: Monday, April 4, 2022 4:40 PM
To: schelsea@bwslaw.com; Paul Herp; Elza, Laurie J (Claims Solutions and Analytics); ewilliams@mvjllp.com; Ernest Isola
Cc: Kimberly Vo; Jonathan Davidi
Subject: Gay v. ARE - ex parte notice

Good afternoon counsel,

Please be advised that plaintiffs will be appearing *ex parte* on **Friday, April 8, 2022 at 1:30 p.m.** in Department 23 at the Southern Court of the San Mateo County Superior Court in the above-referenced case to set a trial date. Please let us know if you will be appearing and/or opposing this request.

Robert

Robert Glassman, Esq.
Partner

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If you are a potential client, the information you disclose to us by email will be kept in strict confidence and will be protected to the full extent of the law. Please be advised, however, that Panish Shea & Boyle LLP and its lawyers do not represent you until you have signed a retainer agreement with the firm. Until that time, you are responsible for any statutes of limitations or other deadlines for your case or potential case.

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PROOF OF SERVICE

**Gay v. ARE
Case No. 21-CIV-01684**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 11111 Santa Monica Boulevard, Suite 700, Los Angeles, CA 90025.

On April 5, 2022, I served true copies of the following document(s) described as **PLAINTIFFS' EX PARTE APPLICATION TO SET TRIAL DATE; DECLARATION OF ROBERT GLASSMAN; [PROPOSED] ORDER** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address vo@psblaw.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 5, 2022, at Los Angeles, California.



Kimberly Vo

SERVICE LIST
Gay v. ARE
Case No. 21-CIV-01684

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Attorneys for Defendant WILLIAM P.
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 ROCKRIDGE BUILDERS (Erroneously sued
 as ROCKRIDGE BUILDERS & DESIGNERS)